

**MINUTES FOR THE
MEETING OF THE
BOARD OF LAND AND NATURAL RESOURCES**

DATE: FRIDAY, OCTOBER 28, 2011
TIME: 9:00 A.M.
PLACE: KALANIMOKU BUILDING
LAND BOARD CONFERENCE ROOM 132
1151 PUNCHBOWL STREET
HONOLULU, HI 96813

Chairperson William Aila called the meeting of the Board of Land and Natural Resources to order at 9:09 a.m. The following were in attendance:

MEMBERS

William Aila, Jr.
Ron Agor
Dr. Sam Gon

David Goode
Jerry Edlao
Rob Pacheco

STAFF

Russell Tsuji/LAND
Michael Caine/OCCL
Guy Chang/DOCARE
Barry Cheung/LAND
Scott Fretz/DOFAW
Tiger Mills/OCCL

Kevin Moore/LAND
Kevin Yim/DOBOR
Guy Kaulukukui/ADMIN
Paul Conry/DOFAW
Dan Quinn/PARKS
Dickie Lee/ENG

OTHERS

Pam Matsukawa, Deputy Attorney General
Harry Yada, K-1
D.G. Andy Anderson, D-20

Greg Ogen, D-20
Eugene Kaminaka, D-13
Charles Stone, J-5
Kelly O'Brien, D-32
Brandan Segal, D-17

Michael Lee, D-14
Gregory Kugle, D-25
Paul Sato, D-20
Sheryl Nicholson, D-20
Doug Goehring, K-2
Ivan Honda, J-2
Senator Malama Solomon, D-19
Robin Midkiff, D-28

{Note: language for deletion is [bracketed], new/added is underlined}

Chair Aila announced that agenda item C-4 is withdrawn.

Item A-1 August 26, 2011 Minutes

Approved as submitted (Pacheco, Gon)

Item A-2 September 9, 2011 Minutes

Approved as submitted (Pacheco, Goode)

Item A-3 September 15, 2011 Minutes of Emergency Meeting

Approved as submitted (Gon, Edlao)

Item A-4 September 23, 2011 Minutes

Member Pacheco and Member Goode recused from item A-4.

Approved as submitted (Edlao, Gon)

Chair Aila inquired if anyone from DOT (Department of Transportation) was here. No one responded.

Item D-14 Denial of Request for Contested Case by 1) Community Alliance on Prisons, 2) DMZ-Hawaii / Aloha Aina, and 3) Michael Kumukauoha Lee re Board Action of September 9, 2010, Item D-3, Canceling Governor's Executive Order Nos. 1225 & 1588 and Resetting Aside Lands to the State of Hawaii Department of Defense for Youth ChalleNGe Academy Purposes; Waiakea, South Hilo, Hawaii, Tax Map Key (3) 2-4-08:09 por.

Russell Tsuji and Kevin Moore were representing Land Division where Mr. Tsuji indicated that this item is for a recommendation for a denial of a request for a contested case in relation to a prior Board decision that the Board made related to the old Kulani Prison on the Big Island. He asked Kevin Moore to testify having consulted with the Attorney General's (AG) office in evaluating whether the requester had standing or is otherwise entitled to a contested case in this matter.

Kevin Moore reminded the Board at it's meeting on September 9, 2010 made a decision on the disposition of the Kulani Correctional Facility. At the end of the meeting were three requests for contested cases – The Owners of a Community Alliance on Prisons, DMZ Hawaii/Aloha Aina, and Michael Kumukauoha Lee. Staff took those requests and passed it on to the AGs for review. The AGs came back and said none of the petitioners had standing or was otherwise entitled to a contested case for the Board's decision. None of the petitioners had identified a specific interest in the land that was harmed by the

Board's actions. Staff's recommendation is to deny all three petitions. Mr. Tsuji said that is working with the Department of Attorney General.

Michael Kumukauoha Lee testified he is a Native Hawaiian practitioner for the limu (seaweed) and recognized in First Circuit Court. The land at the Kulani Prison is the source for the hot springs at Halanui hot springs in South Hilo, Puna District. In his written testimony there are pictures which he described using the limu in healing and treatment of the eyes. The source of that hot spring is the land underneath. He didn't put this in his written petition until the AG mentioned what is the connectivity. The royal patent is under Princess Victoria Kamamalu which is his sixth cousin. It's an allodial claim. Allodial is higher than fee holder or fee simple under Article 12, Section 7 it entitles the family members in perpetuity to use their culture practice so long it's not commercial. The connectivity is under that piece of land you can do a seismic mapping of what's below there. That feeds this particular hot spring and the information I'm putting in as my rebuttal testimony. My eighth great grandfather Kualii in his chant of Kualii circa 1620 harvested limu from the Puna District and he has been doing what his family has been doing for over 500 years. Victoria Kamamalu under the allodial land claim gives me the right under my proven family history to do what I've been doing and recognized in First Circuit Court and he is also recognized at the Big Island as the same cultural practitioner in the Food and Watch case against Kona Blue whose cage broke loose and destroyed valuable coral. I've lived and worked on the Big Island and I have tax returns placed in Federal Court and I am recognized in that particular case. My best use practice for this land under the ho'okipo and the pualalau which has an underground water source and he knows where this water source is at Kulani Prison. His proposal is the LLC build a water bottling company of Mauna Kea water that is 2,000 years old and runs under this ho'okipo and pualalau which would bring jobs for the area and that LLC will support a person to get off the State row and also bring in grants or prisoners to learn whatever they need to do when they get out of prison. The whole package was to put together an LLC company like Kamehameha Schools and bring in grants to teach the prisoners and bring in jobs that are non-polluting for the area, but would increase the opportunity to bring in revenue for the City and the State and that is best use practice and my proposal. This is the connectivity to my cultural practice.

Chair Aila asked the cancellation of the Executive Order and the right-of-entry revocable permit to the Youth Challenge how specifically is that impacting the practice. Mr. Lee said there is no environmental impact statement (EIS) for the land use and the procedures done by the State to institute a move ahead of some new entry into the use of the property. We object that there is no EIS to bring that information you need to know to make the best decision for the usage of the land so I'm opposed to it.

Chair Aila noted that there is no military training associated with the Youth Activity and the number of people with the Youth Challenge is much less than when inmates were held there. Mr. Lee said because they are going to have to have facilities down the road that is not front loaded in that so there is a lot that's involved that is going to come on line after this. I am saying let's do this up front. Get all the i's and t's crossed and zones crossed before we get to more litigation down the way. Member Pacheco pointed out that

all the facilities are already there. Mr. Lee said that's where it sits right now, but there will be future needs that are not anticipated and I'm saying you have to front load these things like the water situation where they have to truck in all the water. My proposal is I know where you can get the water and would save you a lot of money. But, we don't want to disturb the iwi (bones) that are in those caves so I'm trying to manipulate around these things and do the best thing on both sides.

It was moved to approve by Member Pacheco and seconded by Member Agor. All voted in favor.

Unanimously approved as submitted (Pacheco, Agor)

Item D-15 Cancellation of Governor's Executive Order No. 4341 and Issuance of Revocable Permit for Approximately 279.76 Acres to State of Hawaii, Department of Defense (DOD), for Youth ChalleNGe Academy Purposes, with Access, Utility and Conservation Easements Reserved to the Department of Land and Natural Resources, Division of Forestry and Wildlife (DOFAW); Issuance of Immediate Management Right-of-Entry to DOD; Issuance of Right-of-Entry to DOFAW over Access, Utility and Conservation Easement Area, and over Approximately 342.24 Acres for Data Collection, Surveys and Conservation Activities, Waiakea, South Hilo, Hawaii, Tax Map Key: (3) 2-4-08:09 pors.

A number of written testimonies was received and distributed to the Board members.

Mr. Tsuji said that item D-15 is a related item and reminded the Board previously when the Kulani Prison was shut down we cancelled the Governor's Executive Order that was issued to the Public Safety Department. We issued two Executive Orders: 1) to the Division of Forestry for an area for the Natural Area Reserve and a second one for the Department of Defense to operate the school at Kulani. The Legislature last session disapproved the Executive Order to Department of Defense for the school. We concluded that the lands set aside to the Department of Defense for the school came back to the Department (of Land and Natural Resources) and was unencumbered. The school has come in and requested a temporary permit to operate and they have been continuously operating since then, but to legitimize their operation I understand they are working with the Department of Defense of possibly relocating to a more permanent site. The current site at Kulani is beautiful and spacious, but there are a lot of costs associated with that. The request today is to approve the revocable permit to be issued to the Department of Defense for the school. The officials from the school are here to testify.

Board member Goode questioned Rick Campbell (representing the Youth ChalleNGe Academy) that this is a revocable permit which a year type of permit and is that acceptable to you folks at this point. Mr. Campbell said staff was talking about a month-to-month. Member Goode said per the submittal you are looking for another property asking how that is going and Mr. Campbell confirmed that there is another site available,

but will require construction to build barracks for the cadets and that is why they are going to Legislature and that is what it hinges on right now.

Member Edlao asked that this is a month-to-month revocable permit and your recommendation #3 says that this is a month-to-month or understanding it is. Mr. Tsuji said that all revocable permits are month-to-month and can go up to a year and if they go beyond a year it can be annually renewed.

Member Pacheco asked from my perspective this is a very expensive place to run operations with DPS and the reason why it was shut down. Now we got this legislation, DPS is not necessarily going to go back there if they decided its' too expensive for them to run. Where are we at? Mr. Tsuji said as he understands it they don't have the funding to run a prison there. But, the plan is to ultimately open up operations back at Kulani. Initially, they had an objection which is how the submittal was worded, but they sent in testimony that they withdrew their objection to the revocable permit with the understanding that the school is working with DOD on permanently relocating out there and the lands may ultimately go back to Public Safety at a later time, but not right now because they don't have the funding and even if we gave it to them they wouldn't be able to operate it.

Member Pacheco asked my concern is if and when the Youth Academy leaves and the gap between that and DPS or whoever comes in for the upkeep of those facilities. It would be great shames to have that whole place deteriorate while we are in bureaucratic legal jockeying here. I encourage the Department to come up with a plan and bring it back to the Board or an interim plan just in case to move on. Mr. Tsuji said as Land Division when things are cancelled things it gets back to us unencumbered and we have the management responsibility and that would be an expense on our limited resources so we are always looking for someone to management it or take it over temporarily. The Public Safety Department seems to really want that facility based on their letter.

Member Edlao asked if there was any hint of how long if they do kick it back. Member Pacheco said they got to get the funds from the Legislature. Mr. Tsuji said this is just from what he recalls that was discussed verbally with the Deputy Director who was in direct contact with then and heard the earliest they will get funding is a couple years. The economy isn't booming and all the Departments realize money will be tight again this session. Also, Kevin reminded me that part of the submittal included out of that EO that was disapproved a portion of those lands will go management right-of-entry to the Natural Area Reserve to add it to the Reserve.

Member Pacheco moved to approve staff's recommendation. Member Goode seconded it. All voted in favor.

Unanimously approved as submitted (Pacheco, Goode)

**Item K-1 Conservation District Use Application (CDUA) HA-3598 for the
Establishment of the Kalakaua Marine Education Center by**

**University of Hawaii-Hilo at Puako Beach Drive, Lalamilo, South
Kohala, Island of Hawaii, TMK: (3) 6-6-002:045**

Michael Cain representing Office of Conservation and Coastal Lands (OCCL) indicated he was here to recommend approval of item K-1 reminding the Board that they approved the 5 acres back in 1990 and there were other permits the University had to get along the way which are in place and are ready to begin construction. The campus consists of five main parts which he described. The proposal has the support of OHA and the community. We are not aware of any community objections. Mitigation measures include a 30 foot buffer along Puako Drive. The use of native xeriscape landscaping and the facility will have a low profile in keeping with the nature of the community.

Member Gon queried that any development plans for this facility took into account where the erosion control, wastewater and the like is. Mr. Cain said staff reviewed the mitigation measures and are confident that best management practices are being implemented.

Harry Yada representing U.H.- Hilo testified that they are fine with staff's recommendation.

Member Pacheco moved to approve as submitted. Member Goode seconded it. All voted in favor.

Unanimously approved as submitted (Pacheco, Goode)

**Item D-25 Grant of Term, Exclusive Easement to Benjamin B. Cassidy, Jr.
Revocable Trust for Seawall, Steps, and Filled Land Purposes, Niu,
Honolulu, Oahu, Tax Map Key: (1) 3-7-002:007 seaward.**

Written testimony from Andrew K. Evans was distributed to the Board members.

Mr. Tsuji indicated what this request is for what staff considers an encroachment on to State lands. The applicant is Ben Cassidy and his revocable trust reminding the Board about a neighbor's case that came before that was similar to this asking for their money back. He referred to the photos saying this is next to what was previously a private fishpond, the Niu fishpond and this is property Diamond Head of that old fishpond. It is quite a bit larger than the neighboring properties and based on staff's research they tried to work cooperatively with the applicant's lawyer, Mr. Kugle is here, to research and find out the history and how this extra land became or came into existence. It appears from their research that the sea wall was built beyond the record boundary of the property and it looked like it was not built in the water, but built beyond the record boundary where there was some sand on the ground and subsequently filled up. As noted in staff's report the wall is six feet tall from the submerged land area. If you walk in front of the wall you have to be taller than six feet to see inside. The land is filled up and looks contiguous with the abutting private property. Staff worked with OCCL on the shoreline crew along with the State surveyor in coming up with the submittal and recommendation that staff

believes it is appropriate to grant an easement. In this case we are willing to grant an exclusive easement because when you go out there no one would mistake this as a public beach and really looks like private property. If you term it exclusive it will impact the evaluation which in reality is a non-exclusive easement and maybe valued at a lower rate. No one would mistaken this is anything other than should be a private property area. The Attorney General's office raised an issue that he has this one and another shoreline one on Kauai this morning and I'm not sure if it applies, but Mr. Cassidy's counsel is raising Section 171-53 which relates to reclaimed lands and submerged lands basically saying if you are going to dispose of it, give a lease or give an easement for those there are certain requirements need to be made. 1) A finding by the Board that the disposition is not in the best interest of the State. 2) In some instances you need prior government approval and Legislative approval by concurrent resolution. I want to point out and staff will probably work with the Attorney General's office that they may require legal opinion on this thing, but I believe there is a difference with seaward of the quote, unquote shoreline as defined by Hawaii case law from quote, unquote submerged lands or unclaimed lands because his understanding has always been submerged lands as being under water and unclaimed lands was under water and filled up to equal because the valuation to those cases is similar to submerged lands. What the appraisers do is they look at the value of these submerged lands giving the example of the Kaneohe Bay piers. They look at the value of the abutting private property owners, the land value only and come up with a per square foot because it's submerged they can legally cut and give a discount of 50% and give further analysis. From his research it appears that it was never submerged. It was beyond the record boundary and the wall was probably built on the ground and there had been some sand and I believe this is an easement on State land. To be safe Mr. Tsuji asked to amend both submittals to reflect the legal reference they are going by in addition to what they've already cited to add in 171-53 which is #1. 2) Ask the Board to make a finding that the disposition is not prejudicial to the best interest of the State. 3) To the extent required will follow whatever prior Legislative approval or government approval may be required. But, having said that we will continue to look at this issue because I don't think this is a lease or easement of reclaim lands or submerged lands.

