

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

DATE: FRIDAY, APRIL 27, 2012
TIME: 9:00 A.M.
PLACE: KALANIMOKU BUILDING
LAND BOARD CONFERENCE ROOM 132
1151 PUNCHBOWL STREET
HONOLULU, HAWAII 96813

Chairperson William Aila called the meeting of the Board of Land and Natural Resources to order at 9:06 a.m. The following were in attendance:

MEMBERS

William Aila
David Goode
Jerry Edlao
Rob Pacheco

Ron Agor
John Morgan
Dr. Sam Gon

STAFF

Russell Tsuji/LAND
Ed Underwood/DOBOR

Kevin Moore/LAND

OTHER

Bill Wynhoff, Deputy Attorney General
Christi-Ann Kudo Chock, D-14
Greg Barbour, D-1
Mark Morita, D-10
Sheryl Nicholson, D-7
D.G. Anderson, D-7
Randy Vitousek, D-8

Ross Smith, M-1
Judge Robert Klein, D-5
Lono Lyman, D-1
Mike Leary, D-10
Paul Sato, D-7
Tina Coleman, D-7

{NOTE: Language for deletion is [bracketed], new/added is underlined.}

Item A-1 November 10, 2011 Amended Minutes

Board members Morgan and Pacheco recused from this item.

Approved as submitted (Edlao, Gon)

Item A-2 April 13, 2012 Minutes

Approved as submitted (Pacheco, Edlao)

**Item M-1 Issuance of Revocable Permit E Noa Corporation, for Inconsistent Use
Ualena Street, Honolulu International Airport, Island of Oahu, Tax Map
Key: 1-1-14:15 (portion)**

Ross Smith, Property Management/Land Acquisition Supervisor for the Department of Transportation (DOT) – Airports Division reported that they have a ground transportation permittee at the airport who requested to rent space for parking for his vehicles. We consider it as inconsistent use because we know not all his vehicles carry ground transportation stickers – some are permitted and some are not and his staff didn't want to monitor every day. They asked the Board to approve this as inconsistent use.

Member Edlao asked whether this was a month-to-month and Mr. Smith confirmed that.

Unanimously approved as submitted (Morgan, Edlao)

**Item D-14 (1) Status of Negotiations for an Easement for Encroaching Seawall and
Filled Lands; and (2) Enforcement Action Against TLM Partners Ltd. for,
Inter Alia the Removal of the Encroaching Seawall and Filled Lands;
situated at Niu, Honolulu, Oahu, Tax Map Key (1) 3-7-002:seaward of 009.**

Written testimony was submitted to the Board.

Russell Tsuji representing Land Division said as a follow-up from our last Board meeting on this matter, as he had advised the Board referring back to the January 2012 meeting when we last heard about this easement matter - Mr. McConnell requested his money back and wanted to cancel the easement. The Board and staff advised him that if they returned the money it is our position that the seawall and filled lands are encroaching on State lands and would be back in for enforcement. At the end of the January meeting the Board had the \$107,000 or so be returned to Mr. McConnell because he refused to sign the easement document and ordered staff if the parties are not able to come to terms with the easement document within 30 days then to come back to the Board with an enforcement action. Since then as he had informed the Board at the last meeting, they were in discussions and returned the money discussing terms of the easement going back and forth between him and Greg Kugle (counsel for Mr. McConnell). Myself, Sam Lemmo (Office of Conservation and Coastal Lands), our shoreline crew have always been in discussions and staff came down on the terms and the triggers for repayment and as always discussed the sale was always the trigger. There was an issue on the term and initially TLM's position was no term being that the entity is not an individual, but an LLC that could go on for a very long time beyond the passing of the McConnells. Staff insisted that we have to have a term;

otherwise, it is simply unprecedented to have an easement legitimizing the encroachment on State land without actual payment. We added in as per Mr. McConnell's explanation why he needed the money back that he no longer needed to do a shoreline certification and was going to withdraw that application. Staff thought if he is not going to pay cash for the easement we must have as a trigger a shoreline certification and that was proposed as a term or trigger for repayment - so sale, shoreline certification. Mr. Tsuji added a building permit after consulting with staff and the Attorney General's office (AG) when he learned that one can do multi-million dollar renovations to a structure and would not trigger any shoreline certification.

Mr. Tsuji said Mr. McConnell's testimony was he no longer had an interest in residing at this property. He lives on the mainland and is hardly here in Hawaii. We tried to warn him back in January every time when we could not come to terms on the easement we kept reminding counsel that this has to come back to the Board and counsel kept trying to delay it. Mr. Tsuji told him his position was you are no longer an easement holder and you are encroaching on State land. His duty as the Land Division administrator is he must bring this to the Board because we are entitled to enforce and if you are not going to agree to the easement you give us no choice and he always said that. To ask the Board for removal of the sea wall and the filled lands is why we are here. Since the preparation of the Land Board submittal, Greg e-mailed Mr. Tsuji that his client agreed to a 10 year term. We are offering 10 years with no interest that when staff offered that in Mr. Tsuji's e-mail he was very specific that he must have the 4 triggers. Sale, term of 10 years and that's the max, shoreline certification and building permit. His client did not agree to the trigger of the building permit. It was his understanding that his client intends to come back to Hawaii, reside in that home and probably do renovations. If that is the intent of Mr. McConnell I'm not so sure that was understood when the Board ordered the return of the money.

Mr. Tsuji related that in his prior life he was a litigator and tried to independently evaluate the paper in the best interest of his client, but started thinking he is getting too close to this case when he talked to people on the terms because he seemed to not been able to come to terms with Mr. Kugle. Maybe Mr. Tsuji was getting too emotional or hard head and needed to step back. Comments from Sam Lemmo and environmental groups have all said they can't believe how much he is bending over backwards and why are we doing this. Since when do we allow someone to have an encroachment - for encroaching on State Lands, a shoreline property, multi-million dollar home with a seawall and filled lands and why are we allowing him to get away with an easement and without having to pay cash like everyone else. We are here to bring this matter before the Board and to date we have not come to terms. Mr. Tsuji read Christi-Anne Kudo Chock's written testimony and the terms she thought we came to an agreement...she indicated that the parties are close to an agreement, but they are not even close that those are not even the terms he discussed the last time with Mr. Kugle when the shoreline certification trigger was not there. I told Kugle if you want the 10 year term you must have all 4 triggers. Otherwise, let's go back, you don't need the building permit then supply me a term. Mr. Kugle responded several weeks ago. Christi-Anne is here for Mr. Kugle who is out of the State right now and will want to testify and will probably request a contested case.

Member Morgan said he was interested in the submittal referencing the neighboring Lot 20 and the choice given to her was to remove the seawall or get an easement, but it doesn't reference a resolution for that asking for something right next to it that seems to be a similar situation. Mr.

Tsuji explained this was in 1990 and he wasn't working for the State then, but since coming on board he is aware of each beach lot in the area and the various applicants. There are pending applications for years for easements with similar situations – encroachment on State land. We will be moving them. As he told the Board the last time, this is the first one they are bringing to the Board where the applicant is refusing to accept the easement and wants to be able to have the seawall and filled lands for no compensation. It is contentious and controversial dealing with a luxury home and the stakes are high. Depending on the outcome we will go further.

Mr. Tsuji reminded the Board that subsequent to the TLM matter Mr. Kugle also represented another neighbor, the Cassidy family, for another easement and the due process would be an appraisal which was over \$200,000 for a non-exclusive easement because it was a little larger encroachment area. It was asked by member Morgan whether the land owner paid it and Mr. Tsuji said they are evaluating their options, but so far they are not getting the easement.

Member Morgan asked when you use the term filled land or accretion how do we address those issues. Mr. Tsuji said Mr. Kugle alleged how do you know it's not accreted, but we clearly know this which was attached to the original submittal an exhibit in the original sub-division map for that development and this area was outside the original recorded boundary. If you recall the last meeting 6 or 8 months ago where we had aerial photos going back to the 1940s and 1950s and there was a pictorial where there was no wall and then suddenly a wall appeared. That is why it's their position that we might have a contested case asserting that maybe it's accreted and we will litigate that point. If we go through that process it will require experts, probably require borings. When we looked at this initially it was the best team put together by DLNR whom Mr. Tsuji named from Office of Conservation and Coastal Lands (OCCL), Land Division staff and the State surveyor were all out there. They took a look, gathered all the evidence and they believe this was filled lands and not accretion. Staff suspected there was sand there, but you will find a lot of dirt. This wall is 6 feet tall above the submerged land. The filled land is 5 feet above the submerged land and that is no way accretion. It was definitely filled and looks like private land.

Member Morgan said on the other side at Lot 7 and it didn't say in the submittal how it got expanded and asked if there was any record because he referenced there was no accretion and wasn't adjudicated and probably the adjacent lot is bigger so somehow it got expanded. Is there any institutional knowledge on that one? Mr. Tsuji said he didn't know since he couldn't recall where the sub-division boundary was. Member Morgan said the original sub-division was all the way to the fish ponds and subject Lot 8 got this encroachment and Lot 7 is next to it and goes out presumably to the edge of the seawall. Clearly that is relevant on how they got that property. Mr. Tsuji said each lot has got to be studied very thoroughly and not just rely on the sub-division map, everything is looked at. There were multiple instances over the last year and a half where staff came across shoreline property on County TMK maps added to the extra area. In reality when you try to do the research of how that occurred legally the answer was nothing and at the end, referring to the Cassidy lot, they agreed to proceed with the easement, but they can't show they legally acquired that additional property. At first it's 15,000 square feet and then all of a sudden it's 30 and they know there were some additions on the road side, but didn't know how the shoreline side increased which there is no evidence. They had Deputy Attorney General Bill Wynhoff and the shoreline staffs try to find something where these property owners legally

acquired the additional lands. Staff couldn't find anything nor could they find anything on TLM's property.

Mr. Tsuji related how TLM's own consultant came in, applied for the easement and their own surveyor came up with a map showing the encroaching area. Staff brought it to the Board for the application for the easement, did an appraisal, TLM came in and deposited the money, the AGs prepared an easement document, it was signed off by the AGs and when it went to TLM it stalled.

Member Morgan asked about the letter addressing enforcement and the due process question. Mr. Tsuji said he talked to Mr. Wynhoff about that and he doesn't believe there is a due process issue. TLM has been on notice since January 27th. The Board specifically said if you want the money back and you don't agree to an easement you will be back here with an enforcement action and they told them that at the time. Unless they come to an agreement they have to bring it back. A lot of these terms were not discussed. The big issue with negotiating with Greg (Kugle) and his client, Mr. McConnell, I am not sure if it's Greg, the client or both, but they seem to think just because certain items were discussed in the Board meeting such as subordination to a new first mortgage that was actually forwarded at the Board meeting. My interpretation and the minutes so reflect, that was discussed, but not ordered. What was ordered was to return the money, come to terms with an easement within 30 days or act with an enforcement action. We did take heart since the money the Board felt with Mr. McConnell's specific circumstances based on what he testified that he could get away with a lien instead of what everyone else has to do when getting an easement in the State of Hawaii which is to pay cash. That is the lien concept coming into play. When Mr. Tsuji talked to counsel and it ended up being just a lien with no term, no trigger for payment and why they talked about a trigger was because they cannot wait forever. At the end of the day, as he had explained in his e-mail to TLM their normal installment agreement that they bring before the Board when people cannot pay for retro because of back rent is 7% annually. When you look at this it's over a \$100,000 worth of encroachments here for the easement and over a 10 year period that is \$7,000. At the end of the day the lien is not going to be worth anything if you don't have a term and don't have a trigger. I always understood Mr. McConnell's testimony as this is not my residence and that we're from California. He is barely here because every time Mr. Tsuji tries to schedule a meeting it's always delayed and that Mr. Tsuji has been trying to schedule this meeting since January and why not delay it since Mr. McConnell got his money back. If I was encroaching on State land why would I want to come before the Board, again? I got my money back why would I want to come back especially for an enforcement action. Why would I want to come back to talk about an easement? I just like it the way it is.