Gregory Kugle, counsel for Benjamin Cassidy testified confirming Mr. Tsuji's testimony that he was before the Board previously for a neighboring property and talked about how the land and sea wall came to being many years ago. He agreed with Mr. Tsuji's analysis that there was no evidence whether this was ever submerged land or reclaimed land in the sense of what the Statute is talking about Legislature or Governor Approval and he believes it's within DLNR's power to issue the easement or the lease pursuant to the procedures that are followed already. We request that this be done and per his written request that the Board at least not tie the Chair's hands and the Department's hands in terms of whether this would ultimately be a lease or an easement and there is slight distinctions between the two because as mentioned in the submittal the house has been removed and the owners are contemplating what to do with it which could include a sale and we need to make sure that we have the flexibility there and the Department has the flexibility to craft this in a way that is acceptable for whatever future development or sale comes about.

Mr. Tsuji asked Mr. Kugle that the request was for a grant of exclusive easement. Are you asking flexibility for a lease as well? Mr. Kugle acknowledged yes whichever way. It was my understanding that might differ in evaluation and maybe not that much if the easement is exclusive as opposed to non-exclusive. There might not be a real distinction. We just request that the director and the Department has the flexibility to go whichever route works best and I think in terms of the hearing and the approval process it's the same and the Statute allows the Department to do either. Mr. Tsuji asked either an easement or a lease and either exclusive or non-exclusive. Mr. Kugle acknowledged that.

Mr. Tsuji said that we probably need to request to amend the title on the agenda because the title is specific saying grant of term, exclusive easement and then have the Board's submittal reflect the flexibility of making that determination of whether it's an easement or lease or exclusive or non-exclusive. Chair Aila said that would be an amendment. Mr. Tsuji said he recommends we do it today. The impact would be on the title from interest on the outside and I don't think it would. The property is up for sale so they are looking to move this as quickly as possible.

Member Pacheco asked whether the lease would still have to go out for bid. Mr. Kugle said it was his understanding that is not correct if it is an abutting property along the shoreline. It can be done to the abutting owner without putting it out for public auction, but that understanding is incorrect. Our real goal is to get this done today. If there is a problem with that than with the way its worded would be fine, but that is my understanding of the Statute. Mr. Tsuji pointed out to Mr. Kugle that an easement is almost identical to a lease and the key is whether it's exclusive or non-exclusive and that may have an affect on that. Mr. Kugle said if it's going to be an easement and if the Department has the flexibility to talk about whether it's exclusive or non-exclusive and the only impact is on the valuation, appraisers and it also impacts the ability of other people to access the property. But, using the word easement instead of lease causes the Board concern or the need to re-notice it because it has not been leased before then let's keep it as the request stands as an easement. Mr. Tsuji said as some background sometimes prior practice becomes standard practice and nobody goes beyond that, but typically when these land agents bring these shoreline encroachment agreements. We immediately say non-exclusive easement and in this case we worked extensively on Mr. Cassiday's submittal. I thought I was doing Mr. Kugle a favor by putting in exclusive because the last time he was here he had another client who was complaining that it was non-exclusive and he wanted exclusive. Sam Lemmo (OCCL) and his staff specifically looked at this site and had no problem going along with an exclusive easement in this case.

Member Goode asked so the submittal then gives the Department flexibility to go exclusive. Mr. Tsuji acknowledged that saying we would have to amend it to go exclusive or non-exclusive. Member Goode asked whether he suggests amending the recommendation. Mr. Tsuji says he has to amend the submittal anyway with the references he mentioned earlier and add in the Department issue an exclusive or non-exclusive easement. The easements to the abutting landowner are clearly you can have a direct easement and you don't have to go through an auction process. Chair Aila said if

the objective is to get this done today then the easement is the way to go. Mr. Kugle agreed.

Mr. Tsuji said to approve as amended by staff 1) amend the submittal to reflect that the Department has the flexibility to issue an exclusive or non-exclusive easement. 2) The legal references would be added 171-53 to the extent it's applicable. 3) The Board makes a finding that this position is not prejudicial to the best interest of the State. 4) To the extent 171-53 is applicable and necessary prior approval shall be obtained whether Governor and Legislative approval will be concurrent with legislation. Staff will be working with the Attorney General's office and Mr. Kugle.

Member Goode moved to approve as amended. Member Gon seconded it. All voted in favor.

The Board:

Approved as amended.

The assigned Deputy Attorney General raised an issue of the applicability of 171-53, HRS applying in another shoreline encroachment/easement matter, item D-25. HRS 171-53 applies to leasing (and to some extent easements) of submerged or reclaimed lands. Though staff did not and does not believe this case presents an easement within submerged lands or involves reclaimed lands¹, in an abundance of caution and to avoid having to return to the Land Board later with an amended submittal, staff recommended the following amendment.

Amend Title to authorize the granting of either an exclusive or nonexclusive easement to the Benjamin B. Cassidy, Jr. Revocable Trust, etc.

Legal Reference: The text of the submittal is amended by adding references to HRS 171-53 to the extent it is determined that section is actually applicable for this particular disposition.

Amend Recommendation 3 to authorize the granting of either an exclusive or nonexclusive easement to the Benjamin B. Cassidy, Jr. Revocable Trust, etc.

¹ Staff advised the Land Board that it believed there is, or ought to be a distinction between "within the shoreline" versus submerged lands or reclaimed lands as referred to in 171-53. Staff explained to the Land Board that it believed reclaimed lands involves the filling of submerged lands, or land beneath the tidal waters (i.e., ocean). One example that came to light about reclaimed lands is the Dept. of Transportation's project at Honolulu International Airport for the Reef Runway project. In this case, based upon historical maps reviewed by staff, it appears clear that the seawall (shoreline protection structure) was not built in the ocean or on submerged lands. The maps and aerials photos indicate land or sand immediately seaward of the seawall—and the ocean appeared even further seaward of the seawall and easement area. The proposed shoreline is on the seaward face of the seawall, and there is no evidence the shoreline was ever inland of the seawall. This easement is purely for an encroachment on State lands and not submerged lands.

Add recommendation no. 4 as follows: To the extent 171-53, HRS is determined to be applicable to this particular disposition, the Board finds that the disposition approved herein is not prejudicial to the best interest of the State, and staff shall comply with the publication and other requirements of 171-53, if any before execution of the easement document.

Unanimously approved as amended (Goode, Gon)

Item D-8 Grant of Term, Non-Exclusive Easement to Harlan Cabot Amstutz and Patricia Price Amstutz, Co-Trustees of the Amstutz Family Trust for Seawall and Stairway Purposes, Koloa, Kauai, Tax Map Key: (4) 2-6-003:018 & 060.

Mr. Tsuji briefed the Board on some background on item D-8 that this issue came up because Mr. Amstutz wanted to do some improvements on his property. There were some shoreline encroachments that needed to be resolved and did take some time to evaluate this case. Mr. Tsuji referred to the map noting every encroachment and because of the cases that have been coming down against the State and cases clearly saying seaward of the shoreline i.e. up reaches the wash on high tide is held by the State for the public benefit and public trust. Staff comes before you with this request. We have a situation that presents two different scenarios. We have what we believe to be a shoreline protection structure i.e. seawall portions built beyond the record boundary on State land and we are asking that be legitimized to an easement before we proceed through the shoreline certification process. There are areas noted in the map where the shoreline protection structure may have been within the record boundary however the current shoreline extends in land. Under the cases there is no case yet to address what happens when you have a shoreline protection structure that was built within private property that now the shoreline extends inland in Hawaii. He related that he and Bill Wynhoff went to a recent trial called the Gold Coast litigation and there is a Ninth Circuit decision decided in 2010 which presented that exact same scenario. The court decided in that case notwithstanding the shoreline protection structure hadn't been built clearly within private property at one time, but over the years because of erosion or the change in tides, etc. the shoreline protection structure i.e. seawall was now within the shoreline, the wash of the lands were in land. In that case, Ninth Circuit Court of Appeals said the landowner is trespassing and needed to remove the structure at its own cost. That case was appealed to the United States Supreme Court and was denied. What does that mean? It is the law in the Ninth Circuit Federal Court today. It is not binding on the Hawaii Supreme Court, but they may look at that with an opinion. As such there are portions here and he just recently went through arbitration on a case where trees were clearly within shoreline private property and the beach was eroding extremely quickly and the landowner, the County was afraid the tree would fall, but it was on dry land and clearly within the private property record boundaries. The stumps that used to be on dry land and everyone could see that didn't present a danger was out in the ocean. So radical is this beach that sometimes the stump is totally buried in sand and sometimes it sticks up and is below the top of the sea level water. Somebody was body surfing and banged into it and sued everybody. We were found not liable and 100% went to the County. But, there were

extenuating facts that pointed to the county maintaining and should be responsible that what concerned him was that was one case and there will be many more where someone may get hurt. If someone was to get hurt within a portion of the seawall and is within the shoreline we are going to get brought in and we're the deep pocket as a result and is the reason why Mr. Tsuji insisted they get an easement for insurance and liability purposes. Personally, I don't think in that kind of situation he built the structure within his record boundary you have to charge for it. I just don't know and I consulted with at least one Deputy Attorney General and he didn't see any other way other than have him pay for it at fair market value. It doesn't appear to be a large area and the appraised value is going to be very small.

It was questioned by Member Agor whether he was talking about easement C and Mr. Tsuji acknowledged that. There is one portion that staff is recommending removal of the wall and the reason is it was built within the record boundary however the shoreline is way in. When staff went out, it is one thing if it was protecting private property, this one sticks out perpendicular and all staff could say was to prevent collateral access to the shoreline which encourages lateral access to the shoreline. I know our submittal mentioned something about liability, but I have to concur with Dr. Amstutz that I don't think having that structure presents any more liability than not having it because the bottom line is there is a big hole in that area where you could fall down 10-15 feet into. Dr. Amstutz did submit written testimony and he did not object to our recommendation, but he did have his opinion about what we said about the removal of that portion. Member Agor noted the wall is low and Mr. Tsuji agreed that all the fishermen go over it.

Member Agor said I think the impact of having the equipment down there to remove the wall will do more. Mr. Tsuji said I am passing on what OCCL staff recommended, but staff did identify it that we have the measurements and if the Board were to say rather than removal just get an easement for it because the map was prepared to proceed with that route. He brought up the amendment he made on the last item and he wants to make it again here the issue of Chapter 171-53 about submerged land or reclaimed land. Member Agor is familiar with the area that the ocean is a 100 feet from the shoreline protection structure and they have a rocky coastline where you hit the ocean and it's deep and that is not similar. The shoreline was not anywhere close to where the walls were built standing today. However, there are portions where the shoreline today may extend inland, but not at that time when it was built. I don't believe this is applicable, but I will be making the same amendments as he did for the Cassidy case and that's because in this case the ocean is clearly very far away from the shoreline protection structure and separated by lava rock similar to Kona side where it just drops off.

Chair Aila thanked staff and OCCL because this is the most complicated analysis he has ever seen done in this case and for Dr. Amstutz's for his patience in this. Mr. Tsuji reminded the Board that he will be making the same amendments.

Member Agor made a motion to approve staff's recommendation because the wall is not a high wall and you would need to get equipment down there. It would be far more than just releasing an easement to them. He recommended leaving the wall in place. Chair

Aila asked by your experience you feel the wall isn't preventing any lateral access and Member Agor said no.

Member Gon said that would require some changes to your first item of the recommendation as well as the amendments. Mr. Tsuji said they amended it to reflect that change. The two changes would be to amend it instead of removal requiring removal that would go hand in hand with the easement and you already have the measurements and to put in the other amendments he had put in the Cassidy case, about 171-53 out of precautionary purposes.

Member Gon seconded these amended motions. All voted in favor.

The Board:

Approved as amended.

The assigned Deputy Attorney General raised an issue of the applicability of 171-53, HRS applying in another shoreline encroachment/easement matter, item D-25. HRS 171-53 applies to leasing (and to some extent easements) of submerged or reclaimed lands. Though staff did not believe either D-25 or D-8 involved an easement within submerged lands or reclaimed lands², in an abundance of caution and to move this matter forward and to avoid having to return to the Land Board later with an amended submittal, staff recommended the following amendment.

Legal Reference within the text of the submittal is amended to reflect the reference to, in addition to cited statutory sections, 171-53 to the extent it is determined that section is applicable.

Recommendation No. 1 is amended to reflect that the Board is not requiring the removal of the rock wall identified in the proposed easement map as Easement C, and instead, the Board, in addition to the easements recommended by staff, approves the granting of an easement for the rock wall identified in the proposed easement map as Easement C (for a combined Easements A through G, for a total area of 1632 square feet, more or less).

Add recommendation no. 5 as follows: To the extent 171-53, HRS is determined to be applicable to this particular disposition, the Board finds that the disposition approved herein is not prejudicial to the best interest of the State, and staff shall comply with the publication and other requirements of 171-53, if any before execution of the easement document.

Unanimously approved as amended (Agor, Gon)

² Staff advised the Land Board that it believed there is, or ought to be a distinction between "within the shoreline" versus submerged lands or reclaimed lands as referred to in 171-53. In this case, based on an earlier shoreline certification, the encroaching structures are inland of the shoreline, and not seaward. Furthermore, the ocean is beyond the rocky shoreline and proposed easement area.

Item D-20 Resubmittal: Request for Plan Approval for Installation of Fence, General Lease No. S-5188, Brad Radcliffe Anderson, Cord Dominis Anderson, and D.G. Anderson, Lessee; Request for 30-day Extension of Cure Period under Notice of Default dated September 16, 2011; Auhaukeae, North Kona, Hawaii, Tax Map Key: (3) 7-5-09:43.

A number of written testimonies were distributed to the Board members.

Member Pacheco recused from item D-20.