Member Morgan said the devil's advocate position would be to confirm a date where Mr. McConnell could be here and schedule something where you know he is going to be here. Mr. Tsuji said we didn't come to terms on the easement and the next step is enforcement. At this point he told counsel he expected a contested case and let's go. These are the terms unless you the Board tell me that these terms are unreasonable because he has a problem every time they do applications for easements. Nobody gets these kinds of terms. Why are we doing this for this individual, because he lives in Niu Beach Lots and has a \$5 million dollar home?

Member Pacheco asked going to Member Morgan's question about process was raised in Ms. Chock's letter, in your recommendation you are asking us to authorize an injunctive relief. Mr. Tsuji said because it's removal of the wall. Member Pacheco said ok and normally just remind me in these processes when the Department sends a letter saying there is an encroachment or the landowner approaches us saying there is an encroachment and there is this whole process in place and that is what we've gone through in this whole thing. You talked the AG's office and did the applicant get a letter from our Department informing them that this will be coming before the Board? Mr. Tsuji said no and the reason is this and asked Mr. Wynhoff to chime in if they have to do a letter. As you know OCCL spent a lot of time doing enforcements. They will do those types of letters because those individuals are not coming before OCCL to legitimize it for an easement. Here we have the applicant coming to us applying for an easement for the encroachment. They don't want to sign the easement and they know having looked at everything and we agree. It is an encroachment and it is a sea wall on filled land. When we returned the money at the last meeting, we told them unless you agree to an easement you will be back with an enforcement action. I don't know how much more notice an individual needs after 4 months of notice. It was January 27th, exactly 4 months ago that the Board told Mr. McConnell he'll be back with an enforcement action if he cannot agree to an easement. If that is the route they wanted to go throughout contested case he doesn't see any problem with that. We go through it all the time although Land Division hardly does it. Mr. Tsuji referred to the Kauai Amstel case and never was payment an issue that everyone paid cash for their shoreline easements, but this situation was in the reverse where the shoreline had moved in. The applicant came forward and he paid for the easement that he just wants his easement. It was once private land but became government land due to the shoreline movement. That is not the case with TLM. Amstel paid cash and here they are getting away with I'll pay when I feel like it which is the attitude coming back from TLM reiterating the lien and the trigger by selling, but he may never sell and since it's an LLC it could go on with no sale. At the end of the day we are getting an easement, legitimizing an encroachment or zero compensation.

Christi-Anne Kudo Chock representing TLM testified that they asked this matter be deferred to May 11th and respectfully Russell said he has been requesting this meeting since January, but he also conceded that multiple triggers were requested in the negotiation of the easement. She apologized in advance that Russell negotiated directly with Greg and her knowledge is limited. But, even from what Russell just said as what the Department asked for as it was going through the easement and was figuring out what was the proper forum, it asked for multiple triggers that required response and negotiations and that is where we are today with the back and forth, with the 4 triggers that took time understandably which is why we request this matter be deferred to the May 11th meeting when Mr. McConnell and Greg can be here and the Board can ask questions directly of the parties. If to the extent the Board wants to facilitate the execution of an easement or the specific terms, we can do that if they are all here. Russell asked for the meeting maybe a week or so ago unfortunately as the Board knows and as Mr. McConnell testified many unfortunate things happened in his life over the course of the past couple years and his circumstances changed. We first asked for the easement he had intended to renovate the house which Russell referred to as a luxury or multi-million dollar home, but it's pretty much the original structure that was built by the Cassidys or whoever owned that property in the 1930s and it's not a resort home or anything like that and would require renovation which is what he intended to do when he first purchased the property and what he had intended to do when he first

applied for the easement. Many things happened as said on the record when he came before the Board last year in November and he is not trying to reside there or renovate it right now. Typically, the Board had acknowledged processes that when someone is renovating their property they request a shoreline certification and that exchange makes the payment of the easement sensible or reasonable and since that wasn't the case here the reimbursement was ordered and Mr. McConnell is grateful, but because of everything that has happened in his life...he doesn't live here it's not easy for him to schedule a return on a week or two weeks notice. He wants to be here and he wasn't trying to ignore this Board or Russell's request, but there wasn't a request for a meeting since January. We've been negotiating the easement - a form that they agreed to was attached to our submittal and to the extent that the Board wants an easement entered today we request that form be entered. If there is any enforcement action, as Russell acknowledged, we request a contested case hearing where the Department follows a certain process for noticing violations. Russell was saying because of things that were discussed in this Board meeting in January Mr. McConnell has had notice, but the provisions of the Department, its own rules say a citation is issued, it lays out what the violations are (what laws the property owner violated) and that is not what happened here and they request a contested case.

It was asked by Member Edlao whether she and the owner saw the submittal and Ms. Chock confirmed that. Member Edlao pointed out in the submittal it says there was going to be enforcement and Ms. Chock said yes. And in Member Edlao's mind and even without this he (Mr. McConnell) knew that it was going to end up this way because the encroachment wasn't resolved. His thinking is Mr. McConnell knew this action was going to be taken.

Member Pacheco said in the January meeting it was made very clear by the Board including himself that if they want their money back because there was no easement executed then we are back at square one and that process is going to go forward. Its 4 months later and we don't have an agreement. He was not in agreement with the lien concept in the first place. We are not interested in deferring this. Ms. Chock explained that the lien concept was created and that also added to the delay. Member Edlao noted that was just a discussion at that time and you guys didn't come to terms. My feeling is we are just being jerked around and I don't like to be jerked around to be honest. I just want to end this and I told Mr. McConnell the last time either he take the easement and if you don't there is going to be an enforcement case. This is going to cost him more money than what he already had and I told him that. I have no desire to defer this whatsoever and in my mind I think he knows there will be enforcement. If he receives this as you said he reviewed it, he should have been here. Ms. Chock said the Department has been asking for additional requirements to be added to the easement and for the most part we've gone back and forth and Mr. McConnell has agreed to some or most of them. Member Edlao said then he should have been here. If you are saying he is starting to agree to terms that were offered to him then I would suspect he would have been here and end this, today. Obviously, he has a change of heart. Ms. Chock explained that he is not in the country. Member Edlao said that is what he means that he probably has gone somewhere and disappeared. I don't want to see this end up in an uncollectible type thing. We have another issue here because we can't collect. I don't want this to happen. Ms. Chock said that is not the situation. We are ...Member Edlao said you are entitled to what you are thinking. I just want to say that I'm tired of this and I do not want to defer this. If you want to contest this, then fine.

Board member Pacheco made a motion for the Board to go into Executive Session pursuant to Section 92-5(a)(4), HRS to consult with our attorney on questions and issues pertaining to the Board's powers, duties, privileges, immunities and liabilities. Member Edlao seconded it. All voted in favor.

9:41 AM EXECUTIVE SESSION

9:50 AM RECONVENED

Member Edlao asked Mr. Tsuji if it gets to the point that the State gets involved in removing the encroachment does the fine go until that is completed or it stops from when we get involved - \$1,000 a day. Mr. Tsuji said the way it's written for the recommendation staff recommended it was a \$1,000 per day, but only kicks in if Mr. McConnell doesn't remove the wall within the 6 month period and refers back from the day of the Board's decision if it's today as they are requesting. Member Edlao asked assuming if the State goes in to remove that the fine stops or until everything is done. Mr. Tsuji said until the encroachment is completed and corrected. He would assume if this homeowner wants to do it himself because there is a way to remove it engineering wise and still have a sea wall by just bringing it back to your boundary line. It will be a seawall that goes in a bit, but it will protect your property. But, if we go in we won't build a seawall to protect his property and will just take it down. We tried to be reasonable by giving him 6 months to remove it.

Member Edlao asked on that administrative cost is the estimate approved until today. Mr. Tsuji acknowledged that saying it's actually very low and Member Edlao said if we do continue there maybe additional costs which Mr. Tsuji confirmed saying yes that staff low balled it. Member Edlao said considering all the involvement and time. Mr. Tsuji said he went around with the various staff for the amount of hours they put in and the hourly rate they put in for them is below their true salary. Member Edlao said it doesn't include our time.

Member Pacheco asked if we approve this recommendation and there is a contested case would that preclude continued negotiations for the previous arrangement going on now. Is there any ex parte communication on that? Mr. Tsuji said he thinks the Board should express its desire and again Christy wasn't involved with all the back and forth between him and Greg. I told him once they are in enforcement action all these terms are off and we would go for, what we normally go for which is removal or if you want an easement it would be back to the normal standard terms of an easement and it doesn't mean there is a lien. You pay cash. Because you are going to expend a lot of money going through this case, I envision, and assuming they have to because it's not necessarily in his client's best interest considering the easement. We are talking a \$125,000 and yes it's a lot of money for some people, but I don't think it is for this particular property owner especially with a \$5 million dollar property.

Member Morgan said he feels this whole encroachment thing needs to be resolved. His concern is the timing issues and not necessarily the due process issues that were raised, but the request for the May 11th meeting instead of this meeting doesn't feel right knowingly with the 2 week extension to have all the parties in place to rush it is the only part he feels uncomfortable with. The pace of the negotiations and the result of the negotiations weren't where everybody wanted

them and were on-going. It didn't seem to be unlimited to keep this going forever that there is a specific request for May 11th which is why he is uncomfortable with the motion as it stands. He believes this is an encroachment that needs to be taken care of.

Mr. Tsuji said he did talk to Bill last night and his take on it was they were asking for May 11th. He was already late on the 30 days and he didn't feel the negotiations were going anywhere and he wanted to bring the last set of terms they were asking for before the Board. It's with reluctance because everyone else who comes to staff for these types of easements are paying cash. Mr. Tsuji have always felt in this scenario that in Mr. McConnell's best interest not to be before the Board ever and could sit back and keep delaying this matter.

Member Morgan said if they said May 11th and didn't show then you got all the reason in the world to throw the book at them and that is the part he is uncomfortable with. If they didn't say they will represent on April 27th. Mr. Tsuji said from early on when they were going through negotiating the easement he told counsel and Greg Kugle we will have to go back to the Board to bless these terms because these were not approved terms. Mr. Kugle told Mr. Tsuji that Mr. McConnell does not want to go back to the Board. Mr. Tsuji asked them what do you mean, if they are going to come to an agreement these terms were not necessarily approved by the Land Board. His client does not want to come back before the Board. At that point, Mr. Tsuji realized whether it's an easement or an important easement it has to come before the Board which bothered him because if they came to terms to his proposal 2 or 3 weeks ago to Greg, Mr. Tsuji knows he has to go to the Board just to bless it and the Attorney General told him to do that.