Mr. Tsuji reminded the Board about this resubmittal as requested by Mr. Anderson to erect a fence. Where this is the shopping center that is private property which the Andersons developed and there is a neighboring State property and their records indicate it was all part of one big development. This was an auction lease where normally it's a stand alone. These leases are drafted before they go out for auction with the understanding that it was all part of this big project which is why it has such strange provisions that Mr. Tsuji has never seen before such as keep 50% for open view plain even though this is a commercial lease. It probably came from some County SMA process to get this development approved. This is unusual because you never see that in an auction lease. We were here a few months ago and the Board could not make a decision and we are back here today. The Board asked staff to go out to the site, take some photos to the extent there was any violation of term or condition to proceed issuing a notice of default. Mr. Moore is here and personally went out to the site to take the photographs and we did issue a notice of default as it relates to that there was no commercial use or no commercial activities on the site. There was some discussion at the last Board meeting that they did not want this coming back until the NOD (Notice of Default) was cured or the NOD time period had past, but I believe the applicant requested that this matter go as soon as possible to the Board because it does have some bending applications to erect its fence with various entities. One of which is the County through the SMA process and there is a Kona area design committee that still needs to approve that erection of the fence. Kevin Moore, the applicant and representatives of the shopping center are here.

Member Agor asked whether this property was already leased when they started the development of the shopping center. Was it supposed to be an integral part of the shopping center? Mr. Tsuji acknowledged that which is why he pointed out it was an auction lease, but yet it had all these unusual provisions and from what we can tell the parcel was part of that one development. Member Agor said the representation from the person who leased it would be an integral part of the entire development. Mr. Tsuji said he didn't know if there was any representation at the time and Kevin could come up. Our review of the file indicated that this was not a stand alone commercial like a one piece restaurant or something like that. This seemed to be leased so that and he knows the question has come up how long has this lease been in existence, how long has it not been in commercial use per se and how come there was no prior NOD, he couldn't answer that. Mr. Yada who was the former land district agent working for U.H. has left, but I

suspect whenever they looked at the file they saw it was part of that larger development, the shopping center was the commercial activity, ancillary I guess.

Member Goode asked this is in the SMA right and the County of Hawaii did an SMA permit for the whole Marketplace and this parcel at one time was on one application. Mr. Tsuji confirmed that is correct. Member Goode asked whether you talked to the County of Hawaii about this application. Mr. Tsuji said they haven't gotten approval ...Member Goode asked whether they are going to have to do an SMA permit for the fence too and Mr. Tsuji acknowledged that they are going to have to get approval under the SMA that might require an amendment. Member Goode said but generally, my understanding, the applicant has to be under substantial compliance with that SMA permit as represented in the permit. They build the buildings, they get the permits, they occupy, and they have to be in general compliance with the permit. So they take a portion of that permitted area and change things there may be some SMA issues here because he knows its not staff. It's the County of Hawaii. Mr. Tsuji said that is why staff knows he has to get approval under the SMA permit. Member Goode asked they didn't review your application. Mr. Tsuji said they are aware of his request to build this temporary fence. They haven't acted. Member Goode asked whether he knew when they are set to act and Mr. Tsuji said he didn't know that the applicant could answer that question because he wanted the Board to approve his side. Our approval is always subject to whatever laws and I know ordinances apply so in this case even if the Board were to say yes you wouldn't be able to do it if didn't get all your SMA approval and in this case he will have to get the design committee for the area approval as well. Mr. Moore said the thing is the Chairperson has to sign the SMA application as the landowner.

D.G. Andy Anderson introduced his attorney, Paul Sato and testified that Mr. Tsuji summed it up. The lease is a very old lease that was written many years ago. It calls for open space partially and it calls for partially commercial and then it says no parking. It's kind of hard to have commercial with no parking. We are trying to get back control of our property. We have this lease from you that have been determined in a Federal court by a Federal judge to be no park whatsoever in anyway which is before you of the entire shopping center. I can't give you the history of how it happened or why it happened, but it was taken to court by the CGM Market Center people that this was part of the center and made all their arguments before the Federal judge and he ruled that it was a free standing parcel. It was not encumbered in any way and it's a State lease they have free and clear. We cannot get control of our land. You want me to use it for commercial? We have called and Mr. Moore will agree with you that we have agreed and called your attention to the Notice of Default. We are basically allowing them to use our land illegally which is another clause in your lease that we shouldn't be doing. We have participated in calling and identifying the defaults so that you would assist us in getting control of our land. They trespass everyday and have been notified by ourselves and have been notified by legal. We just can't get control of our land. For me to comply and satisfy your default if I were to go to you and say I will lease you this back piece of land. You are going to say is it secure or is people going to be trespassing all day with trucks coming and going all day so I am not in a position to sit down with a potential tenant if we were going to go that route to lease the piece of land to make it commercial because

we don't control our land. We have to go in for a minor SMA. This all started because you had to sign on as landowners on our application. If you approve and sign on the SMA application we will then go before the County Planning Commission and process the SMA, but we ask you to get control of our land. We pay the real property taxes, we pay the lease rent, we pay the insurance, we pay all the legal costs, and we need your help. Basically, that is what is before you.

Member Agor asked what exactly is the long term plan. Mr. Anderson said we have not determined that yet and would hope that if we could secure our property we would be in a better position with the neighbor to find common use or a common development or joint venture. In failing that we have an architect evaluating the uses with the City that would allow us to develop a portion of the land as you would allow us to do. If we go that route we would come back to you with the plan and would have to change the parking section and we are doing our due diligence right now. But, in order to cure your default I have to be able to lease the land and utilize the land commercially and I can't do that unless I get control of it.

Member Agor asked he was curious how will the fencing do this control. Mr. Anderson said as long as the fencing is not up the center continues to use our land. They use it everyday. Mr. Moore was there with me. We saw deliveries of trucks we saw it being used for their economic development, for their commercial use. If I were to say I will lease you this back portion where they are trespassing you would say OK, but who are all these people coming across my land? Don't I have some control over what you are renting me or leasing me? I can't assure you that. So that fence will secure our property from our neighbors, but not from the public who has access from Ali'i Drive for the public open space park.

Member Agor asked whether they were the original developer of the shopping center. Mr. Anderson said Brian Anderson. Member Agor asked at that time they had no problem with the public using ...Mr. Anderson said no because it was all under one title and was deemed allowed to be used, but I would have to say not legally. Paul Sato explained what happened was that Brian Anderson through various entities controlled different parcels of land in that area. He controlled through a sublease from the original lessees, the Greenwells that was a State lease and was used as part of the shopping center. I think where the disconnect happened was when this property went into foreclosure and the problem was the mortgages that were placed on the various pieces of property that comprised the shopping center did not include the State lease parcel. When Mr. Anderson referred to a decision of a Federal court judge that is what he is referring to because this foreclosure action was for a Federal district court and not in State court. At some point in time because of disputes between the lessees of the State parcel and of the receiver appointed by the Federal court to oversee and take possession of all the properties and the mortgage. There was a motion brought to do certain things. Magistrate Judge Curren then issued a decision after all of the papers were filed by the various parties and in his decision he noted that the mortgagee had no interest in the State parcel and therefore the receiver had no interest in the State parcel and pointed out in his written decision that the receiver had practically admitted yeah, we don't have an interest

in this piece of property where the judge issued his decision and denies the motion. I think that decision is attached and is part of the original submission as part exhibit 3 which was submitted by DLNR staff and attached to there is a copy of the court's decision as part of exhibit B. I know it's a little confusing, but you can read it yourself. It's there.

Member Agor asked whether there was any attempt to actually sit down with the shopping center people and flush out why they are using the property and work out an agreement. Mr. Anderson said that you have Mr. Moore's package to you asking for some summary or some history and I think there is a 4-5 page e-mail from Mr. Anderson to the Commissioner Guido Giacometti which is one of 50 asking to please sit down. The people who they work for, LNR are out of Florida and have an office in Newport Beach. A half a dozen requests to sit and meet with them here in Hawaii and I offered to fly to Florida and to Kona. Ignored totally, and not the courtesy of no. Mr. Sato said he wanted to add that he sent letters to counsel on the other side with several proposals that were exchanged, but none came to fruition. I wanted to make it clear that we have tried what we considered to be the right thing to do under the circumstances.

Sheryl Nicholson (attorney from Alston Hunt Floyd and Ing) testified in answer to Member Agor's question on whether there were attempts to negotiate a sit down with the shopping center owners. You got part of the story, but you didn't get the other part. I was representing the receiver during the foreclosure and there were exchanges as Mr. Sato alluded to in which the parties did try to negotiate either the sale or the purchase of the lease hold either in the State parcel or in the shopping center. The reasons that Mr. Sato alluded to why those negotiations failed had to do with the owners view that what was being offered were proposed by Mr. Anderson's group was unreasonable. The shopping center was making offers at the time to pay for the insurance to maintain the property at its expense and to do things that would alleviate the burden of the Anderson's to maintain and prevent accidents on the property as part of the package. But, what Mr. Anderson was looking for was a pie in the sky amount and that is why the negotiations failed. Now having them come forward to propose putting up a temporary fence that is 4 feet tall that doesn't cover 50% of the property that is not in compliance with the lease and that is definitely going to disturb traffic even though it will not deter people from going into that parcel. It will not give them that control. It is not a way to endear Mr. Anderson to the owner. If they sincerely want to talk, no fence. The question whether this Board should even be entertaining this request right now when the tenant is in material default of the lease there is a pending notice of default. The cure period hasn't arrived. In fact, the lessee is asking for an extension of that cure period. Question whether or not they will be able to cure within that period of time which expires in December. Will they be able to come up with a commercial use of the property by then? Clearly not. The possible cancellation of this lease is real. Commercial landlords in this circumstance would not be granting concessions to a tenant as long as the tenant was in material default. The particular default here which is a default of the use covenant goes to the essence of the lease. While that tenant is in non-compliance granting the tenant permission to build improvements that are going to damage the shopping center property, that are going to damage the tenants who submitted written testimonies to the Board.

That is not a commercial use. That is not going to give the Andersons control of their property because people can still walk in from all sides and doesn't address any liability concerns because people can still freely walk onto the property doesn't seem to be appropriate. Ms. Nicholson read Mr. Anderson's e-mail to Kevin Moore that he needs the lessors (BLNR) support in an equal position to negotiate from. With due respect to Board member Edlao I just want to suggest that going about it this way is not the way to bring the Marketplace owner to the table. While the tenant is in default it is highly inappropriate for the Board to be granting this tenant any concessions. And, the concessions they are asking for are not going to be meeting their state of concern at loss of control.

Ms. Nicholson said Board member Agor to you question why the Marketplace is continuing to use these improvements. It's because they were built that way. They were built to be one part and parcel of the Marketplace – the access ways, the drainage improvements, all of that were all built by Brian Anderson. When the lessee first came to this Board they made it pretty clear that it was with the intention of putting that parcel together and developing as part of the Marketplace. We have a letter that was sent by James Greenwell on behalf of Lanihau Partners back in January 24, 1994 addressed to the district land agent for Hawaii Island, DLNR in which Lanihau Partners is saying they entered into the subject lease with the intent that the State's leasehold property would be incorporated into a development including our abutting 4-1/2 acre property. It was clear all along that this particular leasehold interest was intended to be incorporated as part of the whole Marketplace and that's why it was developed and designed that way. It was under Brian Anderson's possession and control for over 10 years. He managed it for a period of time. We have Greg Ogen who is President of the Clark Commercial Group who is the current property manager for the last three years and he also managed it for several years for Mr. Anderson back in the late 1990s. During the period he was involved there were no significant accidents; there was no claims, no lawsuits over access over that parcel. Referring to a question Board member Goode had at the last Board meeting on this whether there was any specific circumstances today that would justify a concern over liability. None and Mr. Ogen can say that. There wasn't anything about the property that the Andersons didn't know. They took over the lease last year knowing what the circumstances were and they bought insurance which was a requirement of the Board. They rebuffed the landlord through the receiver's efforts to get the shopping center to pay for the insurance, electricity, the rent and these were all offered because they wanted too much money. There is no legitimate liability concerns that justifies putting up this fence which is not a commercial use. The tenant is in default. We note that landlord; owner of the Marketplace yesterday did file a formal application for an easement for the sidewalk, for the drainage, the sewer and for the utilities that is currently on the State parcel. Granting a temporary fence at this point would conflict with rights that the Board might be granting the owner hopefully with regards to the existence of those improvements on the parcel. I would suggest that at a minimum the issue of this fence that should interfere with those rights should not be taken up until the Board takes up the easement request. Certainly, not at all while this tenant is in material default that would be highly inappropriate. Also, Sydney Fuke is here who was formally the Hawaii County Planning director and is now a consultant to the Marketplace.

Member Goode asked about the current SMA permit and why it was granted for the State parcel and the adjoining parcels. Is there one SMA permit that encompasses the entire area? Sidney Fuke said by way of background the original SMA permit for the project was approved back in 1989 less the State parcel. In 1990, the then applicant filed an amendment to that application to include the State parcel. The current SMA application includes all the State parcel plus the balance of the properties. Subsequent to that before the development can occur you need a Kailua Village District Design Committee review. During that review process it was done all as one project. When the plan approval was issued by the planning director it was also discussed and reviewed as one parcel and likewise when the building permits were issued.

Member Goode asked as far as County of Hawaii's likely concern it is all under one SMA since the SMA is amended. Mr. Fuke confirmed that it is one SMA. It is my opinion that if you wish to decouple this parcel from the basic SMA permit then the planning commission will have to be in a position to authorize the decoupling of this property from the balance of the SMA and in so doing looking at appropriate mitigation to do address issues such as open space requirements, landscaping, so on and so forth.

Member Goode asked I thought the application before the Planning Commission would require the consent of all the owners. Mr. Fuke acknowledged that is correct.

Member Goode asked what is before us today is to approve the fence in the authorization for the Chair to sign the SMA application for the Planning Department for this temporary fence. Is that correct? Mr. Fuke said that is what I understand the request is. In my opinion if and when the County Planning director and the Planning Commission considers that application confirmed with that would also consider the decoupling of that parcel from the balance of that project.

Mr. Anderson clarified that the arguments we just heard, the lease, the sidewalks, etc. was put before a Federal judge and he denied it. Your State parcel is not connected in any way to the adjoining property. The adjoining property that the Federal Judge says they have no right whatsoever. No easement, no right-of-way, no permission to use your land. We have a liability problem as well. There are four or five bars on that property and close at 2 or 3 o'clock in the morning and these people trespass in the dark. He showed Mr. Moore some liability problems where these people could trip and fall and get hurt. We have insurance as required, but you would be the deep pocket. I have before me my first commercial contract for the use of the land where a pastor is going to put on a puppet show and to be certain he has an insurance policy from him as us as additionally insured and you additionally insured. We are beginning to move already to satisfy the default. As Mr. Moore said in his report to you, I am in discussion with a Mr. Tom Banks from Humpty's who wants to use the volleyball court and the mauka portion for music concerts on weekends for his bar and his restaurant. It makes good sense and makes good use of the land. It opens up to the public use and once we have control of our land and we have the right to rent it we will pursue that contract. I am in discussion with a timeshare group to allow a timeshare type kiosk to go on the property during our due diligence period. We are moving to satisfy the default and they take that default

seriously and we will comply. It is not an argument here. He has been in government for a long time that when there is a default the person is always granted a 60 or 90 day to correct or to come in with an after-the-fact permit, but he has never closed down in the interim. Her (Ms. Nicholson) argument that I should clear the default first is not customary in government and I have my first contract and I don't think I'm in default anymore. The liability question is an important one and I want to say LNR, her (Ms. Nicholson) client did not come to us until over a year after he met with Guido asking for liability insurance and rent. Only when we begin the fence talk did they come forth offering to put us on their insurance policy, but never offering rent. Not quite 100% accurate.