Member Morgan said he is making a distinction between Mr. Kugle and Mr. McConnell because Mr. McConnell can chose to be here. The guns behind it is Mr. Kugle and if he says he'll be here and when someone says he doesn't want to be before the Board that can be a preference or a strategy and as a preference we can all understand that. As a strategy he doesn't know how to interpret that. But, because he said he wanted the item on May 11th it seemed to be a reasonable request and then to push it forward makes him uncomfortable.

Member Pacheco pointed out if we approve this recommendation and there is already an oral request for a contested case they have 10 days to file and that is 4 days less then the next time they would be before the Board which is time for them to try to bring this thing to negotiation until that kicked in.

Deputy Attorney General Bill Wynhoff said Mr. Chair I may have misspoke before because if they did follow-up with a written request which they certainly will then their request will have to come back to the Board again anyway to approve the request and to authorize the appointment of a hearing officer. The Board members commented that would give them a lot more time.

Member Edlao said that wouldn't preclude you guys from continuing the negotiations and hopefully come to terms. He wants to move forward.

Member Goode said he is inclined to approve the submittal and he thinks the client is ably represented here by Ms. Chock that he would like them to continue negotiations. He supports the 4 triggers – triggers of sale within 10 years which is now agreed to those 2 terms, and the last

2 terms were the building permit and the shoreline certification. Mr. Tsuji said previously agreed to the shoreline certification. Member Pacheco said it was only the building permit. Member Goode said there were detailed discussions on that and fine tuning that particular trigger or associated with that and hope they come to a fair conclusion on that, but supports the recommendation.

Member Gon said he wants to echo that desire. The implication was the door was closed on negotiation and these 4 points if we enter into this action, but he wanted to voice his desire that if an agreement can be made on those last points that that be allowed to move forward.

Member Pacheco made a recommendation to further the recommendations and include that negotiations are open until such time as an authorization for a contested case appointment for a hearings officer comes back to this Board or a written submittal for a contested case hearing is filed in 10 days.

Member Edlao said it has always been in contested cases where both parties do continue negotiations. Very rarely do they shut the door. There have been cases where things were resolved even before the contested case started. He didn't think they needed to add all that stuff because in his mind it's automatic. Member Gon said they are doing it as a matter of clarification since...Member Edlao said he understands the frustrations and appreciated that.

There were some Board discussions about leaving in negotiations. Mr. Tsuji said it's clear from the Board that they would like him to proceed with the outstanding terms and if they are going to be back before the Board for the approval for a contested case for appointment of a hearing officer. Member Edlao said that is what Member Goode had commented.

Member Goode made a motion to approve staff's recommendations in support of staff's 4 triggers for the easement and that we ask staff to continue negotiations in light of the contested case request.

Mr. Tsuji asked for one clarification that we're expecting a contested case hearing written request and back to the Board. He doesn't believe Christy filed it today and doesn't know if they can make it for the May 11th meeting now. If this Board is inclined and Christy is committing that she, Greg and their client will be here on May 11th there may have to be a meeting even before the decision on the request for a contested case because he wasn't sure how fast she can get a written request in that she has 10 days from today. Already May 11th is in 2 weeks.

Member Pacheco said if they can do an agreement by May 11th that's great. Mr. Tsuji said she says Mr. McConnell and Greg will be here on May 11th. Is the understanding that they are going to be back on May 11th notwithstanding? Member Goode said he is suggesting not knowing when they will file. Mr. Tsuji said all the representation is being made by Christy and Mr. Kugle's office with Kugle and McConnell being here and knowing them apologizing this is how he feels if they bypass May 11th they are not going to make it again. Member Morgan said that is where you throw the book at them. Member Edlao said then it is enforcement and proceed as an enforcement. Mr. Tsuji said if he tries to do it May 25th they will say May 11th and not May 25th.

Mr. Wynhoff asked what the motion was. Member Goode said to approve staff's recommendation that the Board supports their 4 triggers, arrange a payment on the easement and negotiations shall continue in light of any contested case request proceedings. Mr. Wynhoff said you are moving to approve the Board's recommendation that this won't be taken out and a fine be entered subject to continuing negotiate that he isn't understanding if that is part of the motion. Member Gon said they are authorization the enforcement action. Member Edlao said they don't want them to stop that they can come to terms and agree to the full...Mr. Wynhoff said staff's request was to order these guys to take it out and payment of this fine if they don't. When hearing the motion saying he is not trying to tell you what it should be. It's yes we approve that, but we also would like the staff continue to negotiate and approve these 4 points while we process on what likely will be a contested case path. Mr. Tsuji pointed out that the fine doesn't kick in until 6 months. Mr. Wynhoff said he understands that. There is nothing really to talk about. We are going to come back to the Board with 1. Yes we got a deal. Is the Board approving that deal and if that is so... he didn't think that will happen by May 11th. If we come back with staff saying we got a deal whether they come or don't come isn't that important. 2. They might come to the Board and say they requested a contested case and we haven't yet settled and would like to have the Board approve the contested case and appoint a hearing officer. Again, he doesn't think that will be by May 11th and would not be that important for them to be here. They asked for a contested case and would want the Board to approve it to appoint a hearing officer. He doesn't see May 11th as that important. He is just trying to get you all clear on what we have.

Member Gon asked as amended there is no mention of any dates. Mr. Tsuji said he thought with having Mr. McConnell and Mr. Kugle here as they requested as is so important today was important for the Board. Member Morgan said that is the only relevance to May 11th is if they deferred to May 11th then you wouldn't have to worry about all this. Ms. Chock will go back and say that the Board is very serious. He completely agrees that all the remedies are going to be more expensive than paying for the easement.

Member Edlao seconded the motion. All voted in favor except for Member Morgan.

The Board:

Approved as submitted. Counsel for TLM Partners Ltd orally requested a contested case and was advised of the requirement to file a written request within 10 days of this Board action.

Board indicated their desire to see the four (4) triggers for payment agreed to, which mean full payment of the lien being made upon the first of one of the following to occur: (1) upon a sale or transfer of the secured property; (2) issuance of a shoreline certification; (3) issuance of a building permit; or (4) March 1, 2022.

Notwithstanding its decision to grant the relief requested by staff and order, among other things, the removal of the encroaching seawall and filled lands, and assessing the administrative fines as requested, etc. and Board informed Counsel for TLM and staff that they should continue discussions on the easement document, at least

until such time as the Board is asked to make a decision on TLM's request for a contested case.

Approved as submitted (Goode, Edlao)

Item D-5 Amend Prior Board Action of December 8, 2006, Item D-7, Grant of Perpetual, Non-Exclusive Easement to Kona Residence Trust for Access and Utility Purposes, Puuanahulu, North Kona, Hawaii, Tax Map Key: (3) 7-1-003: portion of 002. The Purpose of the Amendment is to Authorize the Use of Non-Standard Provisions in the Grant of Non-Exclusive Easement Instrument Including, Without Limitation, Those Relating to Abandonment, Withdrawal, Liability Insurance, and Pollution Control Measures;

Amend Prior Board Action of June 23, 2011, Item D-8, Acceptance of Department of Transportation's (DOT) Grant of Limited Vehicle Access Rights onto the Queen Kaahumanu Highway, Relating to Issuance of Grant of Perpetual, Non-Exclusive Easement (LODS-28,998) to Kona Residence Trust for Access and Utility Purposes at Puuanahulu, North Kona, Hawaii, Tax Map Key: (3) 7-1-003: portion of 002. The Purpose of the Amendment is to Authorize the Non-Exclusive Assignment of the Access Rights to Kona Residence Trust and Approve the form of Such Assignment.

Russell Tsuji reminded the Board when this came before them previously the applicant asked for an access easement over their parcel to access Queen Kaahumanu Highway, but their parcel does not run all the way to the Highway and would need a separate DOT right-of-way. Judge Klein, DOT and DLNR attorneys have been working on various types of agreements. They have come to terms as an exhibit to their submittal. The Deputy Attorney General for the Department requested to bring it before the Board because there were many changes to the normal standard form. Staff and Judge Klein have been working on these changes and attached a red lined version of the final easement document and asked the Board to approve. The money was paid a long time ago and the applicant has been patiently waiting for their easement document and staff wants to close it out.

Judge Robert Klein testified that they worked hard with staff to come up with the documents and he thinks they are very fair improving the standard documents. They have no objections. He did call attention to the grant of easement document attached as D-3, paragraph 15 is broad granting to the State to withdraw the easement if in the future a public reason arises to withdraw the easement and doesn't provide for any re-location or another alternative nearby and the easement could be wiped out if the State declares there is a public purpose which is a rather broad reason. This is not an exclusive easement, but a public easement that the public can use it and already serves a public purpose. It conflicts with paragraph 7 in the same document that talks about if there is any future development that necessitates a relocation of the easement or a portion of it then the relocation will be accomplished at the grantee's cost. Except if other State lands are available then the easement would be granted without payment of any monetary consideration. It talks about a substitute easement or similar within the reasonable vicinity of the original

alignment of the easement area would be provided. In 7 they would retain the easement albeit under a different location. In 15 if there is a public purpose they will lose it completely. When he and Mr. Tsuji discussed it the State needs the flexibility and cited a reason why the public purpose arose. An easement might be wiped out with no alternative access and the palila bird was cited. Judge Klein's issue was can the owner of the property be allowed to have an alternative easement if available and could it not be written into paragraph 15 so it's consistent with 7 and consistent with the action taken in 2006 to grant us an easement particularly if the easement is non-exclusive. It does serve a public purpose already. It could be made consistent maybe with a few words put into 15 such that the State could take the easement that we paid for, but just allow us an alternative if one is available so it conforms with 7; otherwise they are in total agreement.

Mr. Tsuji related the Saddle Road project and palila bird that in the future whoever is here will accommodate the easement holder that he felt comfortable putting it in writing noting this is an access easement over a State parcel. The likelihood of staff withdrawing that strip is slim for public purpose because we have a lot of other lands outside of it. After Member Goode's inquiry Mr. Tsuji said their parcel is landlocked seaward and the State parcel is closer to the highway. Member Pacheco said the parcel is significant access for surfers.

Member Goode referred to paragraph 15 testimonies and said it sounds like condemnation if you own it already. Mr. Tsuji agreed that in his view it's contractual provision in addition to the normal condemnation but its close. Staff is trying to compensate which is why there is a formula in the submittal. He understands the concern, but as a practical matter it won't occur because they have unencumbered lands and this is a small strip and for them to take that back is not likely.

Member Pacheco asked what is wrong with having that language if available from the State. Mr. Tsuji said up until the palila bird he didn't think they would do it, but it was critical for the Saddle Road project to go forward.

Member Edlao recalled a similar easement for an access road to substitute with another easement. Mr. Tsuji said the relocation on 7 models the DOT provision because they may have to relocate their side. Judge Klein said they didn't have problem with the taking if there is a public purpose. Take it, but don't land lock us. Let us have the opportunity so we aren't stuck again for another 5-1/2 years of trying to work out an easement. If available that he didn't care what limitations are placed on it. In case, Russell is not here and nobody remembers and it happens they will be landlocked again. They just want that opportunity.