Greg Ogen, current Property Manger of the Coconut Grove Marketplace testified that he was involved with Brian in the very beginning that he had the concept of this Marketplace. You have to understand a lot of the tenants that are there today they bought into Coconut Grove Marketplace because of Brian's vision in creating the volleyball court and the sand volleyball that made it a success today. When you start talking about liability as far as he is concern there have never been any significant issues down on the State parcel. We do have several bars on property, but the way Brian had designed the property you can go to and from the bars without ever crossing the State volleyball parcel. The people who are coming in off of the street are coming from the Ali'i Drive side. Most of the traffic from the bars go to and from the parking lot and don't necessarily have to cross the State parcel. In relation to the fence, the fence is not going to really resolve that. From my perspective the tenants I deal with on a day to day basis are being impacted by this property rights issue and those tenants are there because they like the ambience of the center and the State parcel is an important part of the overall Coconut Grove Marketplace from the very beginning.

Member Gon made a motion to go into Executive Session pursuant to Section 92-5(a)(4), Hawaii Revised Statutes, in order to consult with its attorney on questions and issues pertaining to the Board's powers, duties, privileges, immunities and liabilities. Member Edlao seconded it.

9:35 AM EXECUTIVE SESSION

10:00 AM RECONVENED

Board member Goode asked whether the default notice was in September and was for a 60 day period. Mr. Moore acknowledged that was correct. Member Goode asked whether that was something administratively granted or is not something before us. Mr. Tsuji acknowledged the latter explaining that typically their monetary defaults has a short response time, but these non-monetary has a 60-day secure period. Member Goode said we have 60 days, mid-November and possibly another 30 days, mid-December. Mr. Anderson showed a copy of a recorded contract as a commercial entity which staff has seen before. Mr. Tsuji said he has not seen it. Member Goode said to cure the default they would submit that or any other evidence and Mr. Tsuji acknowledged that was right. Member Goode asked whether analyzing that would be a Board action where Mr. Tsuji

said it doesn't have to be. Especially if staff does analyze that and it does adequately cure the default and end it there as far as the NOD. But, if in a situation where we didn't think it would cure the default and the applicant believed it did it may be another Board item. Staff could analyze it, but the Board has the discretionary authority to evaluate the facts before and make a determination. It's not the first time where a staff recommendation was not followed.

Member Agor moved to approve staff's recommendation with an amendment that the fence does not commence until the default is cured. Mr. Tsuji asked for clarify no construction of the fence until after the default is cured. Member Edlao seconded that.

Member Agor said that for himself and the Board members that they don't like getting put into situations like this between two businesses. Over the years they've given this message out to the public. For the most part when a State land is being contemplated we expect people to co-exist on it and around it. The applicant will have to come back to the Board on their final. At that time I do not wish to see the same parties fighting with each other and I hope by then these parties would have sat down and worked this thing out like good people should because I will be looking for it.

Board member Edlao said you took the words right out of my mouth remembering the last time and hope you guys cool down where cooler heads will prevail and sit down to come up with something agreeable to both sides. Times are hard and we don't want to be put in this kind of situation and we are hoping that both parties come together and man-up to discuss this. Wish you luck and hope to not to see you guys again.

Mr. Tsuji said before you vote I wanted to clarify that it is no construction of the fence until after the default is cured and also part of our standard requirements is to get all approvals as required. Member Edlao agreed that is automatic.

Member Goode said I see this as a County matter that they have the final say in the SMA process and I look at this as giving the Chair the authority to sign the SMA permit application or if they have to get a building permit sign those applications. I would rather not see us as a Board saying we approve this. As the land owner we'll sign the application, best of luck with it.

Mr. Tsuji said to be clear to all parties the Chair signing off as landowner on these applications or even approving the plans does not necessarily relieve you of all the other requirements. We have had situations, notwithstanding the preliminary approval of the building plan because we understand with the County in permitting whether a building permit or SMA will require the landowner sign off and they also want to see that the landowner is approving the plan before they'll consider it. If they do not approve it or that permit is not acquired to proceed with construction of those improvements have triggered or is going to be a problem under the lease and come back with a Notice of Default. We approved it, but there are other requirements required. It has happened in other instances.

Chair Aila took the vote and all voted in favor.

The Board:

Approved as amended. The Board approved the plans as submitted, provided however, there shall be no construction or installation of the fence at least until the default is cured, and the approval is subject to the applicant/lessee complying with all applicable laws, ordinances, rules and governmental permits for the construction or installation of the proposed fence.

Unanimously approved as amended (Agor, Edlao)

Item K-2 Conservation District Use Application (CDUA) HA-3599 for a Single Family Residence (SFR) & Related Improvements by Douglas and Dawn Goehring at Kolekole Gulch, Wailea, South Hilo, Island of Hawaii, TMK: (3) 2-9-003:003

Mr. Cain related some background on the parcel where it is a limited subzone further back into the gulch and not open to residential development. He described the area's terrain of non-native vegetation and the level plateau. The residence was described and it does comply with the design standards of HAR § 13-25. It is a two story residence. There were concerns regarding the slope and potential impact on view plans. Noting that there have been five applications and this one was the most comfortable to present to the Board. There has been no historic or recreation concerns. To mitigate they plan to reduce landscaping which will eliminate any visual impacts from Kolekole Beach Park. Mr. Cain related what the plateau area will need and recommended adopting one non-standard condition #18 asking the landowner to execute a waiver and indemnity prior to submitting constructions plans for approval which is recommended for houses in high hazard areas or limited subzone. Staff recommends approval with standard conditions.

It was asked by Member Gon whether a cultural impact assessment was done as part of the environmental assessment. Doug Goehring, the landowner explained originally he used the archeological assessment that was done for the Kolekole Bridge Retrofit which was done by the State and at that time the Historical Division approved that as an adequate assessment for that parcel. Since then it's changed and the Department requested that they need a better cultural and archaeological assessment done on the property which he had re-done. It didn't make it in the draft, but made it into the final. There were no findings.

Member Agor asked whether this was all lava rock and what the availability was there. Mr. Goehring acknowledged that it is and there is a lot of it on Big Island.

Member Edlao asked whether there were any other homes in the area. Mr. Cain said this is the first and only possible one. Further up is limited subzone and high slopes. There is no potential for any other homes because the gulch is limited subzone and staff can't process an application for that.

Member Edlao said he had a problem with condition #4 that it should not be approved by the Board, but should be no rental or commercial activities on the property period. He was concerned that this is an isolated area with one house and we approve that with that kind of condition no one would know and no one would complain about it. It wouldn't be fair to other people. Mr. Goehring said he had no problem with that. Mr. Cain said to take out the last five words and he had no objections to that.

Chair Aila asked if you were okay with condition #18 that Mr. Cain talked about. Mr. Cain said the indemnity which staff can work with him on and explained basically if engineering survey fails and the house slides in you're responsible. Mr. Goehring agreed.

Member Edlao asked whether he is bringing in these rocks and Mr. Goehring acknowledged they will be brought in.

Member Pacheco made a motion to approve staff's recommendation as amended and Member Edlao seconded it. All voted in favor.

Unanimously approved as amended (Pacheco, Edlao)

Item D-13 Consent to Assign General Lease No. S-4307, Geo'Co., Inc., Assignor, to Automotive Warehouse, Inc., Assignee, Waiakea, South Hilo, Hawaii, Tax Map Key:3rd/2-2-58:03.

Mr. Tsuji reported that there was an outstanding performance bond issue and the current lessee has fallen ill and was hoping to sell his lease. Staff recommended the approval of the assignment, but the performance bond will be cured 30 days after the execution of the assignment of the lease. He assumed the new buyer is aware of the performance bond and would cure that rather quickly.

Eugene Kaminaka, President of Automotive Warehouse, Inc. testified that they request that the assignment of the lease be made and are prepared to do the performance bond.

Member Pacheco asked if this lease approves us from paying a premium. Mr. Tsuji said it does not have a lease premium policy. Some of our older leases don't have that exact provision. Since then our leases had provisions when you want to assign or sell your lease subject to Board approval and staff analysis, but may be subject to a premium being assessed. For example, when a new lessee or assignor comes in to pay for the lease there maybe a portion that we would ask they share with the landlord. And, especially if the premium is being paid for the land value, but doesn't apply to this case

Member Pacheco made a motion to approve as submitted and was seconded by Member Goode. All voted in favor.

Unanimously approved as submitted (Pacheco, Goode)

Item J-2 Administrative Enforcement Action Under Citation No. 1 AI-OA-KJS021 Issued to Ivan Honda on September 5, 2011 for the Emergency Rule Prohibition Under HAR Section 13-256-73.13, “Ahu O Laka Safety Zone”

Kevin Yim representing Division of Boating and Ocean Recreation (DOBOR) made a clarification that he wanted to present J-2, J-3, J-5 and J-7 and briefed the Board on item J-2 that this has to do with the Kaneohe Sandbar and activities on a holiday weekend similar to actions after the 4th of July weekend. These actions reflect activities on the Labor Day weekend and Guy Chang of DOCARE was here if there were any specific questions as for the actual situation. Item J-2 concerns a Mr. Ivan Honda who was cited for consuming, using or possessing alcohol within Zone H-2, the Ahu O Laka Safety Zone. The DOCARE officer observed Mr. Honda remove a green colored glass bottle from a cooler and upon boarding the boat the officer(s) found in the blue cooler 19 bottles of what appeared to be beer. The officer asked Mr. Honda if he recalled being warned about this earlier in the day about the alcohol in this particular zone and Mr. Honda replied “yes.” Under 256-73-13(b), HAR the following actions are prohibited in the Ahu O Laka Safety Zone between the hours of 12 am and 11:59 pm of any day of a 3-day weekend that includes consumption, use or possession of alcohol. With that we asked that the Board find that an administrative infraction of said section was committed and Mr. Honda committed the infraction.

Item J-3 Administrative Enforcement Action Under Citation No. 1 AI-OA-VKL171 Issued to Steve Kaneko on September 5, 2011 for the Emergency Rule Prohibition Under HAR Section 13-256-73.13, “Ahu O Laka Safety Zone”

Mr. Yim related item J-3 concerning Steve Kaneko is the same situation as item J-2, the same violation, but in this case the officer observed Mr. Kaneko reaching down into a cooler for a said beer. Mr. Kaneko uttered that it was his beer and no one else was drinking. Mr. Yim reiterated that under the same HAR as item J-2 alcohol is prohibited in Ahu O Laka and Mr. Kaneko committed the infraction.

Item J-5 Administrative Enforcement Action Under Citation No. 1 AI-OA-JBY191 Issued to Charles Stone on September 4, 2011 for the Emergency Rule Prohibition Under HAR Section 13-256-73.13, “Ahu O Laka Safety Zone”

Mr. Yim reported a Mr. Charles Stone was cited for consuming, using or possessing alcohol in the Ahu O Laka Safety Zone committing an administrative infraction of the HAR mentioned previously. DOCARE observed 4 bottles of various types of alcoholic beverages in an open bar in plain view of the officer. Mr. Stone said he forgot the alcohol was on board his vessel and he did not drink that alcohol. Mr. Yim asked the Board to find the administrative infraction under the HAR as noted in the submittal.

It was asked by the Board whether Mr. Yim will present items 4 and 6. Mr. Yim said that those two are military and he understands the Board wants them separate.

Item J-2 Ivan Honda testified asking to make the zones more visible because he thought he was out of the zone. The Chair noted the signs and large maps posted at the launch ramp.

Item J-3 Steven Kaneko said he saw the signs and agreed that they were not out of the zone. He was on Ivan Honda's boat. The Chair reminded them that the citation is for possession and not drinking.

Member Pacheco asked that they need determine a fine if they want to impose a fine. Is that correct? The Chair acknowledged that.

Member Edlao asked what kind of administrative costs were there to bring these three before us. Guy Chang said it took the officers about 3 hours to get all the reports done, evidence checked in and everything. We're looking at \$100 per hour per officer being that it's Labor Day. Member Edlao said total of \$300 per person so \$900 for cases.

Member Pacheco asked whether there was anything on possession in vehicle or anything they could compare this to. Mr. Chang gave an example of State Parks that possession of alcohol is a petty misdemeanor which could go up to \$1,000 or a year in jail.

Chair Aila noted the response from the community is Ahu O Laka is a much more family friendly place and is working.

Member Edlao agreed it is working. His concern was the time the officers spend out there and would like to include administrative costs be recouped. As for the fines, unless it's meaningful then it's just a recommendation that this is a new thing depending on the circumstances, but a rule is a rule and has to be abide by regardless whether you saw the buoy or not. You had to have knowledge of the buoy or otherwise you wouldn't have moved. I'm leaning towards the \$300 plus a nominal penalty fee of \$100 or something like that. The last time we did this they got away with \$200 and that was really a slap on the hand. To make it meaningful so the people out there know we are serious about these things. At first I thought of an additional \$200 for a total of \$500 which is kind of steep particularly with something so new, but just for discussion add on another \$100.

Mr. Chang commented that the Department and their Division put in a substantial amount of work into those new rules at Ahu O Laka and being these violations occurred on the last 3 day weekend holiday, Labor Day we found it blatant especially after they had been warned of the violations out there in the morning. We find it a blatant violation that they disregarded the rules and went ahead and drank in the zone anyway. I would like the Board members to take into consideration of that, please.

Member Goode agreed and suggested if the person is here I would go with \$400, but if they don't show up here to charge them an extra \$50.00 plus \$500.

Member Gon said he liked the no show premium.

Charles Stone spoke saying who he was. His attorney Michael Fried was here earlier, but had to leave to go to court. I was advised to deny the alleged infraction and request a contested case hearing.

Chair Aila said let us take the action first and then you can request a contested case hearing.

Member Goode apologized thinking that he was not here and said all our report says is the officer observed four bottles of various types of beverages in an open bar in plain view of the officer. How did you see them? Mr. Stone explained that the officers did a safety boarding on his boat. He wasn't denying the item wasn't on board, but I do want to request a contested case hearing.