Member Agor suggest leaving 15 as is and amending 7 to include future development if the State exercises 15. Judge Klein said he was fine with that. Mr. Tsuji said paragraph 7 should read if future developments necessitate a relocation of the easement granted herein or be exercised in paragraph 15. He will insert after the "or any portion thereof. There was some discussion about the language.

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

The Board:

Approved as amended. As to the redlined version of the Grant of Non-Exclusive Easement attached to the submittal as Exhibit 3, paragraph 7 was amended to read as follows:

7. "Should future development necessitate a relocation of the easement granted herein, or any portion thereof and/or the Grantor exercises its right to withdraw the easement for public purposes under Paragraph 15, the relocation shall be accomplished at the Grantee's own cost and expense; provided, however, that if other lands of the grantor are available, the grantor will grant to the Grantee without payment of any monetary consideration, a substitute easement of similar width within the reasonable vicinity of the original alignment of the easement area, ..."

Unanimously approved as amended (Pacheco, Gon)

Item D-1 Mutual Cancellation of General Lease No. S-4602; Re-Issuance of Direct Geothermal Resources Mining Lease to the Natural Energy Laboratory of Hawaii Authority for Geothermal Well Facility Purposes, Kapoho, Puna, Hawaii, Tax Map Key: (3) 1-4-001:082.

Numerous written testimonies were distributed to the Board members.

Mr. Tsuji conveyed some background on the Natural Energy Laboratory of Hawaii Authority (NELHA) which is a State agency attached to Department of Business, Economic Development and Tourism (DBEDT) whose purpose is to develop new types of renewable energy. The Board's predecessor issued a geothermal lease for 5 acres out in Puna which is used as a research and development (R&D) site. They have a 65 years lease, but wanted an extension. Instead staff suggested cancelling it and issuing a new 65 year term. Or, they could cancel the lease and issue an EO. There is no project to approve and there is no applicant for any project at this time. If one should come forward they will comply with any 343 requirement. But, this is only to extend the term of this lease to allow NELHA to manage the area for geothermal R&D. Knowing who is on the NELHA Board they would be perfect to manage the parcel. For some reason this item attracted a lot of opposition which is why Greg Barbour is here to explain what NELHA is trying to achieve with this submittal to alleviate any concerns. He will ask for a withdrawal or deferral.

Greg Barbour representing NELHA testified giving some background history about the site. There was a power plant in the 1980s and NELHA took over. All production stopped in the late 1980s, the well was plugged in 1993 temporarily and then permanently in 1999 where they abandoned the well at that time. NELHA went out for proposals for the land. Puna Geothermal Ventures (PGV) entered into a rental agreement with them. The concept was they would use the property for community geothermal technology programs. It was not used for geothermal R&D. It was used for value added type projects that had strong support of the local community using the excess heat from the plant an adjacent lands. Some projects were lumber drying, drying of agricultural products, hard glass blowing, etc. which had strong support from the community. PGV never found a private sector entity to facilitate that community economic development. The buildings on site are used for storage. Their agreement is ending next year close to termination of the lease and they found it appropriate to ask for an extension where they will go

out for another RFP for new uses for the land that they have nothing in mind. If the extension was approved they would go through the process of entering into a sub-lease and any associated public input would be required. They are good stewards of the land citing their ocean science park on the Kona side and test 120 sites every 3 months of the ground water. They have offshore transects that they test and they require an environmental assessment (EA) for every sub-lease they do and that includes a charter school – West Hawaii Explorations Academy. The new monk seal hospital they required an EA. Their Board is very responsible and works well with this Board and they would be the appropriate agency to look for renewable energy uses for this site. The Chair of the County Council called saying that geothermal issues have come to the forefront on the Island of Hawaii over the past couple weeks and there was a large meeting in this area. He requested that we make a presentation to the County Council to inform them what I just told you and that he would be more than happy to do that. But, he leaves it up to this Board to defer or withdraw.

Member Pacheco said they need some time to dispel the misconceptions out there. After looking at some of the testimonies and people he talked to they think we are giving a lease and there is going to be another geothermal production center being put in there and we need to communicate that. He asked you said you didn't have any projects in mind, but as for alternative energy what things could you see possibly happening at that site. Mr. Barbour said the project proposed by PGV was funded by small grants from the Federal DOE 10 years ago is the perfect use for that area using the excess heat from the nearby...for community economic development. The site is about 4 acres, PGV has about 500 acres. There is no way would this site be used for commercial production and all the experts agree with that. This community economic development is DBEDT and NELHA's mission.

Member Pacheco said he understands PGV has a sub-lease and once it expires will NELHA mediate the site of some of its structures or the well. Mr. Barbour said the well is completely plugged and abandoned. It's difficult to find. He isn't aware of any remediation steps that are necessary. The buildings are in good condition and used for storage. After Member Agor's question about having a hard time finding the well, Mr. Barbour said it's overgrown and there is no visual evidence.

Member Gon pointed out the confusion was the declaration of the exemption of the EA, but he question to what project. Member Morgan said to the new lease. As for the environmental requirements it's made clear should the applicant propose use of the land it will trigger HRS 343 and the applicant will be responsible for compliance with all environmental...which Mr. Barbour has made clear in his testimony that they have a long record of requiring EA of any projects that occur under you. Mr. Barbour noted they are a public agency and he doesn't see any situation where they wouldn't follow the procedures they follow.

Member Edlao was concerned that they couldn't find the well and that during the closing of the plant there had to be some kind of remediation or inspection necessary. Is there or he just doesn't know? Closing requirements of what was going on there. Mr. Barbour said no. Not to his knowledge that he read the file and this agency signed off on the procedures that they used to plug that well and abandon it.

Member Pacheco displayed some photos from written testimonies. Mr. Barbour said he wasn't aware of that being on this site. There was some discussion about how it can be overgrown. Member Pacheco said deferring is the way to go here and let the process play out that it's the timing on the heels of a public meeting and the County Council concerns.

Member Goode asked if the NELHA site is State land. Mr. Barbour said they have a master lease and they collect all the sub-lease rents. Mr. Tsuji said the provision on rent is 50% of operating net income, but from day one NELHA always showed a negative. Member Goode asked whether they are collecting a percentage of the sub-lease rent from PCV and Mr. Barbour said no.

Member Goode asked if that is a provision on the lease. Mr. Tsuji said it is a straight provision that it's not a standard provision. They are not collecting anything and which is the reason for NELHA out in Kona because it takes a lot of staff time to take to the Board and didn't really cover anything. The Statute was amended to allow for good cause for the Board to waive its consent rights for the best interest of the State for the Keahole site. If it's the Board's preference to continue to have these consent rights especially for the Puna geothermal since its controversial staff can work on amending the rent provision if it makes the Board more comfortable.

Member Goode said he was inclined to defer since it is a sister agency. Mr. Tsuji said we should at least recover for staff time since it takes a lot of time and it will be deferred anyway where staff will work with Greg.

Member Goode pointed out that he made a comment that this is not a site for future generation of geothermal energy and asked is that what you said. Mr. Barbour confirmed that.

Member Goode wondered whether he would object to a term in the lease that precluded that use. Mr. Barbour asked commercial production of energy. Member Goode said geothermal energy to the site and Mr. Barbour said not at all. Mr. Tsuji summarized prohibition on commercial development of geothermal at the site. Member Goode acknowledged that. Member Pacheco pointed out in recommendation #2 where it says for geothermal facility purposes and we could use better language there to cover the potential uses of what that property could be without making it sound specifically.

Member Goode said what he heard in written testimonies was going back down, extracting and releasing monthly. Member Pacheco pointed out the law has changed in the set backs that are required on that parcel wouldn't be able to if they wanted to by Statute or Rule because of the set backs. Mr. Tsuji acknowledged that and said that is why when Dr. Thomas looked at the site it is not for development and at most an R&D site. Member Pacheco said even the R&D operation caused a lot of problems in that neighborhood which is why people are saying this is going back to the 1980s of the sulfur smell. Watch our language, watch how we do it and make sure we communicate well with the public and counsel.

Lono Lyman, Manager of Kapoho Land Development and corporate officer had submitted written testimony and testified relating some background about the transfer of the site as a viable geothermal resource and other related uses. Kapoho Land Development supports continued research of related uses – agriculture which would address the State's food security objective.

Attached to his written testimony is the deed transfer where he related more background. Mr. Lyman related the trust doctrine through the Waiahole watershed and he had a disagreement with a DLNR deputy as applicable to geothermal because the ali'i never claimed domain over Pele or over eruptions where he related a story about Kamehameha's fish ponds and Princess Ruth and the Mauna Loa eruption. It remains an unsettled issue. They look forward to working with the State. Puna Geothermal Venture has 850 acres adjacent to the site where about 2 years ago they entered into an agreement for their remaining acreage. There are hotter resources elsewhere on the land, but they support this extension for greater flexibility for more research.

Member Pacheco asked on that 4 acre parcel if it is ever leased out and there is money to be made on it you will want a piece of that action. Mr. Lyman said it is not a matter of wanting it. It was agreed.

Mr. Tsuji said staff asked for a deferral until NELHA can do its explanation to the County Council with no definitive date.

Member Pacheco made a motion to defer this item. Member Morgan seconded it. All voted in favor.

The Board:

Deferred until the Lessee and staff believe the timing is appropriate for the Board to act on this request. The Board asked (1) the staff to next time carefully word the submittal and consider language other than development of geothermal energy or power, such as limiting the character of use to research and studies involving geothermal energy; and 2) revisit the rent the Lessee to pay the State.

Deferred (Pacheco, Morgan)

Item D-6 After-the-fact, Consent to Assignment of Sublease K-15 of General Lease No. S-5619, by Black Pearls, Incorporated, Assignor, to Kona Blue Water Farms, LLC, Assignee; located at Ooma 1st, North Kona, Hawaii, Tax Map Key: 3rd/ 7-3-43: 92 (formerly: TMK: 3rd/ 7-3-43: portion of 42).

Acknowledge the Conversion of Kona Blue Water Farms, LLC into Kona Blue Water Farms, Inc.

Consent to Assignment of Sublease K-15, under General Lease No. S-5619, by Kona Blue Water Farms, Inc., Assignor, to Keahole Point Hatcheries LLC, Assignee, Ooma 1st, North Kona, Hawaii, Tax Map Key: 3rd/ 7-3-43:92.

Mr. Tsuji related some background on item D-6 and had nothing to add to it that Mr. Barbour was here to answer any questions.

Unanimously approved as submitted (Pacheco, Edlao)

Item D-10 Request for Mutual Termination of General Lease No. 5590; Island Demo, Inc. Lessee; Moanalua, Honolulu, Oahu; Tax Map Key: (1) 1-1-064:006.