Member Goode asked whether he knew these rules were in affect and knew where the areas were. Mr. Stone said I do. More or less, there was a map that came out in the paper. I've been at the Sandbar all my life and I'm pretty familiar with the Sandbar. The actual zones are not that well marked. Member Goode said he isn't familiar with the Sandbar, but looking at the maps the zone is anywhere close to the Sandbar.

Member Pacheco asked you are saying they boarded you for safety reasons and didn't board you because they observed you in possession of alcohol. Mr. Stone said no, they were doing a safety boarding. Member Pacheco queried and the bottles of alcohol were in an onboard bar. Was it something they had to open up? Mr. Stone said it's in a cabinet down below. When they asked for my registration I happened to keep it in that cabinet and so when I opened the cabinet to get that registration it never even dawned on me that stuff was there. I didn't close the cabinet door and so when they came on board to check the fire extinguisher, of course, the cabinet door was open where the bottles were in a holder. Member Pacheco asked whether he was drinking and Mr. Stone said no because he had his 8 year old granddaughter and her two friends and his wife.

Member Pacheco asked the way this rule is set up if somebody just brings in alcohol in that area in their cooler is a violation. Mr. Chang confirmed that. Member Pacheco queried that the way the rule is it would preclude anybody from going out to the Sandbar and leaving the Sandbar to go drink unless they go back on shore to pick-up alcohol. Mr. Chang acknowledged that. The Chair said possession of alcohol within that closed zone. Mr. Stone noted that the alcohol was in a cabinet and not in a cooler that his boat is 32 feet and didn't even think about it. He doesn't inventory the boat every time he goes out.

Member Pacheco asked what fines were done previously since he wasn't at that meeting. Chair Aila said for some of the violators was \$25 and do community service by writing articles in the military newspapers as well as dealing with their command structure. The other civilian one was a \$200 fine. Member Goode said for the military one they were only on the island for a couple weeks and had no knowledge of the rule. There were extenuating circumstances. Member Pacheco said over \$300 for these circumstances

seems a little high and would feel more comfortable with a \$200 range. It is a new thing, but it is the third weekend and it has curtailed the drinking. A lesson is learned and \$200 is enough to sting. I would like to talk more about Mr. Stone's situation. The other fellows admitted to having open beers and consuming. I can imagine being on a large boat having stuffed it (the alcohol) underneath. To go out and search the whole boat for any stashed bottles or be in violation of this new rule I would think more like a \$100.

Mr. Chang said he had a question for Mr. Stone. Mr. Chang was running the operation at the end of the harbor. He had pulled in with his vessel and his family and we educated him by giving him a map of all the GPS coordinates so he could punch it in his vessel. As far as finding the alcohol on his boat, the officers doing the boarding by my understanding the report said they were checking the expiration on his fire extinguisher when they saw in plain view bottles of alcohol. The law says possession in the zone. They did not board his vessel to search for the alcohol. They boarded when they saw the alcohol in plain view that he was in possession of alcohol. Mr. Stone was well aware that no alcohol was allowed in the zone and he had the GPS coordinates to punch into his GPS so he knew where he was. Chair Aila asked if there was other safety boarding as part of this operation throughout. Mr. Chang said it was part of our operation to do safety boardings, education, and everything else to do with boating in the harbor rules.

Member Edlao made a motion to recover administrative costs of \$300 and add another \$100 for a total of \$400 per agenda item.

Member Pacheco asked for clarity the 3 hours was what it took to do each report per violation. Mr. Chang acknowledged that.

Member Agor seconded it.

Member Edlao said that he doesn't want to be a mean guy, but we cannot operate doing things and not at least have covers for our administrative that the State is in dire needs. This is not a money making thing. It's an expense. I'm a business man and I don't do things just to tread water and I've got to cover my expenses which is what I'm trying to do. To tell you honestly my first intention was recover the administrative costs and I had no idea what it was and add another \$200, \$300 to that, but I'm being kind by adding a \$100. You got to understand that we got to recover our administrative costs otherwise; we're just wasting our time out there. People will come in \$50 fine, sure then they go out and drink some more. The \$50 is no big deal with five guys and they all chip in \$10 each. Why have these rules if all were making is a recommendation? Forget it. Even at \$400 it is not a money making thing. If we are going to do this kind of stuff with \$50 or \$100 fine and not recover administrative costs then forget about the rules and go with fines and hopefully we'll get enough people to cover in maybe 10 years to recover our costs for this year.

Member Pacheco said he had a concern with the Board having already processing some of these and already fined \$200 and even the military was \$25 I just want to be sure we're being fair and consistent. He asked why \$200 previously and now \$400. Member Edlao

said because I had a lot of time to think about this. Chair Aila said and also the experience being this was the third 3-day weekend and all that education had gone into the previous two 3-day weekends and was well publicized. There were signs at the harbor.

Member Edlao agreed and said if we had to go back on those previous ones I would do the same thing because I've come to realize you cannot operate without recovering at least our administrative costs by adding the \$100 on top of the fine. The \$200 fine brought attention and people noticed. The violations continue and we need to step up to the plate now and make it more clear that we are serious. Maybe the next time it will be a \$500 fine on me if I do this and they will think twice if they take alcohol out there or not. I'm not looking at this as a profit thing and if I was I would be talking \$5,000. Why fool around if we want to make money then go make money because we are not making money at \$100 and \$50.

Member Pacheco said he thinks we are not making any distinction between possession, open container or consumption in this case. Chair Aila said that was specifically the case. It was to make the enforcement of the area very simple to do and it was possession. It would've been a lot more complicated had the standard been consumption. You would have to witness the consumption, capture that, go to a lab to prove it was alcohol, and come up with a chain of custody. In coming up with this rule it's the simplest way....Member Pacheco said he remembers the discussion, but it doesn't preclude us from trying distinctions when we are imposing a fine. The Chair agreed. M

Member Goode said he would like to look at the intent and remember, this is a temporary rule that is going to expire and we need to get a permanent rule in place. Looking at intent, I believe Mr. Stone. I can see boarding that size boat and having something in the back of the cabinet with no intent of it coming out whatsoever and just forgot. I definitely see his case as different. I would amend the motion to say \$300 to cover the cost for Mr. Stone and keep the others at \$400. While the rule is easy for the enforcement side it's been really difficult for this Board because we don't get a recommendation on a fine amount and leaves it up to us resulting in this lengthy discussion. We are not used to being judge and jury in these kinds of matters. I would keep it at \$300 for Mr. Stone and \$400 for the rest of the guys.

Member Pacheco asked down the road on this rule is this something we could roll into the civil penalties program. Chair Aila said we certainly could have recommendations in terms of a penalty. Mr. Yim said like a base amount. The Chair said in the judiciary we call it a bail schedule. Mr. Yim said this could be a class A or whatever you want to call it and all those categories that fall into this class A would have this fine. Member Pacheco said what I'm asking is would we be able to put this into our civil where DOCARE could just write a ticket and have the amounts on them to pay as oppose to coming to the board. Chair Aila said we are looking at that as we go through this process as we make the permanent and are exploring that. We realize it is hard for the Board members that this is new and has never been tried before. This was put together to address an emergency situation and in my opinion is very successful.

Member Pacheco said he can support the motion with the amendment.

Board member Gon asked whether Board member Edlao could support that. Member Edlao said he will stand on his motion and to take the vote.

Chair Aila took the vote on Member Edlao's motion of \$400 across the board. There were 3 ayes and 3 nays which is a tie.

Member Goode made a motion for items J-2 and J-3 for \$400 and J-5 for \$300. Member Pacheco seconded it. All voted in favor except Member Edlao.

Chair Aila said that you can request verbally a contested case hearing today and within 10 days have the written filed. The Board Secretary said the petition form is on-line or you may check with staff for the form.

There was some discussion on how to pay the fine(s).

The Board:

Approved staff's recommendations for Items J-2 and J-3 and issued a fine of \$400 each. And, approved staff's recommendation for Item J-5 and issued a fine of \$300.

Approved as amended (Goode, Pacheco)

12:00 PM RECESS

1:00 PM RECONVENED

Chair Aila reconvened the meeting.

Item J-4 Administrative Enforcement Action Under Citation No. 1 AI-OA-ETV043 Issued to Dennis Randle Jr. on September 3, 2011 for the Emergency Rule Prohibition Under HAR Section 13-256-73.13, "Ahu O Laka Safety Zone"

Mr. Yim said Dennis Randle is not here because he has been deployed and recommended deferring this item.

Member Edlao moved to defer and was seconded by Member Gon. All voted in favor.

Deferred (Edlao, Gon)

Item J-6 Administrative Enforcement Action Under Citation No. 1 AI-OA-PJR032 Issued to Bradley Teeman on September 5, 2011 for the

Emergency Rule Prohibition Under HAR Section 13-256-73.13, "Ahu O Laka Safety Zone"

Mr. Yim indicated that Bradley Teeman was cited for consuming, using or possessing alcohol within the Ahu O Laka Safety Zone and thereby committing a violation of the applicable HAR section. DOCARE observed Mr. Teeman with two bottles of what appears to be an alcoholic beverage in his hand. The rule as previously stated deals with the consumption, use and possession of alcohol. Staff is asking the Board find an administrative infraction of the previously mentioned HAR section under the citation listed in the motion.

Bradley Teeman testified that he didn't know about the violation or the rule. He has been in Hawaii for two years. The Chair asked how he came to Ahu O Laka and whether it was from a military base. Mr. Teeman confirmed that he came from the Marine Corp Base.

Member Edlao asked how many times he has been out to Ahu O Laka prior to this. Mr. Teeman said a couple times within the last year.

Chair Aila noted that the Marine Base is highly peppered with the notice of the restricted area and had been in the news for the past 5 months. Mr. Teeman said he just got back from a deployment in June and was gone for 6 months.

Member Edlao asked whether the boat was his or a friend's. Mr. Teeman said he had rented it from the Marine Corp Base where Member Edlao asked whether they told him about the rule. Mr. Teeman said he had no idea about this rule. The Chair said they have been notified. On the Marine Corp Base when you sign the waiver to take out the vessel there is a condition in there that there be no alcohol on their vessels. Before you do that again you should read that one. Mr. Teeman said okay.

Member Pacheco noted in staff's report it stated that when they (the officers) approached, you slowly lowered a bottle below the gunwale and he asked is that an accurate statement. Mr. Teeman acknowledged with a "yes." Member Pacheco asked then you were hiding the alcohol from the officers. Mr. Teeman said he figured they were coming over and I suppose something was up.

Member Edlao asked it wasn't because of the rule because you were unaware of the rule. Mr. Teeman said yes, I was unaware of the rule. On a good note, the officer left his cell phone there and he didn't notice it until they had already driven off and he picked it up that night after he called him back. He said he would put in a good word for him. Mr. Chang said he could speak for the officer that he is appreciative.

Member Edlao commented referring back to the previous cases that the administrative costs as far as the fine taking into consideration you are in the military and serving the country however there were administrative costs to process all of this.

Member Pacheco asked what the logic was for the previous military fines because they weren't coming through the public harbors and signs...Chair Aila said in the previous cases the military were not aware of the additional warnings that were given and were not aware that anyone who rents a vessel from the Marine Corp Base within the conditions of the rental agreement explicitly stated that you will not provide any alcohol aboard. That is the difference now from what they had at that time. We also have a clear understanding of what the administrative costs are associated with the enforcement of this rule.

Member Edlao said from that they wrote letters and hoping to reach out to all the military bases and yet we still have violations from the military so something is not working which concerns him and even after speaking with all the commanders and this still happens. Mr. Teeman said I was the example made of at my command because even my enlisted person in charge didn't know about the rule. Member Edlao said whatever we did hoping our message would get across to the rest of the bases and obviously it's not working. Chair Aila said that we talked to the Base Commander and the MWR (Morale, Welfare and Recreation) folks who handle the rental of the vessels that there is that condition in that agreement you signed to rent the vessel that no alcohol is to be on board. It's not only a regulation at the restricted site. It is a condition of the permit in which you rent from the MWR at Marine Corp Base Hawaii.

Member Pacheco made a motion to accept staff's recommendation and posed a fine of \$300. Member Goode seconded it. All voted in favor.

Unanimously approved as submitted with a fine of \$300.00 (Pacheco, Goode)

Item J-7 Request by the Division of Boating and Ocean Recreation (DOBOR) for Board Approval for Cancellation of Eight Revocable Permits and Reissuance of Seven Revocable Permits for Use at State Small Boat Harbors (SBH) on Islands of Oahu, Hawaii and Maui

Mr. Yim said that a person from the neighbor island was here, but left. Staff wants to update the revocable permits. The eighth one will be issued a use permit. The reason why staff wants to issue new revocable permits is the rents have been at the same rate for some time and they want to bring them up to a minimum of a \$100 for each permit. Staff wants to cancel eight revocable permits and re-issue the seven.

Unanimously approved as submitted (Gon, Agor)

Item D-19 Corrective Action Regarding Trespass on Unencumbered Lands Adjacent to Malama Solomon's Property and Damage to Archaeological Features; Kohanaiki, North Kona, Hawaii, Tax Map Key: 3rd/ 7-3-06:02 and 7-3-06: Kaukahoku Road.

Mr. Tsuji indicated as noted in staff's submittal this item is for corrective action related to Senator Malama Solomon inadvertently crossing over some State unencumbered lands and on her property. The portion on the State unencumbered lands was technically a trespass while on her property she damaged some archaeological sites. The Deputy Director went out there. Staff did not go out there except for the State Historic Preservation Office (SHPD) having gone out there and completed a report. Pua Aiu's letter indicating a recommended corrective action is attached as an exhibit. Also attached is a diagram of the area which explains the area that she crossed over State land which looks like a historic cart path on the Big Island. Malama Solomon is here. Kevin Moore is here from the Big Island. Pua Aiu (SHPD) is around to answer any questions. Mr. Tsuji distributed a handout. Pua Aiu also distributed the archaeologist report and some photos.

Mr. Tsuji said what was handed out by Pua Aiu was previously requested by a private citizen pursuant to 92, HRS. The Deputy Director consulted with the Attorney General's office and concluded that report could be considered not public until the Board reviews that report which has not been publicly released, in spite of the request.