Mr. Tsuji indicated that Island Demo has 2 sites and 2 leases and experienced flooding in the Mapunapuna area that there are on-going lawsuits regarding that. Island Demo requested retaining 1 lease and give up the other which is what this is for. Reading the terms it is a termination for default because they are about \$50,000 in back rent. One of the terms was to give up the lease and not be eligible for another State lease for 5 years which is a requirement in Statute if you have been defaulted or terminated. It's crafted in that language rather than default because they are asking for that one thing. They owe \$50,000 in rent and they have a performance bond for roughly \$50,000 and they are asking to be let go and don't come after them for the back rent or the performance bond. Island Demo submitted written testimony to support the request whether it's for the performance bond because they have an indemnity that they got to provide for the surety where the surety will go after them. Mr. Tsuji understands that Island Demo's financial situation is fragile and it would cause a hard ship resulting in either going out of business or bankrupt. His recommendation was 50% to approve the proposal except letting them walk away from the bond 100% he largely recommended taking 50% of it. This parcel is dirt and using this property for storage – no hazardous material. If they do go forward Mr. Tsuji insists on a clean property which Island Demo has started and will go into a Phase II if necessary. This is one of the older leases and doesn't have that expressed language that we have today where before staff accepts the property back by termination or cancellation that we would require it. He thought that is significant for the Board to take into consideration. You can take staff's recommendation, but it's your call and they are offering more equivalent to a termination because Island Demo understands Mr. Tsuji's concern that this is an industrial site that he wants to make sure the property is clean.

It was questioned by Member Pacheco whether they were still making payments on their old monthly rent. Mr. Tsuji said he thinks they stopped. The 2 leases went through re-opening and they elected to arbitrate those 2 leases, but it was put on hold and staff agreed to put the arbitration on hold because of the large law suit in Mapunapuna. Mr. Tsuji related the 2 lawsuits – one by HRPP going after the County and State which was under a mediation concept where the County installed a flap gate at the Nimitz Highway drainage, but the ocean water is coming back flooding the area. Because of the lawsuits the County agreed to try to mitigate future flooding staff agreed to put the appraisal arbitration on hold because their argument was the appraisal the State did was too high and ought to have considered the annual flooding in the area. If the Board accepts what they are proposing they will eliminate one lease and arbitration would go away and they propose to accept the State's rent on the parcel they are keeping for the lease. They are not paying on the 5590 lease, but are current on the other one that they want to retain.

Mark Morita submitted his written testimony and introduced Mike Leary, owner of Island Demo. Mr. Morita testified the reasons that support the proposal is the economic and financial hardship and a way for Island Demo and the State to reasonably resolve their dispute. Not just the land, but also the on-going litigation and as part of what they are proposing they would dismiss or release the State from the lawsuit. Mr. Morita talked about the flooding being weekly or more which caused the hardship.

Member Pacheco queried whether the other parcel was subject to flooding also and Mr. Morita confirmed that it is describing where it comes in from. Member Pacheco wondered whether the flap gate is working. Mr. Morita said it is in, but the flooding still happens because it's a maintenance issue that if the flap gate is not maintained the flooding still occurs. There were some discussions about the flooding at high tide.

Mike Leary testified relating some of his business background doing demos and remediation work for the State. There are problems with homeless stealing anything metal and issues with arson. They used to have an automotive shop, but people stopped coming because no one wants to drive through the water. Their office has mold on the walls from the flooding. They have a solid waste permit for recycling of C&D material where license would dump their waste with them, they sort it creating jobs and keep trucks off the freeway going to Nanakuli. When the economy soured there was no work and the State raised the rent. They don't have the jobs like before. His staff reduced considerably, but they have jobs. Mr. Leary described being in a Phase I process and went one step further by doing the soil contamination reports and so far it's clean which they will submit to the Board. They will make sure the property is all clean and ready to go.

Member Pacheco asked him how what that process would be and Mr. Leary said \$12,000.

Member Gon asked whether he was exploring other properties that aren't flood prone. Mr. Leary explained it took him 2 years to get a solid waste permit since 1996 and there hasn't been another one since. Mr. Morita pointed out that the solid waste permit is specific to the site and wouldn't work if they moved to a different site.

Member Pacheco asked whether they are still in arbitration on the lease. Mr. Morita said no. If the Board accepts their proposal they would withdraw the arbitration and accept the higher rent and will continue paying that which is current.

Member Morgan asked whether he was ok with staff's submittal. Mr. Morita said the only part is having Island Demo pay half of the back rent plus the installation of the fence around the property. That added cost is a burden that he didn't think Island Demo could bear at this point.

Member Pacheco asked if the Board chose to forgo the back rent would you be ok with the perimeter fencing. Mr. Leary said when they got the property the fence was 4 feet and full of holes and was cut to accommodate the easement with 2 driveways. They didn't do anything with the fence except the homeless attacked it and they put up roll up cans and that seemed to work. But, U-Haul next door used them as trash containers and someone set them on fire. There is no fence around the property and is perfectly flat, clean, and solid. You took our fence down to do some duct work and never put it back up. Mr. Morita confirmed that and clarified the fence Mr. Leary is referring to was part of the duct build installation in order to access the area where the outfall is the City easement and the State drainage ditch they had to take down the fence around Island Demo's property, the other lot that Island Demo is keeping. The contractor hasn't been back to put the fence back up and is no longer on the property. Mr. Tsuji asked whose responsibility was it. The County? Mr. Morita confirmed it was the County's project. Mr. Leary said if he had jobs he would put the fence up himself, but right now it's difficult.

It was asked by Member Morgan how much would a fence cost. Mr. Leary said maybe 20 to 30 thousand. Got to get a permit, someone has to draw it up, get the materials and someone to install it. When it was leased at the auction it was as is which is how he got it, but it wasn't level.

Mr. Tsuji said part of this proposal is the release and dismissal of the law suit against the State which in his view is significant since the case was going for 5+ years and that he was inclined to go either way with it, but he does want to get out of it. Member Morgan said it sounds like you are ok, but not real happy with the recommendation. Mr. Tsuji related the importance of getting out of the law suit. Mr. Kimura may say acceptance of the dismissal may require the Attorney General himself to approve it even if the Board is inclined to exempt it. Mr. Morita was throwing it in to the proposal primarily to get out of the lease as requested and he didn't think they would object if the Board said to let the case proceed if that is going to hold up getting out of the lease. Mr. Morita confirmed that is correct.

Board member Pacheco made a motion for the Board to go into Executive Session pursuant to Section 92-5(a)(4), HRS to consult with our attorney on questions and issues pertaining to the Board's powers, duties, privileges, immunities and liabilities. Member Goode seconded it. All voted in favor.

11:17 PM EXECUTIVE SESSION

11:35 PM RECONVENED

Member Morgan asked whether Mr. Tsuji was ok with no fence and that was confirmed by Mr. Tsuji to be more than reasonable. He noted that Phase I is not completed and Mr. Leary said it takes 4 weeks.

Member Morgan made a query about a timetable for the rent. Mr. Tsuji said he was comfortable, but the reason why he insisted on 50% was he understands the Board's concern about staff trying to collect rent. Member Edlao said it should be 50% of the rent owes on the lease until Phase I environmental assessment is accepted by the Chairperson. If it is accepted you are going to give them back the 50%? Is that what you are saying? Member Pacheco clarified he means the rent is occurring up until the Phase I is completed and they will owe 50% of that. Right? Mr. Tsuji said it's wrong. What it's intended to say is 50% of the bond, but he will leave it up to the Board. He was trying to appease the Board's prior matter. They are doing more by doing the Phase I.

Member Morgan made a motion to approve staff's recommendation with an amendment to eliminate D-2 and D-3 and to disregard the issue with the law suit which is not in consideration. Member Pacheco seconded it.

Member Gon said that any decision he makes today is without regard to any disposition of any litigation with regard to the property or the Lessee. Member Pacheco said likewise.

Chair Aila took the vote and all voted in favor.

The Board:

Approved as amended. The Board deleted items B(ii) and (iii) of Recommendation B; in other words deleting staffs' recommendation for a perimeter fence to be installed and the recommendation to retain or pursue 50% of the bond amount currently held. In effect, the Board accepted the Lessee's proposal, but did not condition its agreement to mutually cancel GL5590 on the Lessee's proposal to dismiss its lawsuit against the State or release its claims. It would be up to the Lessee if it voluntarily chose to dismiss the case against the State and release its claims.

Unanimously approved as amended (Morgan, Agor)

Item D-7 Grant of After-the-Fact Term, Non-Exclusive Easement to LBUBS 2007 – C2 Alii Drive, LLC, for Drainage and Utility Purposes; Issuance of Right-of-Entry for Survey, Mapping and Maintenance Purposes, Auhaukeae, North Kona, Hawaii, Tax Map Key: (3) 7-5-09:43 pors.

Board member Pacheco recused from item D-7.

Mr. Tsuji reminded the Board that this is the Coconut Grove Shopping Center matter and Lessee D.G. Anderson. It is the Shopping Center's application for an after-the-fact grant of easement. He pointed out that this property is about .33 acres and described the location. It is urban classification, LUC, zoned resort. After staff's review of the file it clearly shows this was an auction lease, however the terms and conditions were highly unusual. In the use it specifically says 50% be kept for open park which is unheard of. There are provisions in this lease that is not standard that this property was auctioned for one thing - for this development of the shopping center. The Andersons developed the Shopping Center by putting in the drainage and utility easements and the sidewalks which was part of the original application. Staff's recommendation is to approve the sub-surface easement, but not the above ground easement. The Shopping Center is ok with staff's recommendation, but they do need the sub-surface easement for the drainage and utilities. Mr. Tsuji pointed out the color portion of the survey that the County of Hawaii has drainage when the State doesn't have an easement. These easements have been in place for many years that he didn't know how long the County drainage was there, but the Shopping Center's easements were there in connection with the development of the shopping center. Coconut Grove articulated their testimony and their right based on the equity and facts of this case and history. Secondly, from a legal standpoint they believe they are entitled to an easement under the document. Mr. Tsuji and Kevin Moore are in agreement that they are entitled to it.

Deputy Attorney General Bill Wynhoff said that he and Russell have been talking about this and he has a little bit of idea of what the AGs are thinking, but what he is going to say is new because he has been involved in all these other matters. Mr. Wynhoff has talked to counsel for both parties who are here. Basically the AG, without getting into the merits of policy that is not really our call, but we're concerned that the Board is being asked to put an easement on somebody else's interest in the property. The State owns the property, but we've leased it so what the Board is being asked to do is to put an easement over, in affect somebody else's property that is

the leasehold interest. We're concerned to whether the Board can do that, whether the Board has jurisdiction so to speak to get involved in and decide what could be characterized as a dispute between two different parties. When he spoke to Sheryl Nicholson, I said I have this concern and I'm really not sure whether we would advise you guys even could. What he thinks the parties have agreed to and what he would be happy to be seen done, perhaps this matter could be deferred so that the parties and Russell could have a dialogue and have some briefing and thinking about whether this is something that the Board could in fact can have done before the Board decides whether it does want to act. That is my suggestion and both parties are here.

Mr. Tsuji said if the parties are ok with deferment he had no problems with that. He knows that Bill doesn't do or see the documents or give advice from the Department of Attorney General all the time, but he wanted to point out to this Board. There are 2 sets of situations that they've been advised over and over again. This parcel is landlocked, it is not a kuleana, the Board and State of Hawaii is required to grant an access easement to this landlocked property. Then we get the kuleana lots that you must definitely grant access over your State property. Looking at it from the staff's side – why is that? Because it's a matter of law they've been told. To buy a kuleana lot you don't have to be Hawaiian and with zero dollars you can buy a landlocked kuleana lot if you have a State parcel and can get an access easement as a matter of right. That is why he is confused with all the advice coming out from the AG's office about when someone shows an easement as a right and now questions whether this Board can even grant it if it wanted to as opposed it must because coming before the Board in May is "you must" per the advice of the Department of the Attorney General because this parcel happened to be landlocked.

Member Agor asked the original intent of the lease does it prevent the Lessee from using the property for other than the intent at that time like if you wanted to build on it. Mr. Tsuji said you would be limited to 50% be open space for a park. He didn't think it will prohibit the construction of a building if you can somehow get it through all the approvals. That might be a little difficult. Because what we have here is a detention basin and the engineers said it's a flood zone. If you build anything it's got to be as if it's in a flood zone which means vertical and is not suited for construction if it's a detention basin. If it was a stand alone property we would not allow anyone to be using the property as a detention basin, but it is already that way in the County's and developer's perspectives when they developed the shopping center. That is why staff is coming to the Board for an after-the-fact grant of easement. Mr. Tsuji described the detention basin (the sand pit).

Member Agor said the volleyball court as the detention basin should stay there, but the other half of the property he don't know how the Lessee can fully utilize...Mr. Tsuji said he recollected there is the sand volleyball court that slopes gentle up.

Chair Aila asked Bill whether his advice to the Board at this time is to seek further investigation on whether or not they can proceed on this matter. Mr. Wynhoff confirmed that is his recommendation and even if they came to us for an approval it would still be the same process anyway, but if it was on his desk today he wouldn't sign it. He would ask Sheryl why do you think the Board has the power to do this. We will have to go through this process to determine whether the Board has the jurisdiction to do it. You can either hash it out on the merits now or let it go to us or let it go to us then hash it out if you do that. But, my advice would be you defer

it rather than hash it out on the merits and maybe it ought to be included, but you could do it either way. The AG will not sign it without considerable further thought.

Mr. Tsuji pointed out as in other cases where staff has been told the AG's have said you are required as a matter of law to grant the access easement. Mr. Wynhoff acknowledged that and when they have this dialogue they will see some of these things that were shared.

Sheryl Nicholson testified that she and Tina Coleman were here on behalf of the owner of the Market Place property. She related talking to Mr. Wynhoff about his concern and she agreed to defer, but if not they are prepared to proceed. Ms. Nicholson said she doesn't know why the Board couldn't act on the request to recognize the easement that was created in early 2000, but if there is any question in the Board's mind on whether they have the power to do that then she would like the opportunity to come back to discuss it. For clarification, Mr. Tsuji indicated that we were in concurrence that they were not seeking the easement for the above surface. They have withdrawn their request for the pedestrian access across the State parcel because they are in the process of constructing other alternative routes, but there are portions of the drainage improvements that are above the ground in the volleyball court, the semi-permeable membrane that covers the volleyball court that allows the water to percolate down which is part of the drainage infrastructure for which they are seeking an easement. The other part is below ground and the utility lines which they are seeking easements for. Referring to Member Agor's question about denying the tenant full use of the upper portion of the property, the infrastructure there is below ground and didn't think any were above ground, but she may be wrong. She isn't aware of anything in the lease that would permit the tenant to get beneath the ground to build and the easement is non-exclusive. If they want to use that area they can use it. We are not claiming the right to exclusive use of the easement area except to the extent to which the drainage is fashioned or occupied.

Member Agor asked only the upper half if the Lessee decides to get full use of the lease he would want to go with the upper portion. Also, in the submittal you guys did contemplate moving the utilities by investigating the cost of it. Ms. Nicholson clarified that it was the Andersons who obtained the drainage report in 2010 in conjunction with their plan to take over the State lease. Brian and Joan Anderson had the sublease to the State parcel until 2009. The leasehold interest in the parcel reverted back to Brian's mother-in-law Pat Greenwell whose trust actually holds the State lease. The Andersons commissioned this report to determine how much it would cost to remove and replace. Member Agor said he understands. Ms. Nicholson said the Andersons went to the engineer who originally designed the improvements and it was his conclusion that it would be cost prohibitive to do and would only do as very last resort. It's one of the many reasons why they are here to argue that the easement ought to be granted. She relates the history of ownership and interest of the parcel(s). We are here to ask for formalization of that easement which is a right dated from early 2000 pertinent to the interest in the Market Place – the fee and leasehold that were transferred to the LBUBS entity that purchased it out of foreclosure. The purchase, both documents, the assign and the lease, the assign the deed itself, deed and assigned the interest itself of these properties together with all rights all easements all privileges that appertain to the property. The rights, the implied easements that were created back in early 2000 were these rights that came along. We are

willing to defer it, but they strongly urge that the Board does have the jurisdiction to do it because she doesn't know of any reason why they don't. And if they do they ask it be granted.

Paul Sato, counsel for the Andersons testified that the jurisdictional issue of the Board is something he couldn't comment on since he never looked at it. All the issues Ms. Nicholson testified on was raised in the Federal foreclosure action in late 2010 where he related who Ms. Nicholson was representing at the time, Giacometti who was the receiver of all the properties under the LBUBS and became the commissioner and he wanted to sell the property. The Andersons went to court to stop it and they argued the same things argued here. Magistrate Judge Kurren issued an order saying no. The receiver, the mortgagee – no one had any rights to the State lease which Judge Kurren issued an order to that affect which is attached to Mr. Anderson's written testimony. Mr. Sato related how the commissioner, Giacometti sign a document that there was no interest in the State parcel because he was aware of Judge Kurren's order and he didn't want to get sued for transferring something he didn't have which was any rights or interest in parcel 43. There was a foreclosure sale, quit claim deed from Giacometti was given to LBUBS and he confirmed it is true that the quit claim deed that was given to Ms. Nicholson's client does have the standard language saying not only do you get the property together with any other easements, rights appertaining to the property that was sold – the buildings, tenant leases, easements that are located within the property. What Ms. Nicholson leaves out is Mr. Giacometti told everyone that the property he is selling includes no interest in the State parcel which LBUBS knew when they took title of the property and was a party during the foreclosure action. Everyone knew this was the legal position and the order of the court. Subsequent to this Ms. Nicholson's client filed the present application arguing the same things before Judge Kurren – a joint development with Brian Anderson, sublease by the Greenwell Trust. Now they've raised the issue whether or not they are entitled legally and all they are seeking is a confirmation of easements created in early 2000 as doctrine of implied easements.

Mr. Sato said looking at the cases you have common ownership of the fee simple interest because it's the fee simple owner who can create and grant easements. Not a Lessee because you have no right to create an easement affecting the fee simple interest of the land. He referred to LBUBS cases where there was a single owner in fee and he gave an example of dominant and servient parcels and that is not what we have here. There was no common ownership of the fee where there was an intent to create a right to use the State parcel. If a Lessee could do this to a fee simple owner it would be unfair to the fee simple owner and would be contrary to the lease. Looking at the current State lease there is a specific contractual provision that says that the Lessee is not allowed to create interest in the land whereby somebody can occupy, use, etc. without the specific consent of the State which is not done here. Every time you enter into a typical commercial lease the Lessor never wants to give the Lessee the opportunity or the power or the right to create what the applicant is saying is being created here - interest in the fee simple. If we get that legal basis set aside because he didn't think there is a basis for them to say that under the current status of Hawaii's real property law that they have a right to an implied easement. Then the question is does this Board have the power to grant a brand new easement affecting its Lessee's rights and that is the crux of the problem here. Because if you accept what the Hawaii cases have said there is no basis for a creation of an implied easement you have to be able to create an easement out of ___ law and say to Mr. Anderson irrespective of the fact that we have a lease contract with you, we are going to give you an easement, but we're going to give an

easement to Ms. Nicholson's client which effectively prevents you from using your property for its intended use.

Mr. Sato related building above ground and whether or not it will affect underground facilities. Also, if you put in underground parking garage you can't have these utilities mixed in and have to be relocated. There is the covenant of quiet enjoyment which is contained in every commercial lease including this lease which the State guarantees as long as Mr. Anderson pays the rent and is in compliance with the lease terms. Mr. Sato reminded the Board that they came before because of a notice of default because the Department took the position that we defaulted under the lease because we weren't complying with the commercial use requirement and he thinks they've gotten past that. But, they will always be subject to this especially if the applicant's application is granted because they will never be able to put in the permanent improvements necessary to comply with the terms of the lease, generate leasehold income so that we in turn can pay the State for the right to use that property.

Mr. Sato pointed out that the applicant also argued that Mr. Anderson knew about all this and so did LBUBS having bought the property knowing this was a problem. Ms. Nicholson argued that the cost of relocating the drainage and other facilities for the Shopping Center from the State parcel would be prohibitively expensive, but there isn't any proof of that. There was a drainage study done and an estimate of \$750,000. LBUBS bought the Shopping Center for \$5 million and the estimate doesn't seem to be out of proportion for the Shopping Center because it is generating income for the lender. You have to remember that it is the lender that bought this or an affiliate of the lender. The lender could have included the State parcel when it redid the loan, but chose not to. By doing so it could have avoided the reason why we are before this Board. All the parties knew what they were doing. Why should the Board be placed in a position of getting into a situation that there is no firm legal basis to say there was implied easement or otherwise created in early 2000 simply because they cannot meet the common ownership of the fee that there was no common ownership of the fee at the time this was done. Even looking at an easement by necessity looking at the cases at the site an easement by necessity is not a separate category of easements, but part of an implied easement except by showing necessity you can skip the intent requirement. You still need common ownership referring to an ICS case that one of the elements for an easement by necessity is common ownership and it is ownership that Mr. Sato urged the Board to look at. It is not whether you are a Lessee, a developer or legally or not legally done certain things – the question is who owns both parcels such that when there was a conveyance to Ms. Nicholson's client there was a use of the State parcel for drainage. There is no common ownership and he urged the Board to look at those cases because you need the common ownership requirement. Ms. Nicholson skipped over this saying that Brian Anderson was a Lessor or owned a portion of the Shopping Center and he was also a Sublessee of the State parcel, but that doesn't mean joint ownership. He leased 2 different parcels.

Mr. Sato said that granting of an after-the-fact easement would result in a breach of the lease by the State, our Lessor which would result in the inability for Mr. Anderson to properly use and develop the State parcel in accordance with the terms of the lease and that is his view. There is no compelling equitable reason for the Board to do this. Each party knew what was going on and each took their risks. Should the Board be asked to make a decision which affects legal rights of the parties under these circumstances where there maybe an incomplete recitation of all

the facts for you folks to make a decision. And, clearly a decision to grant an after-the-fact easement based upon the idea that there was an implied easement created back in 2000 violates the terms of the current order by Judge Kurren because he specifically found that they didn't have an interest in the State parcel.