Senator Malama Solomon testified as I had made my remarks when I was interviewed by the press, we had two articles with the Hawaii Tribune Herald and West Hawaii Today where there was some confusion on the part of my contractor and myself. When I had called the County of Hawaii, they said this was a public access road and was one of these roads that were in limbo that they didn't know who had jurisdiction over it. I was not there when my contractor moved in, Warren Matsumoto who has been cleaning aina (land) in Kona for over 40 years. When he went in there he didn't go in and knock the walls down. He got off the machine. We had some people there. Alan Hon our archeologist was there. My dad was there and he's 85 years old. What they did was they moved the pohakus (rocks) so they could get into the aina which has been in their family for over 50 years. It is one of the only parcels that have never been developed. My neighbor, Gayle Cheng, and the reason why we got involved was swearing at our bulldozer operator and was really perturbed that we were knocking those trees which were 30-40 feet in height. The root systems were so deeply buried that when Warren knocked down those trees the root systems disturbed the wall. It was not our intention to go out there and blatantly destroy the wall. It happened as part of the process. There was a heiau in the front or could be an observation platform like a kahua. We always knew there was something in there, but didn't know what it was because you would get a feeling when you go past it. As a result my dad left it alone and never touched it. We knew there was something mauka, but we didn't know what it was and left it there. When I went in for my grubbing permit, they (County) advised me to do an archaeological study which I did. Then Alan Hon came up with these various sites, but at no time was the family instructed that we were mandated by law to preserve these sites. We were with the understanding that at all times the preservation of these sites were voluntary on our part. This is the reason why we chose those two sites. We didn't choose it, our mama chose it. This was her aina before it came to my sister and me. The intent of the ohana was we were going to do an ulu (breadfruit) farm on that property. Chair Aila asked whether the two sites you are referring to, you want to preserve.

Senator Solomon replied in the affirmative. The kahua or platform has already been cleared, but when we looked at the house site because of the complications in terms of the different platforms and enclosures we have within it we decided not to touch it and left it intact. There is still fauna growing around it and their mother instructed them to plant la'i (ti leaf) around it as the barrier because she felt that is where the uhane (spirits) could rest and that is what we did.

Member Edlao asked whether all the corrective measures that were recommended are all completed. Isn't there more? The Senator said no, I just given you an update as to what we've done and did it on our own before the corrected plan and the archaeologist put together the recommendations. It was my understanding with your approval of the corrected action plan then we will proceed with the rest which is the repair of the damage on the wall and will all be done under archaeological supervision. Member Edlao said it will be a lot of work. The Senator said not to sound facetious, but it's really not what the reports purported to be. It's really small kine and not huge. Mr. Kaulukukui could respond to that, but it really isn't something that cannot be done expeditiously.

Guy Kaulukukui, Deputy Director of the Department of Land and Natural Resources testified as the Senator indicated and as a result of SHPD's preliminary report I did go out and looked at the site myself. I live on Hawaii Island which was a weekend I was back home. I walked the site and was fortunate enough to be there on a day where the bulldozer operator was there and I had an opportunity to talk to him as well as Alan Hon, the Senator's archaeologist. I was able to walk the path the bulldozer crossed referring to the map in the submittal and that is the issue before you as the Senator indicated. The actions that she is taking for preservation on her private property are distinct from the actions that the corrected action plan is requiring on the public property. In my own report I struggled with the words, but I referred to the walls in particular, as well as the features as being unremarkable because I didn't want to say they were insignificant because all aspects of our culture are significant. In terms of being unique or remarkable they weren't the walls that line the cart path. I would call it aggressive curbing being stacked two to three high in some places. It's the kind of wall I could build myself and is not a Billy Field's dry stack wall that was compromised in two locations so that the bulldozer could go through. There were two rock mounds described that were impacted and those mounds were very low about one row high gathering of rock walls. There was probably an interior habitation wall on the unencumbered State land that was also impacted. It appears one place that the bulldozer went through which was on the mauka side, that wall was already disturbed where moss was growing on the rocks strewn on the ground. The makai side was disturbed by the bulldozer, but there was a rock wall for habitation which is fairly common when walking these landscapes. I would concur that we weren't necessarily talking about remarkable historic features.

Member Pacheco asked whether the question has to do with any of the sites that were destroyed on the Senator's property that this is damage on the State property. It's egress throughout the property. Mr. Kaulukukui confirmed that.

Member Goode asked whether parcel 2 was the State parcel. Mr. Kaulukukui said I believe so that he would have to look at it.

Member Pacheco inquired what was growing there – Christmas berry, guava...Senator Solomon said yes, rose apple. We only had the Hawaiian indigenous trees, mostly kukui nut, a lot of wild coffee. There were three large ohia trees that were preserved.

Member Goode asked whether she was okay with the recommendation. Senator Solomon acknowledged that was fine. It's reasonable.

Member Goode asked whether we got a defacto right-of-entry to go back in there. Mr. Kaulukukui said they will issue a limited right-of-entry to do the corrective action.

Member Pacheco inquired about the recommendation asking for 60 days. Staff said six months where Member Pacheco read it "...where the Board reserves the right to impose a fine if the corrective action is not timely and corrected to satisfaction." We are looking at a total of eight months possible and if not this will be brought back to the Board. Chair Aila said I would say that is the correct interpretation.

Member Pacheco made a motion to approve staff's recommendation. Member Goode seconded it. All voted in favor.

Unanimously approved as submitted (Pacheco, Goode)

Item D-32 Amend Prior Board Action of January 27, 2011, under Agenda Item D-7, with 2nd amendment of General Lease No. S-6003 and Cotermius Grant of Non-exclusive Easement No. S-6004, Olowalu-Ukumehame, Lahaina, Maui, TMK: (2) 3-6-01: Portion 14 and (2) 4-8-01: Portion 1.

Mr. Tsuji reported that Kaheawa Wind Power II (KWP II) closed early late last year and they amended the lease in early 2011 to articulate the easements that were issued under the leases for access, overhead or underground power lines, etc. The way staff drafted the submittal was to show the Board the different type of easements that currently exist and the type of easement changes that are being requested. He referred to Exhibit B which is the only map staff could articulate from was presented by the applicant by the area in red for the easement under the current lease. The green highlighted areas is the area they want to change. Each of the Divisions that may have jurisdiction looked at and were okay with the changes. DOFAW had a concern that native plants would be destroyed and recommended that the native plants be restored. There is a requirement under OCCL because the area is within the conservation district. Staff recommends approval of the change with the added conditions of no construction until they complete the habitat conservation plan approved by the Federal authority and issued the incidental take license by the Federal authority and coming before the Board for approval on those two items. There was a recent Chair's consent to mortgage that was approved last week and there was a condition in there that no funds be used for vertical construction until approval of

the habitat conservation plan and incidental take license. Unfortunately, despite my request the Department of Attorney General did not place that condition in the consent to mortgage so he is adding that as reassurance to put it in the amendment of the lease.

It was questioned by Member Gon on Exhibit B whether the green was an alternate and Mr. Tsuji explained the green is what the applicant is proposing to be approved as the aligned easement. It is in lieu of the red.

Member Goode said that as you fly back to Maui it looks like most of the site work has been done and is close to putting the turbines up and asked when will that be. Kelly O'Brien representing KWP II said they are anxious for that to happen, but are held up because they have not completed the habitat conservation plan (HCP) and had to stop construction. They hope to get through that process in the next couple of months and hope it will be on our agenda at the next meeting in November for State approval and the Federal will follow 4 to 8 weeks after that. The turbines are on island and ready to go in. There is a subsequent piece that follows not long after the Federal, but there is an additional complication because we are amending their HCP for the existing project. The Feds determined they want the amendment complete before they issue the KWP II HCP which is what is holding up the process on the Federal level. It has been a long and trying process, but they hope they are at the end. The State piece has been easier to work with and the Feds have been more challenging.

Unanimously approved as submitted (Edlao, Gon)

Item D-28 Amend Prior Board Action dated September 28, 2001, Item D-16; Grant of Perpetual, Non-Exclusive Easement to Luakaha Mauka Community Association for Sewer Line Purposes; Nuuanu, Honolulu, Oahu; Tax Map Key (1) 1-9-007:002 portion.

Mr. Tsuji conveyed that he had nothing to add to the submittal and the applicant is here.

Robin Midkiff representing Luakaha Mauka Community Association testified that the sewer line is already in place and being used. They would like to use the appraisal done in 2005 because it is on conservation land and was used for the fire protection system.

Barry Cheung, Oahu Land Manger said that they have a fire protection easement done with an appraisal and what Robin is asking the Board to use the same appraisal to be applied to this sewer line easement.

Mr. Tsuji and Mr. Cheung had some discussion about the sewer line easement. Chair Aila said they don't think they can accept Ms. Midkiff's request because the appraisal would likely be less than 2007. Mr. Tsuji said the appraiser will note it is preservation land.

Unanimously approved as submitted (Goode, Gon)

**Item D-29 Re-Submittal - Request to Reconsider Forfeiture/Termination of
General Lease No. S-4007; God's Love Mission, Inc., Lessee,
Waimanalo, Koolaupoko, Oahu, Tax Map Key: (1) 4-1-027:023 and
024.**

Mr. Tsuji said he is passing out an attorney-client privileged e-mail from the Deputy Attorney General to him and reminded the Board of this prior request by staff to reconsider a prior termination of a lease which is under God's Love. If this Board recalls approximately 30 days ago this Board was advised by the Deputy Attorney General staffing the Land Board meeting didn't think the Board had the authority to reconsider a prior decision to terminate a lease. Very rarely as I as Administrator of Land Division and former Deputy Attorney General ever disagreed with a staff attorney, but in this case I did and I believe the Board has the right to reconsider a prior discretionary decision that it made to terminate God's Love lease if certain conditions were not met where in the original meeting was to cure all defaults by a certain amount of time period. The reason why I'm personally recommending reinstating this lease is because when initially when it came to the Board with the defaults and the Board indicated they would grant a termination but postpone the effective date for 90 days to allow the applicant to cure certain defaults. In this case it's monetary defaults and a performance bond. The 90 days went through and there were payments made in between that period, but when the final 90th day occurred it was his understanding at that time a certain amount of money was still outstanding and at that time he thought it was a larger sum and the performance bond was outstanding. As a result he signed off on the letter informing the tenant your lease will be terminated because of outstanding defaults. Subsequent to that letter I discovered after thoroughly researching it the actual financial amount due on that date was substantially less than he had thought. That is why he reconsidered and recommended at the last meeting for the Board to reconsider. Since that time the lessee represented by Kali Watson was here and are here today had a certified check in hand presented to cover the defaults. This Board suggested staff accept that and deposit that. All the monetary amounts are all current right now. The other item is the performance bond which is based on twice the annual rent and used as a security deposit. Mr. Tsuji recommends we accept because the language of the lease allows this is the Board accept a real estate lien on two properties that has been offered by the lessee for a limited time period of 12 months to allow the lessee time to dispose of one of them to come up with the cash or CD equivalent for the performance bond. As he has expressed to Mr. Watson my preference is not to have the real estate lien secured for any longer than a 12 month period and would like them to proceed with selling the property and will substitute the real estate lien later with the cash.

Member Goode thanked Mr. Tsuji for working hard on this and to get that other real estate as back-up and see if there is equity in there. Mr. Tsuji said usually there is extensive due diligence to accept it and here he looks at this real estate lien as the equivalent to a mortgage which is going to be very short term and will not have to foreclose on it because that is where banks get into liability problems with the EPA having not thoroughly checked out the property for environmental conditions. They foreclose on it and there are no bidders and end up taking back the property and the IE

become the owner then the EPA gets on them which was Mr. Tsuji's concern. Here we have the understanding with the lessee that they will continue to try to sell one of the properties and come up with the cash to substitute for the liens. He has worked with Kali before and he trusts him.

Member Goode asked whether the applicant was okay and Mr. Watson acknowledged that.

Unanimously approved as submitted (Goode, Agor)

Item D-24 Consent to Quitclaim Assignment and Assumption of Grant of Easement No. S-4304; Patrick T. Perkins, Personal Representative of the Estate of Mary Karen Caldwell Perkins aka Karen Caldwell Perkins aka Karen C. Perkins, the Assignor; to Kainehe III LLC and Jean C. Marchant, Successor Trustee under that certain unrecorded Robert B. Marchant Revocable Living Trust Agreement dated April 12, 1983, the Assignee; First Amendment to Grant of Easement No. S-4304; Kalawahine, Honolulu, Oahu, Tax Map Key: (1) 2-5-019: portion of 005.

Mr. Tsuji said he had no changes to this submittal.

Member Gon asked whether the applicant was fine with all the conditions and she said she was.

Unanimously approved as submitted (Pacheco, Gon)

Item D-17 Grant of Perpetual, Non-Exclusive Easement to James A. Scanlon and Sarah N. Scanlon for Access Purposes, Kaiaakea, North Hilo, Hawaii, Tax Map Key:3rd/ 3-4-03:11.

Written testimony from Brandon Segal was distributed to the Board.

Mr. Tsuji conveyed what item D-17 was that he had no changes and that the applicant and Kevin Moore, Big Island district manager were here.

Brandon Segal testified thanking Mr. Moore for his assistance on this. This lot is a rectangular lot at North Hilo bordered on one side by a stream where the other side is a private lot and mauka of the land is State property where the other side borders on the Belt (Road). Mr. Scanlon is restricted by DOT and by his land grant for access to the Belt Road from that course of his property so he is essentially landlocked. He bought the property in late 1988 and with that property he has an easement over the adjoining private parcel. He travels over the back side of his lot over the parcel and travels on his driveway which is on the 30 foot road reserved easement and crosses back on the private parcel and accesses the Belt Road from there which is the only way he can get in and out of his property. When he brought the property his understanding or misunderstanding

was he that he wanted in 2007 from DLNR that was not...I guess where the circumstances were he reported some squatters on the land and DLNR did an investigation and found out there was a lot of people using this property. For those reasons we ask the Board to grant the recommendation for the easement. The caveat is my client does object to the standard terms and conditions of paying for the easements and for liability insurance. The reasons why is this driveway on this 30 foot road reserve has been there at least since 1934. The Territory of Hawaii deeded that property to a sugar company LPS and went down to Hamakua. The sugar company built that road on that road reserve. These properties were transferred over to private landowners and the landowners around those properties do use this road where there is land mauka of this property and hunters have used this road for generations. In light of the public use of the road and fact that Mr. Scanlon has no control of who has access to the road and number one he is required to obtain liability insurance essentially puts a target on his head. He can't gate the road because he feels that is inherently unfair. I do understand there is an appraisal process that occurs after the Board grants or terminates the easement so if the Board has discretion now based on those conditions that these will be graded on the without the participation of the liability insurance.

Mr. Tsuji responded saying he hasn't heard about this objection until today, but Kevin can correct me if I'm wrong. My response is first of all public roads, roads under the public is not under the jurisdiction of the Board of the Land and Natural Resources by Statute 171-2 that doesn't mean there isn't roads that private roads or roads that they can grant easements for and that is what we are granting is a private easement. Now the issue of gates I have not discussed that with my district manager, but how we've treated those in the past for these private easements is we haven't turned them down or said that it could be granted that they can put up a gate for a private access easement, but as long as the district land agent or whoever at DLNR will have the key in case they need to access it's property - DOFAW firefighters when they need it. I don't know if you've had a chance to discuss that issue with Kevin.