D.G. "Andy" Anderson testified referring to Exhibit E of all the pipes and drainage lines and apply the 10 foot width, 80% of their lot is lost. Apply the County set backs and there is no way that he could develop that parcel commercially as his lease calls for. He related sending a design to staff for a restaurant for the upper part of the site with parking underneath. It is hard to accomplish setting that restaurant against Exhibit E. Approving this easement would destroy all economic value to their parcel. Mr. Anderson referred to the expense of relocating the pipes that he is a restaurant man and they have a 27 year lease which would take 2 years to build and permit. In 25 years this restaurant could easily do \$3 million a year where he can do 8 to 12% gross profit. That is \$7 to \$9 million that he is deprived of utilizing his property. They don't want to lose \$750,000; he doesn't want to lose \$7 to \$9 million either. If you appraise the land appraise on what he will be losing on his commercial use of his property.

Mr. Anderson referred to Mr. Oreck's testimony that on page 1 it says these improvements are required as a condition of the original 1989 SMA permit for the development of the Market Place complex and in the application it included parcel 23, parcel 25 and parcel 43. In the process, the County discovered that parcel 43 was not eligible for consideration because of the conflict between the Greenwell family and the State as to who owned it. Because of this dispute parcel 43 was withdrawn from this SMA amendment. The SMA was developed without the State parcel. Mr. Anderson related some history of a developer, Sandra Putie in 1990 who amended the SMA to include parcel 43 as a park. She should have been 50% park and 50% commercial if she had recognized the State lease. The language, the application and the approval was based on 100% park where they were in violation because they couldn't use 50% park and had to get a temporary user. Everything in her application was based on a gazebo, a water feature, landscaping, no where in her SMA amended does she refer to drainage, sewer lines, etc. She went in for a park. To try to tie in the original 1989 SMA language with the one that actually passed is not accurate. He related an e-mail from the County that she understood he was having some discrepancies with the DLNR as to whether the State lease and the SMA 277 are in compliance regarding the parcel being wholly and passive park or a 50% park. Our documentation seems to lean toward the entire 3.38 acres being a passive park. As the infrastructure is illegal and unapproved by you it is also not yet approved by the County in a SMA amendment. If they didn't come back to you for approval, they also did not go to the County to amend 277 from a park use to a partial commercial development. When they tie in the 1989 SMA does not apply to parcel 43 in any way. The amended SMA went all for park - no drainage, no pipes, etc. - park, gazebo, water feature and landscaping. He doesn't mind complying with the request, but he doesn't think Russell will be able to negotiate this and he doesn't think this is something this Board should be trying to settle. This is a private matter between 2 private people. If it has to go back to court then that is where they have to go and the Board shouldn't have to be involved. Mr. Anderson had concerns with this deferment going more than 6 months or a year he can't proceed with his restaurant.

Member Agor pointed out that the Lessee cannot use the property because there are utilities under there. The Shopping Center has a problem because their utilities are on somebody else's property. You guys have to lock yourselves in a room and solve your problems.

Mr. Anderson related getting an appointment with John Marshall, Mr. Oreck's company, and flew to Dallas and spoke to Mr. Marshall. As long as this application is pending and I might win here then we are not going to talk. If it dies we'll talk. I cannot get them to the table as long as you keep the door open to them.

Member Morgan asked you concur with Mr. Wynhoff that there is a jurisdictional issue. Mr. Sato said he wouldn't call it jurisdictional that his whole point was that there is no legal basis for the creation of an implied easement as cited by Ms. Nicholson. If you were to try to grant an easement here it would not be confirming an existing easement if you were creating a new easement which maybe not allowed because you have contractual agreements with Mr. Anderson now which says he has a right to use the property pursuant to a lease and a covenant of quiet enjoyment which probably be breached and with that he would agree.

Ms. Nicholson said if the commercial use that Mr. Anderson is saying will be deprived of the restaurant he plans to build on the State parcel with or without the easement we are requesting that plan is impossible because parking is expressed prohibited under the lease. It is in violation of the lease just as building drainage infrastructure on State land without the prior Land Board's approval or just as building anything on the Shopping Center without a valid SMA. We are not depriving Mr. Anderson of all commercial use to the property and to look at how this lease came about referring back to Mr. Tsuji's presentation that this lease at the auction was intended for the benefit of the Market Place. It was not contemplated that the commercial use of this parcel would be for a restaurant and was bound by the SMA. Ms. Nicholson clarified the "they" who put in the drainage and utilities in the State parcel were the Andersons that were required by the SMA. Her client is not here to ask for an implied easement with regard to the leasehold interest. The Andersons severed their common ownership sending it to Brian's company. This entity had no legal interest in the State parcel which is all that Judge Kurren ruled, but it had the implied easement and it had the right to use the drainage and utilities on the State parcel for the Market Place. There were no complaints by Brian or Joan Anderson in all those years as they held the interest in the State parcel. But, what was the legal basis for TGM and Ainakona once they owned the Market Place leasehold to use the improvements on the State parcel – it was the implied easement. And, the reason it is an applied easement "they" did not take the time to document an expressed easement. If they had done that then the title of that, LBUBS would have received in the foreclosure in the description of the property together with this easement, but they didn't and it didn't mean there was no easement. The implied easement existed at the leasehold level. Or they would have asked to affect the fee instead of the leasehold interest and wouldn't affect the Andersons, but Brian and Joan Anderson already recognized this from 2001 forward. Ms. Nicholson related what happened when LBUBS received the property in foreclosure. Should they have included the State parcel, sure and we would not be here if they had included the Lessee's interest in the State parcel as part of their collateral and didn't do it.

Ms. Nicholson said does that mean that when LBUBS acquired the property out of foreclosure that had no rights at all, absolutely not and that is not what Judge Kurren ruled. There was no

argument in the Federal Court whether or not there was any implied easement over the State parcel for these improvements that issue was never raised, it was never decided. Judge Kurren's order did not say that LBUBS, or the receiver, or Ainakona, LLC had no implied easement in the parcel. It is a mischaracterization of Judge Kurren's order to suggest that this issue today was decided in the foreclosure action. LBUBS was not there at the beginning and they weren't the ones to put in the infrastructure violating State and County law and were not the ones using it in this fashion all these years. LBUBS came at the end and took the Market Place as collateral which included all rights pertinent to the Market Place. The Andersons created this situation to begin with. They did not have to take the assignment of the State lease and could have left it where it was, but Andy Anderson was involved with construction of the drainage improvements and took the risk. She related how much LBUBS has to spend to fix this problem created by the Andersons in the first place.

Mr. Sato said Ms. Nicholson argued that Judge Kurren's order did not address the issue of implied easement but she forgets is when a party litigates a matter there is an order of judgment that is issued by a court there are doctrines called the doctrine of *res judicata* and collateral estoppel, these doctrines prevent a party against which an order is issued from relitigating those issues which were actually put before the court or which could've been put before the court. What he was arguing was he didn't say that Judge Kurren's order specifically addressed the issue of implied easements. What he said was Judge Kurren's order was issued after Ms. Nicholson made the same factual arguments that she is making before this Board. What legal ramifications arise from that particular argument was argued by the lawyers. Whether she argued implied easements before Judge Kurren because of an intentional willingness to forgo that argument or whether or not it was not very important to her at that time, he doesn't know. Looking at the order is whatever claims made or could of made that are foreclosed by the issuance of the final order. It is clear when you read the order it says specifically that they do not have any interest. Ms. Nicholson does not address what the terms of the sale were to her client. She has not denied the fact that Mr. Giacometti had said to everyone who is interested in buying the property "we are not including in the sale of the foreclosed property any rights or interest in parcel 43." Ms. Nicholson is arguing a right and was not transferred to her client. He was not arguing whether Mr. Anderson's equity was better than what LBUBS had. He argued that both parties took a risk on this that issues were raised by Mr. Anderson way before the foreclosure sale and was something these people didn't know about.

Mr. Sato said what Ms. Nicholson said was ownership of the leasehold interest and what they are trying to create is a leasehold easement and he wasn't certain whether you can do that. In Mr. Sato's mind an easement is something that is created that affects the fee simple interest which allows a third party – not the Lessee, not the owner of the property, but a third party allowing to use my property for utilities or some other purpose like drainage usually done with the fee simple interest. That is the case here if you read their application they made no distinction between lease and fee. All they said is we have an implied easement, common ownership and should confirm the easement. If you look at the details of their argument and the details of the cases they've cited, the cases dealt with fee simple ownership which makes sense since it's the fee simple owner who creates the interest. A Lessee is prohibited from creating any interest while allowing a third party to use the property except unless you get permission from the landlord. That is typical and that is the provision in this State lease, paragraph 13.

Mr. Sato acknowledged that there is a parking restriction, but you cannot use the parcel as a parking area which means you can't turn this into a parking lot and charge money for it. It doesn't prohibit ancillary parking which is used in conjunction with permitted commercial use. Ms. Nicholson also says it's prohibited by the SMA. There are such things as a new SMA, amending the current SMA. We are obligated to develop this facility to comply with every State, Federal and local law which means we may have to go in and amend the SMA or get a new SMA and they will probably come back to the Board when we get their plans finalized asking to apply for a new SMA and the Board will determine at that time whether that SMA meets the conditions of the lease which is why it isn't impossible for them to do what they want to do. Yes, there is a 50% requirement and they are trying to abide by that as shown by the drawings as submitted to the Board.

Mr. Sato pointed out that Ms. Nicholson says that Mr. Anderson (D.G. or Andy) did all the drainage, but it was done by Brian where some letters were addressed to both Brian and Andy, but Andy can swear before you that he wasn't involved in the develop of this Shopping Center. He doesn't know why those letters were addressed to him and he never got them because if you look at the address it is not his address. Andy and Brian has their separate projects whether business or personal issues. If you look at the details, there is no legal basis for the creation of any so called leasehold implied easement because leases prevent you from doing that pointing out the provision in our State lease, paragraph 13.

Mr. Anderson noted that when he saw staff's report with his name cc'd on a couple letters he will say under oath that he didn't know how it got there that he had nothing to do with this Shopping Center. He and Brian don't get along in business. Ms. Nicholson said she couldn't understand why he would take this parcel with all the risk. This parcel came to them after the judge ruled. Nobody had any interest in it – no rights, no title, etc. and it came to us clean from a Federal Court decision saying that they can now develop it. He has every right because the State lease says he can develop his commercial park under any use, County of Hawaii permit for a commercial use. I can put my restaurant there. The County has seen his plans and the parking he is putting under there. He will have to go back and amend the SMA which is no problem and once that is done he will come back to the Board and get his lease approved. Any responsible lender will make sure you have all your permits approved and in hand before doing anything. His son, Brian screwed up, but Lehman Brothers in their rush also screwed up. We (he and the rest of the family) were not involved in this project. When they got this cleaned and cleared parcel from the courts they took it as an investment. They think they can turn it into a nice restaurant and he asked the Board to help them by honoring our lease and respect the quiet enjoyment of their lease. It is complicated and let them solve this in court.

Tina Coleman testified with respect to the lease and the parking permit provision the lease specifically says in paragraph 42, "the Lessee shall not use any portion of the demise premise for parking and or loading/unloading area." nothing else which means no parking whatsoever whether for sale or intended use for a restaurant. Also, what the court ruled and what Judge Kurren said and this was in the context whether or not the receiver has the ability to do something with respect to the State parcel with respect to maintenance or to prevent in this case the Lessee of that parcel from alienating it. The court said and she is reading it from the court's decision, "That the Greenwell Trust leasehold interest in the State parcel is not for the estate

property and therefore not within the receiver's possession of control." The receiver got his authority through the collateral that the lender had and yet the lender screwed up. No question about it. But, we now have to fix this problem going forward for whomever is going to own this parcel, the Shopping Center, whether it's the current owner LBUBS or somebody else. It needs to be fixed. She thinks the Board has the ability and the authority to fix it.

Member Agor said that we could either defer or deny, but if we deny there would be no decision.

Member Morgan pointed out that staff asked for a deferral to at least look at the jurisdictional issues. Mr. Wynhoff said he wouldn't necessarily ask for it. One way or the other whatever action you take it may not get to the AGs. I think you should wait to see if you even have the jurisdiction to make a decision and that would be my recommendation. Member Morgan agreed to go with his recommendation. This is definitely a court of law issue here and you are closest for advice on the legal perspective. I would lean in that direction. That is his motion. Member Gon said he is willing to second that.

Member Goode commented saying that we heard a lot of legal arguments that went before the Supreme Court and amongst that this is all screwed up that everyone is involved. Nothing meshes. It seems to me that the proper venue for this is a court room before a judge to decide who has what and he tells us whether we grant an easement or not. Member Morgan agreed. Member Gon said it seems consistent with a deferral.

All voted in favor.

It was asked by Mr. Anderson how long will it be before it comes back to the Board. There was some discussion with both counsels and Mr. Wynhoff said once he gets input they can make a recommendation. It depends on your counsel.

Deferred (Morgan, Gon)

Item D-8 Re-Submittal: Rescind Prior Board Action of November 9, 1990, Item F-2, Directing Acquisition of Private Lands (Tax Map Key: (3) 7-6-16:32) by Negotiation or Eminent Domain; Quitclaim Conveyance of Road Remnants to County of Hawaii; Issuance of Immediate Management Right-of-Entry to the County of Hawaii, Holualoa 1st and 2nd Partition, North Kona, Hawaii, Tax Map Key: (3) 7-6-16:13 and Road Remnant A.

Kevin Moore representing Land Division reported that they have some road remnants that have been an issue with them for decades and now staff has a solution by transferring them to the County. The County and the encroaching private landowner have their own arrangement about exchanging some lands between them to fix it.

Randy Vitousek said some times deferrals result in resolution. They support the staff.

Unanimously approved as submitted (Pacheco, Gon)

1:04 PM RECESSED

2:08 PM RECONVENED

Item D-12 Issuance of Right-of-Entry Permit to Steven Boyle for Beach Activities Purposes to be held from May 12- 20, 2012 at State Lands fronting the Kahala Hotel, Waialae, Honolulu, Oahu, Tax Map Key: (1) 3-5-023:seaward of 041.

Mr. Tsuji presented item D-12 and introduced the applicant.

Steven Boyle representing the Kahala Hotel testified that they are building a stage partially over the sand and partially over the ocean that will be used as a sun deck for 2 days and as a stage for the gala night. He gave some dates. After Member Edlao inquiry Mr. Boyle pointed out where the stage and grass is. There will be security 24 hours a day. It will be anchored in the sand. This was done last year at this hotel and they are looking at it for future events to expand capacity to their ballroom events. It worked out well last year.

Member Morgan asked whether there were any negative public comments or input and Mr. Boyle said none.

Member Gon asked after the size and configuration from last year's stage compared to this year's. Mr. Boyle described last year was more of the stage out on the water with the gangplank. They are not doing as much in the water being supported by the sand going out.

Member Edlao asked how big is the venue and Mr. Boyle said 400 people. It's a big market here and they are trying to do more for the hotel to create more space for them so they can go after business.

After the Board members' inquiry on how the event went, Mr. Boyle said it went very well. The neighbors were all informed where all the sound faced the hotel and they will not have any noise going out to the condos next door. All the rooms adjacent to it will all be for staff so it won't affect any guests either.

Member Pacheco asked the hotel has a revocable permit (RP) for the area that's being used and this is the right of entry for the structure. Mr. Tsuji said they have a revocable permit to use certain lands that the Kahala has private land and State land where in the past they were allowed to put in a beach there and part of that was State land and not accredited land. They do have an RP. He related a pre-setting issue which the State doesn't allow. Anyway the area is State land, but might be under the RP. Mr. Boyle said all the Kahala and staging staff were here this morning to testify.

Member Morgan said Kahala is a resort destination and he doesn't think there is any environmental degradation. This is a great creative use and an advantage for Hawaii. He supports it.

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

Member Gon suggested Mr. Boyle bring in some pictures of the event and he said he will.

Unanimously approved as submitted (Morgan, Goode)

- Item D-2** **Approval in Concept for the Issuance of Direct Lease to Puna Community Medical Center for Comprehensive Medical Center Purposes, Keonepoko Nui, Puna, Hawaii, Tax Map Key: 3rd/ 1-5-08:05.**
- Item D-3** **Issuance of Right-of-Entry Permit to Imata & Associates, Inc. for Field/ Topographical Survey and Geo-technical Investigations Purposes Upon State Lands at Waiakea, South Hilo, Hawaii, Tax Map Key: 3rd/ 2-4-001: 19, 24, 179, 181, 182 & 183, 2-4-028: 001, and 2-4-056:014, 022, 028 & 029.**
- Item D-4** **Amend Prior Board Action of June 23, 2011, Item D-7, as amended, Issuance of Direct Lease to Boteilho Hawaii Enterprises, Inc. for Dairy Purposes, Opihipau-Hukiaa, Kokoiki, North Kohala, Hawaii, Tax Map Key: 3rd/ 5-5-003:004, 005 & 006, 5-5-005:001 and 5-5-006: 002, 003, 004 & 015. The Purpose of the Amendment is to Modify the Character of Use Provision to Detail Permitted Dairying Activities on the Land, and to Clarify that the Mutual Cancellation of Existing Leases and Issuance of a New Direct Lease Shall Not Vest Ownership of Existing Improvements in the State.**
- Amend Prior Board Action of July 22, 2011, Item D-3, Amend Prior Board Action of June 23, 2011, Item D-7, Issuance of Direct Lease to Boteilho Hawaii Enterprises, Inc. for Dairy Purposes, Opihipau-Hukiaa, Kokoiki, North Kohala, Hawaii, Tax Map Key: 3rd/ 5-5-003:004, 005 & 006, 5-5-005:001 and 5-5-006: 002, 003, 004 & 015. The Purpose of the Amendment is to Defer the Requirement to Conduct a Level One, Hazardous Waste Evaluation for General Lease Nos. S-5572 and S-5574.**
- Item D-11** **Consent to Assign General Lease No. S-4902, Bonnie-Lee H. Echiberi, Assignor, to Bonnie-Lee H. Echiberi and Auralee Shea, Assignee, Maunalaha Homesites, Makiki, Honolulu, Oahu, Tax Map Key: (1) 2-5-024:024.**
- Item D-15** **Amend Prior Board Action of July 14, 2006, Agenda Item D-10, by Replacing One of the Assignees, Pok Ye Kamalolo, with Michael S. Padeken, Jr.; Consent to Assignment of Homestead Lease No. 16A (HL No. 16A), Walter Kimokeo Kamalolo, Sole Heir to the Estate of Annie Aukai Kamalolo, Assignor, to Walter Kimokeo Kamalolo and Pok Ye Kamalolo, Assignees, Hauula, Koolauloa, Oahu, TMK: (1) 5-4-01:26, and 29, and (1) 5-4-07:26.**

Mr. Tsuji said he had no changes to the above items.

Unanimously approved as submitted (Morgan, Goode)

Item D-9 Issuance of Right-of-Entry Permit to MC&A Inc. for a Beach Activity / Team-Building Event for Cadence Pharmaceuticals, at Wailea Beach, Maui, Hawaii: Tax Map Key:(2) 2-1-008: seaward of 109.

Item D-13 Issuance of Right-of-Entry Permit to MC&A Inc. for Set-up and Conducting Beach Activities to be held on May 17, 2012 on the beach area fronting Kahala Hotel, Waialae, Honolulu, Oahu, Tax Map Key: (1) 3-5-023:041(Portion).

Member Pacheco recused from items D-9 and D-13.

Mr. Tsuji had no changes to the rest of the items.

Unanimously approved as submitted (Edlao, Goode)

Item J-1 Request to Write-Off Uncollectible Accounts

Item J-2 Issuance of a Revocable Permit to Maalaea Charters, Inc. for Space to Operate a Commercial Charter Vessel Office for Vessel Activity Sales, and Sales of Various Outdoor Activities, Maalaea Small Boat Harbor, Maalaea, Wailuku, Maui, Tax Map Key: 3-6-01:2 por.

Ed Underwood representing Division of Boating and Ocean Recreation (DOBOR) said there were no changes.

Member Edlao commented that it's so sad to have to write off all these uncollectibles. Mr. Underwood noted that this is only a small portion that there are hundreds that go back uncollectible. They went through the process with the collection agency. Now what will happen is they go to the Attorney General's office, but they can only handle 5 days at a time. He agrees that it's unfortunate, but a lot of these people just left or ran up a bill and moored without permit fees and left and no way to track them down.

Chair Aila said for point of information, the administration is going through discussions to see how they can go after anybody with an uncollectible debt in the State of Hawaii in terms of their tax returns.

Member Pacheco said he understands how much we charge for these things which is not a lot of money, but people have \$11,000, \$12,000 - \$15,000 in arrears and he is hoping we aren't allowing people to get that far in arrears. Mr. Underwood explained what happens is once people go on mooring without permit after 30 days these jump to 1-1/2 times then it goes to 2 times which starts to add up very quickly. By the time staff coordinates with our attorneys to do the impoundment and run through the process the time is ticking which is what happens. They did have a Bill in committee that died. Right now, if you rack up a bill with us we come and impound your boat. The Courts say now you no longer owe any money to the State because we impounded your boat. The boat may be worth \$500, but he owes \$10,000 and we lose all that

money. Then we have to pay to dispose of it. The Bill would clarify to say we impound your boat and if we sell it we'll apply it to whatever you owe, but you still owe the remaining balance. It has been 2 or 3 years trying to get this.

Member Edlao asked whether there was something that staff could indicate at other State harbors to have a watch list. Mr. Underwood confirmed that they already do that and put the word out. Chair Aila pointed out you cannot even get another permit at another facility if you owe money.

Mr. Underwood said now with us going on-line everyone is apprised. Member Morgan asked where are all these folks. Mr. Underwood pointed out that in Ke'ehi Small Boat Harbor staff disposed of 40 boats last year and they just did another 8 last week.

Unanimously approved as submitted (Edlao, Gon)

Item M-2 Issuance of a Revocable Permit to Tri-Isle, Inc. at Kalaeloa Barbers Point Harbor, Island of Oahu, Tax Map Key: (1) 9-1-14:24 (portion)

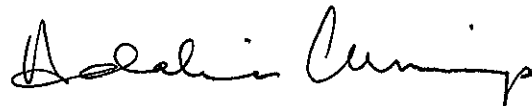
No one from DOT-Harbors was here.

Unanimously approved as submitted (Morgan, Gon)

Adjourned

There being no further business, Chair Aila adjourned the meeting at 2:23 p.m. Recording(s) of the meeting and all written testimonies 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