Mr. Segal said I think that if there was a gate on the property and did have control over the property he (Mr. Scanlan) would be more amenable to carrying liability insurance. My response to the public road issue is we don't even know if that is a public road, but I did support some legal argument that under the common law doctrine and implied dedication the State can imply or dedicate a right of way to the public and that is based on continued public use over a period of time. A public use over a period of seven to eight years can constitute implied dedication.

Mr. Tsuji said maybe the State can, but not within the Board or Department of Land and Natural Resources. Public roads under Chapter 264 are either under the County Roads or the State of Hawaii, Department of Transportation. I don't believe this is under the Department of Transportation and I don't know what the County's position would be if this is a County public road, but from a jurisdictional stand point this Board does not have jurisdiction over public roads per se. If it was some argument in some court decision that said that this State Board is granted or implied or bond by an implied easement for access purposes it will end up being bounced out of this Board's jurisdiction

because our Statute specifically excludes within the power of the Board where public lands under the jurisdiction of the Board public roads. We have a separate Chapter 264 which deals with the public road. Mr. Segal said when he uses the term road...Mr. Tsuji said we do have private roads giving the example to access State Parks, our forest systems or even private easements for public access purposes, but not necessarily public roads as the term is defined. Mr. Segal replied he understood. Mr. Tsuji suggested if your client is interested in putting up a gate we have not said "no" to that.

Board member Pacheco asked do other people who have the lots there are they using that road also for access. Mr. Moore said with his best information "yes." Member Pacheco asked whether that is any approved access for going up to the Forest Reserve. Mr. Moore said that is an old sugar cane parcel and was access for the sugar cane company. It may butt up to the Forest Reserve, but he didn't have that information.

Member Pacheco asked say we had a piece of property like that or a situation like this where we had multiple lots that were also using that road. It came up before us when we had multiple parties for using that easement. How would we deal with that? Mr. Tsuji reminded the Board that we had that for Oahu six months ago and said the position of the Department would be it may have occurred in the past it would need to document that with an easement. There was a similar area in Waimalu with some fighting with the various neighbors, but the position that the State is taking is there will be an easement and it won't be a public right-of-way, but more a private easement. Member Pacheco asked whether they will split the land among the land owners or if its not they all pay that amount. Mr. Tsuji said the easement is personal and yes, individually. You are talking about the appraised value, how much you would pay for the easement and Member Pacheco confirmed that. Mr. Tsuji acknowledged that they would have to pay for the appraised value of the easement and the right to use...Member Pacheco asked about liability insurance. Mr. Tsuji said they would all need to cover for liability and they would also need to indemnify and agree to repair and maintain. We don't have many of these, but if we were to start having multiple easement holders using private easements for access purposes by say five land owners in the area and I'm sure they could get together to share the repair and maintenance costs of that easement area. Notwithstanding, yes, they would have to pay fair market value of the easement based on the appraisal that we perform under Statute that there is a statutory requirement and they would need to secure the insurance and each of them there would have multiple insurance. As a practical matter what would happen? Somebody gets hurt there would be a battle of insurance carriers of who comes in first based on who has coverage.

Member Pacheco asked whether he knew if the adjoining land owners had ingress/egress off of Mamalahoa Highway and Mr. Tsuji acknowledged they do. Member Pacheco asked then it is possible a gate could go in there. Mr. Moore said they would have to explore that. Mr. Tsuji said it's not they don't have them that they do have them on Maui where there are access easements with gates. In those instances every person has a right to use the road has a key, our DLNR District Land Agent has a key as well as the Division of Forestry. Member Pacheco asked about adding a condition to explore that possibility. Mr. Tsuji said that was fine.

Member Pacheco made a motion to approve staff's recommendation and adding a condition to direct the Department to explore the possibility of allowing the applicant to gate the road. Member Edlao seconded it. All voted in favor.

Mr. Segal said just to preserve his client's right because he'll talk to him after this and requested for a contested case hearing to reserve that right, but doesn't expect that to happen.

The Board:

Approved as amended. The Board amended the Recommendation section by adding a recommendation no. 4 allowing staff to evaluate and if appropriate, consider allowing the applicant to install a gate at it own cost and expense. If a gate is ultimately allowed by staff, then access keys shall be provided by the applicant to all DLNR offices and other governmental agencies that may require access through the easement area.

Unanimously approved as amended (Pacheco, Edlao)

Item J-1 Petition of Seabird Charters, Inc. (SCI) for Waiver of Minimum Gross Receipts Requirement for Reissuance of Commercial Use Permit for Lahaina Small Boat Harbor, Maui. Delegate Authority to the Chairperson or Administrator of the Division of Boating and Ocean Recreation (DOBOR) to Determine When Reissuance of a Permittee's Commercial Permit Would Be Fair and Warranted According to HAR §13-231-61

Kevin Yim representing Division of Boating and Ocean Recreation (DOBOR) related that the owner that purchased stock of Seabird Charters from another entity and planned to close the transactions. The vessel has been out of operation for awhile and is in need of repairs and maintenance and to get the required insurance. As a result the owner was not able to meet their minimum gross receipts requirements as required HAR and asked to waive for the 2011 and 2012 permit year and approve the reissuance of the commercial permit for a one year term to Seabird Charters, Inc. They are asking for an exemption from the HARs because of the circumstances of their purchase. Staff asked to delegate authority to the Chairperson or the Administrator of DOBOR to determine when reissuance of the commercial permit would be fair and warranted according to the HARs.

Member Edlao moved to approve as submitted. Member Goode seconded that. All voted in favor.

Unanimously approved as submitted (Edlao, Goode)

Item C-1 Request Approval to Issue an Invitation for Bid and Authorize the Chairperson to Award, Execute, and Extend Contract(s) for

**Helicopter Transportation Services for the Division of Forestry and
Wildlife, Maui District
And
Request Approval of Declaration of Exemption to Chapter 343, HRS
Environmental Compliance Requirements for the Requested
Invitation for Bid**

Paul Conry, Administer for Division of Forestry and Wildlife (DOFAW) introduced Scott Fretz who is the Wildlife Program Manager and also manager of the Conservation Plan and could provide additional information. Mr. Conry said item C-1 is routine authorization for helicopter services and no changes for that.

Board members Edlao moved and Pacheco seconded it. All voted in favor.

Unanimously approved as submitted (Edlao, Pacheco)

**Item C-2 Request Approval to Enter into Agreements to Collect Fees and Costs
for Technical Services Provided to Applicants Seeking Incidental
Take Licenses, and Delegation of Authority to the Chairperson to
Approve, Modify, and Amend Agreements for Those Services**

Mr. Conry briefed the Board that item C-2 is establishing a system for staff to charge fees for technical services for parties entering into conservation plans and safe harbor agreements. This was Act 147 that was recently passed establishing the authority to do this and help the Department meet the increasing cost for administering this program. By now we have 12 habitat conservation plans (HCP) that are in the works which is a larger work load for staff to keep up and move them through the process. They originally proposed going through the rule making process, but the wisdom of the legislatures said that it would take you too long and let's just establish what the fee is and in the Statute the legislators established a \$50.00 per hour fee as part of the process. What staff wanted to do is bring before the Board what process staff would use and a draft template of an agreement they would enter into with parties in the beginning of their HCP planning process. Use that for establishing what the fees are and the collection of those fees.

Member Goode questioned so an applicant comes in with an HCP and their will be an agreement of those fees. It sounds like all staff time is associated with either developing, reviewing or monitoring HCPs. It is unusual to hire on an hourly basis. When you hire on an hourly basis you feel you have some control, but when you are a consultant you could spend hours. This is open ended and if I was the applicant I would say how would I know how many hours would I spend on this. Mr. Fretz said this is not clerical time and would just be staff. We are doing the technical work on the HCP itself. It's reviewing documents and letting them know who they can contact, what kind of options are out there for recovery of endangered species. It is very technical and it's the kinds of information our staff uniquely has and is qualified to do. As for making sure it isn't open ended what we do is we get the application from the individual or the applicant and we'll go over it to get an idea of what this project involves and since we've done a lot of them

we have categories of how much time its going to take to spend on them. Then we'll get back and discuss it with them. It's by mutual agreement. We'll make an estimate and tell them what we think we'll spend on it. If they don't like that or think it's too much I assume they will respond and say why does it take that long and what can I do to reduce it. We can discuss it with them and that is how we plan to do it. As far as the hourly goes we modeled this off of similar rules set up by DBEDT (Department of Business, Economic Development and Tourism) for the Renewable Energy Division and they set up a similar process because they were doing similar technical work. Whether it's hourly or a set amount it wouldn't matter to us. The way we estimate how much time we will need is by the hour because from our experience that's what we do. We'll go back and look at how much time we spent on the last one we did and the one before that and the one before that. It's how we estimate the work load.

Where Member Goode asked you estimate so many hours of IT time and bill the client on a monthly basis. If we have hours for an attorney here is so many hours for work time. Mr. Fretz acknowledged that is what staff is proposing since they don't do that now. Staff has been tracking the hours for years just to know what we've been spending on this.

Member Edlao asked whether staff is charging that now. Mr. Fretz said they don't right now. There was some discussion on if the client questions why they spend so much time on this staff will work with them and staff will. Mr. Conry noted this is a voluntary agreement where the client can go out and hire a consultant to do it for them as well and would greatly reduce staff's time. Mr. Fretz said it already happens and staff is trying to get out of the consulting business and minimize the time they spend. Staff tells the applicants to figure out what they are proposing for their mitigation. Staff just reviews it, respond to it and give it back with their recommendations.

Member Goode queried isn't that what an agency is supposed to do. Mr. Fretz said they have no positions for that. None have ever been established. Member Goode said say each application is \$2000 or \$5000 it could be a hefty fee. I know for SMA applications the County gets \$10,000 because there is a lot of work and staff time. But, it's not a moving target. Mr. Fretz agreed and said not having that fee we can say a small fee of \$2000. There will be big applicants of \$10,000 or \$15,000. It gives staff that flexibility.

Member Pacheco asked does the Statute require you to charge the bill allowed or say we estimate this amount of hours and charge a flat rate right there. Or would you prefer to keep track. Mr. Fretz said we would prefer to bill the actual hours worked. If make an estimate and spend less, we don't plan to bill the rest of it. We prefer to bill exactly what we spent working on it. There was some discussion of the way the Statute was written where it's separate out the \$50 per hour as fees and costs. Only reimbursable costs would go into the agreement with the applicant up front. Mr. Conry related an example with endangered species. There are applicants who are begging staff to assume all of this. There is a point that staff can't do everything for everybody. Depending on what is required there is always the option for the client to hire someone to provide the technical.

Member Agor noted if the cost gets higher and it comes to us. A fee is different. Member Pacheco said then the recommendation would be to go to the Chairperson. Mr. Conry said that the Board will end up with the final product.

Member Pacheco asked where would the money go to and Mr. Conry said to the Endangered Species Trust Fund which was set up to implement habitat conservation plans. Member Pacheco asked with the way the State works you can't just go out and hire somebody because a position has to be created. How is this money going to get the extra staff to take care of this burden? Mr. Fretz explained we have 3-1/2 on staff doing this through a contract in collaboration with the University – all RCUH people. Staff is working on another similar contractual relationship that provides the personnel services and once we get money in the trust fund they hope to create actual positions under the trust fund.

Member Pacheco asked whether you are talking about numbers within a species. Mr. Fretz acknowledged that and said that a project is more complex based on the number of species and kinds of species which is why staff created those categories. He gave the example of two nene which is an easy project, but a wind farm project on Oahu with take of geese, sea birds, etc. gets complicated because each species has biological attributes, recovery is complicated and is hard for the applicants to figure these things out and takes staff a long time to review and make recommendations.

There was some discussion about the chart and how it works. It can be highly complex. Some consultants are really good at these and staff hopes to do it quicker and won't bill them for hours they don't spend.

It was asked by Member Pacheco what kind of support have you heard from the consultants and applicants. Mr. Fretz said they went to the Legislature to support this bill.

Kelly O'Brien representing the client testified in support that it is a mixed bag from the costs, but it's something that is not unusual and they want the Division to be appropriately staffed which would be to their benefit.

She and the Board members had some discussions of processes in California and Oregon.

Mr. Tsuji apologized for interjecting and said that this issue has come up with the Energy Division having to push through permits for renewable energy projects. The reason DOFAW is good at this is because they already do an hourly rate based time basis. Timesheets weren't well received with some staff. An appropriate fee should be given for expedited requests.

Member Gon said that it is difficult to get staff to agree to until they see the benefits of it. Mr. Tsuji said for him its second nature, but hard to implement on some staff. Mr. Fretz acknowledged that at DOFAW they are tracking every hour.

Member Goode said he was glad that the private sector supports it and is comfortable with this. Mr. Fretz noted that the money to fund this is money for endangered species and taking away from endangered species recovery money and supporting private industry that are seeking licenses to take. It's better to have it funded by the applicants.

Member Goode asked whether the contracts have a not to exceed, a cap. Mr. Fretz acknowledged that there is a cap. It is in the template and they agree on that.

Unanimously approved as submitted (Gon, Edlao)

**Item C-3 Request Approval to Enter into a Cooperative Management Agreement With the Agribusiness Development Corporation (ADC), for Agricultural and Renewable Energy Purposes and for the Hunting of Game Birds and Game Mammals in the Kekaha Area of the Waimea District, Island of Kauai; and to Authorize the Chairperson to Finalize Terms and Sign the Agreement
And
Request Approval for Declaration of Exemption to Chapter 343, HRS Environmental Compliance Requirements for the Cooperative Management Agreement**

Mr. Conry distributed proposed amendments and described item C-3. What he is proposing for the amendments in the first paragraph, under background and the same for the agreement, page 2 that they had comments from Conservation Council concerned with enhancing game animals that the exemption under 343 wasn't appropriate. Staff went back and better characterized what the intent is. It is to control damage to agricultural and natural resources while providing opportunities for public comment – a better description of what the intent is. Staffs talked with ADC and are happy to enter into it and want to see controls over the public. Staff is doing more of these. The Board submittal is to approve the Chairperson to finalize that and execute it.

The Board:

Amended page 1, first paragraph, 4th line under Background by adding after “....personnel to” control damage to agricultural and natural resources while providing opportunities for public hunting. Also, deleting [obtain a population of game birds and mammals on such areas where game populations may be harvested and where the environment will sustain regeneration of the vegetation and minimize the threat to watershed resources.] And, this is the same for the agreement, page 2.

Unanimously approved as amended (Agor, Pacheco)

Item C-5 Request for After the Fact Approval of Amendment to Extend Incidental Take License and Habitat Conservation Plan for Lanai Meteorological Towers and Amendment to Extend Associated Memorandum of Agreement

Mr. Conry conveyed background on item C-5.

Mr. Fretz said that this already came to the Board and was approved, but when they took it to the AG's office they had some technical changes and bring it back to the Board.

Unanimously approved as submitted (Edlao, Pacheco)

Item D-10 After-The-Fact Issuance of Right-of-Entry Permit For Dam Maintenance and Remediation Improvements To:

Jenning Pacific, LLC on Lands Encumbered by General Lease S-5660 to William J. Sanchez Sr. For Upper Kapahi Reservoir, DAGS Job No. 14-23-7391, Waipouli, Kawaihau, Kauai; TMK: (4) 4-4-004: 004 and 051,

Earthworks Pacific, Inc. on Lands Encumbered by Revocable Permit S-7448 to William J. Sanchez Sr., For Hanamaulu Field 21 Reservoir, DAGS Job No. 14-23-7395, Wailua, Lihue, Kawaihau, Kauai; TMK: (4) 3-9-002: Portion Parcel 20 and Lands Encumbered by Revocable Permit S-7453 to Kapaa Banana Company Inc., Aahoaka Reservoir, DAGS Job No. 14-23-7393, Wailua, Lihue, Kawaihau, Kauai; TMK: (4) 3-9-002: Portion Parcel 01

Mr. Tsuji said to withdraw item D-10 to make some corrections and will come back.

WITHDRAWN

Item D-3 Amend Prior Board Action of March 12, 2004, Item D-11, Consent to Sublease of General Lease No. S-3852, United States of America, Department of the Navy, Lessee/Sublessor, to Nextel WIP Lease Corp. dba: Nextel Partners, Sublessee, Waimea, Kekaha, Kauai, Tax Map Key: (4) 1-2-002: portion of 26.

Item D-4 After-the-fact, Consent to Assign Sublease (Navy License No. N6274204RP00032) of General Lease No. S-3852, Nextel WIP Lease Corp. dba: Nextel Partners, Assignor, to NPCR, Inc., Assignee, Waimea, Kekaha, Kauai, Tax Map Key: (4) 1-2-002: portion of 26.

After-the-fact, Consent to Assign Sublease (Navy License No. N6274204RP00032) of General Lease No. S-3852, NPCR, Inc., Assignor, to TowerCo Assets LLC, Assignee, Waimea, Kekaha, Kauai, Tax Map Key: (4) 1-2-002: portion of 26.

Item D-5 Amend Prior Board Action of November 14, 2008, Agenda Item D-1, Consent to Sublease General Lease No. S-3852, United States of America, Department of the Navy, Sublessor, to New Cingular Wireless PCS, LLC dba AT&T, Sublessee, Waimea, Kekaha, Kauai, Tax Map Key (4) 1-2-002:026 Por.

Item D-6 Amend Prior Board Action of August 22, 2003, Agenda Item D-16, Consent to Sublease General Lease No. S-3852, United States of America, Department of the Navy, Sublessor, to Cellco Partnership, Delaware General Partnership dba Verizon Wireless, Sublessee, Waimea, Kekaha, Kauai, Tax Map Key (4) 1-2-001:006 Por.

Mr. Tsuji indicated items D-3, D-4, D-5 and D-6 all relate to a general lease on Kauai amending prior after the fact consents for sub-leasing and didn't have any changes, but noted that the rent will come directly to the State.

Unanimously approved as submitted (Agor, Goode)

Item D-27 Re-Submittal - Amend Prior Chairperson's Action dated February 22, 2011; Consent to Assignment and Assumption of Contract (Mt. Kaala: Hawaiian Telcom License Agreement); General Lease No. S-4223, Kahuku Wind Power, LLC, Assignor; Hawaiian Electric Company, Inc., Assignee; Mokuleia, Waialua, Oahu, Tax Map Key: (1) 6-7-003:portion of 024.

Mr. Tsuji reminded the Board that this is the third time before them that this is a re-submittal where we are asked to agree to the assignment. The lessee is Hawaiian Telcom and the sub-lessee is HECO and they both concur to a 50% share and 50% to the State of Hawaii with a connection to Wind Farm III. Otherwise, no changes.

Unanimously approved as submitted (Gon, Edlao)

Item D-30 Second Amendment to Prior Board Action of December 1, 2010, Item D-3, Designation of Certain Select Properties for Income Generation to Support the Management of Lands under the Jurisdiction of the Board and Department of Land and Natural Resources; relating to various TMKs on the Islands of Oahu, Maui, Hawaii and Kauai as articulated in Exhibit B attached hereto and incorporated herein.

Mr. Tsuji reminded the Board of this prior item giving some background which supports all the Divisions in the Department. Instead of coming back on a lease by lease basis, aside from adding some telecommunication facilities, staff is coming in with a generic and ask the Board to approve and authorize the staff is able to use for income generation and support the land development fund or any of those types of leases that are commercial, industrial, resort, renewable energy and telecommunications. To help the

Department to retain funds in this area and all of it is subject to OHA's and DHHL's share.

Member Edlao referred to an EO on Maui that someone hasn't used for 20 or so years which is the potential and maybe we should pursue something like that. Mr. Tsuji said that Maui staff has been in touch with the Chairperson and he related generating income. There were some discussions on what the plans were for that property. It was brought up by Member Pacheco on whether the money from these income generating areas stays on island. Mr. Tsuji related some discussions and cautioned what you wish for.

There were some discussions on the Public Lands Development Corporation. Also, issues with water and infrastructure and what could be done to develop.

Unanimously approved as submitted (Pacheco, Edlao)

- Item D-1 Denial of Request for Contested Case Hearing by Kanaka Hui, Manini**
- Item D-2 Rescind Prior Board Action of July 8, 2010, Item D-1, Resubmittal, After the-Fact, Assignment of Sublease Under General Lease No. S-3852, Nextel WIP Lease Corp dba Nextel Partners (Nextel), Assignor, to TowerCo LLC (TowerCo), Assignee; Consent to Five Year Extension of Sublease to TowerCo, Waimea, Kekaha, Kauai, Tax Map Key: (4) 1-2-02: portion of 6.**
- Item D-7 Authorize the Cancellation of Revocable Permit No. S-6842 for Sugar Cultivation and Pasture Purposes to Gay and Robinson, Inc., Hanapepe, Waimea, Kauai, Tax Map Key: (4) 1-8-006:002, (4) 1-8-007:003, (4) 1-8-007:010 and (4) 1-8-008:020 and Authorize Issuance of Revocable Permit for Diversified Agriculture and Pasture Purposes to Gay & Robinson, Inc., Hanapepe, Waimea, Kauai, Tax Map Key:(4) 1-8-006:002, (4) 1-8-007: 010 and (4) 1-8-008:020.**
- Item D-9 Amend Prior Board Action of July 8, 2011 (Item D-3) Set Aside to Department of Agriculture for Agricultural purposes, Kapaa, Waipouli, Kawaihau, Tax Map Key: (4) 4-3-004: 001, 009, 014 & 017, (4) 4-4-004: 004, 005, 043, 044, & 051, (4) 4-6-005: 011.**
- Item D-11 Grant of Perpetual, Non-Exclusive Easement to Hawaiian Telcom, Inc.; Issuance of Construction Right-of-Entry for Access, Utility and Overhead Telecommunication Lines Purposes, portion of Rice & Kula Lots, Kapaa, Kawaihau, Kauai, Tax Map Key: (4) 4-5-005:012.**

- Item D-12** Grant of Term, Non-Exclusive Easement to John R. Miller LLC, for Access and Utility Purposes, Keahialaka, Puna, Hawaii, Tax Map Key: 3rd/ 1-3-08:20.
- Item D-16** Amend Prior Board Action of February 22, 2008, Agenda Item D-5, Grant of Term, Non-Exclusive Easement to Chantee Shiroma, Glenn Shiroma & Samuel Alameda, Charles C. Selhorst and Vivian B. Eusebio for Access and Utility Purposes, Kulaimano Homesteads, South Hilo, Hawaii, Tax Map Key:3rd/2-8-06:06.
- Item D-18** Amendment and Restatement of Grant of Easement No. S-27,613 to Napuu Water, Inc. for Water Transmission and Storage Purposes, Puuwaawaa, North Kona, Hawaii, Tax Map Key: (3) 7-1-001: portion of 006.
- Item D-21** Issuance of Revocable Permit to Terrance P. Kaialii Akuna, Wailua Homesteads, Koolau, Hana, Maui, Tax Map Key: (2) 1-1-004:018.
- Item D-22** Issuance of Revocable Permit to Hawaii Explosives and Pyrotechnics, Inc. for Aerial Fireworks Display at Duke Kahanamoku Beach on January 25, 2012, Waikiki, Honolulu, Oahu, Tax Map Key:(1) 2-3-037:021 (Portion).
- Item D-23** Withdrawal from Governor's Executive Order No. 4314, and Reset Aside to the Department of Accounting and General Services, for Microwave Tower Site Purposes, Makiki Heights, Honolulu, Oahu, Tax Map Key: (1) 2-5-019: por. 003.
- Item D-26** Amend Prior Board Action of April 28, 2006, Item D-16, Grant of Perpetual, Non-Exclusive Easement to Hawaiian Electric Company, Inc. and Hawaiian Telecom, Inc. for Access and Utility Purposes and Issuance of Construction of Right-of-Entry, Waimanalo, Koolaupoko, Oahu, TMK (1) 4-1-08:05 & 80 por.
- Item D-31** Permission to Contract a Professional Services Consultant to Establish the Public Land Trust Inventory.

There were no changes per Mr. Tsuji.

Unanimously approved as submitted (Pacheco, Gon)

- Item E-1** Request for Approval to Designate Interim Campsite Areas Pursuant to Chapter 13-146-51, HAR, at a Shoreline Portion of the Kiholo State Park Reserve and to Authorize the Chairperson of the Department to Designate Future Camping Areas for the State Park System

Dan Quinn representing State Parks conveyed background on item E-1. Currently designation of camp sites is the purvey of the Board and asking the Board to designate this. This is the makai portion connected with DOFAW's Pu'u Wa'awa'a. Kiholo has been overrun by unregulated campers. Up to 400 people and they are providing some opportunity for people to camp by designating specific camp sites in areas that would not impact the resources. Staff is going through a simultaneous master plan and EIS process for the 43 acres. He displayed a map of Loretta Lynn's old house and private parcels within the area is chock full of archaeological sites. There are people driving on the beach where the ili'ili on the beach are being hammered by vehicles within a foot of archaeological sites and suggested confining vehicles to an area and make some appropriate ways down to designates campsites as staff goes through this bigger process. Staff would like the Board to reduce our footprint that has been pre-existing on the site. This is exempt from 343 requirements.

Member Pacheco asked whether to designate campsites in the future is in the interim plan as far as when the master plan comes forward. Mr. Quinn clarified that it would be to delegate to the Chair the authority to designate camp sites. It is still the purview of the Board to designate these camp sites.

Member Pacheco said he was excited for this going forward and the community is looking forward to it.

Unanimously approved as submitted (Pacheco, Gon)

Item E-2 Requesting Approval to Renew the Month-to-Month Revocable Permit #SP0070 Issued to the Sand Island Off Highway Vehicle Association (SIOHVA) for the Continued Management and Use of a 30 Acre Portion of Sand Island State Recreation Area, Oahu, for Off Highway Vehicle (OHV) Recreation, Honolulu, Oahu, TMK: 1-5-41:6 (portion of)

Mr. Quinn presented some pictures of Sand Island which was passed around and which he described. In the beginning it was described as temporary use of the area. Staff wants to extend the RP because this activity has been quite popular. It is not the best place, but it works well.

Unanimously approved as submitted (Goode, Gon)

Item L-1 Appointment of Mauna Kea Soil and Water Conservation District Directors

Item L-2 Contested Case Regarding: Application for a DLNR Safety Construction/Alteration Permit, Permit No. 46 - Hanamaulu Field 21 Reservoir (KA-0135) Dam Alteration and Removal, Kapaia, Kauai, Hawaii

Item L-3 Appointment of Hamakua Soil and Water Conservation District Directors

Item L-4 Certification of Election of West Maui Soil and Water Conservation District Director

Dickie Lee representing Engineering Division reported that there were no changes to items L-1, L-2, L-3 and L-4.

Unanimously approved as submitted (Edlao, Goode)

Item M-1 Issuance of a Fixed-Base Facility Lease Bradley Pacific Aviation, Inc., Lihue Airport, Island of Kauai, TMK: (4) 3-5-01:Portion of 8

Item M-2 Five Years Extension of Cooperative Agreement No. H-89-8 Issued to the United States Department of the Interior at Kawaihae, Kohala, Hawaii, TMK: 3rd/6-1-03:25 (Portion)

Item M-3 Consent to Sublease Kahului Retail Concession DFS Group L.P. to Island Shoppers, Inc., Kahului Airport, Island of Maui, Hawaii, TMK: (2) 3-8-001-019

Item M-4 Modification #4 to Master Lease No. DOT-A-07-0013, FAA Agreement No. DTFAWP-07-L-0004, Federal Aviation Administration (FAA) Honolulu International Airport, Honolulu, Oahu, TMK: (1) 1-1-03:portions of 001

Item M-5 Authorization to Issue Direct, Negotiated Taxi Management Concession Agreement at Honolulu International Airport, Honolulu, Oahu, TMK: (1) 1-1-03: portion of 1

Chair Aila asked if anyone was here to testify and no one answered.

Unanimously approved as submitted (Pacheco, Goode)

Item H-1 Non-Action Item Open Discussion by Board Members about Issues, Policies, etc. affecting the Department of Land and Natural Resources (DLNR) or Board of Land and Natural Resources (BLNR)

Mr. Conry briefed the Board on the on the Western Association of Fish and Wildlife meetings that we are hosting this year that he and Scott Fretz are the planning committee. He related when this meeting was hosted here last, about 20 years ago. It's to open the eyes of participants of what we do here in Hawaii and encouraged the Board to participate. There is a commissioners committee that gets together and talks about their issues. They might talk about management of wildlife, establishing national monuments,

Federal management over State resources, etc. There is a winter meeting and a summer meeting on the Big Island. And, they encourage sponsorship.

Adjourned (Pacheco, Gon)

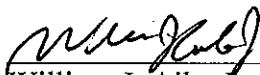
There being no further business, Chairperson Aila adjourned the meeting at 3:00 p.m. Recordings of the meeting and all written testimony submitted at the meeting are filed in the Chairperson's Office and are available for review. Certain items on the agenda were taken out of sequence to accommodate applicants or interested parties present.

Respectfully submitted,



Adaline Cummings
Land Board Secretary

Approved for submittal:



William J. Aila, Jr.
Chairperson
Department of Land and Natural Resources