

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

DATE: FRIDAY, AUGUST 24, 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 9:02 a.m. The following were in attendance:

**MEMBERS**

William Aila, Jr.  
David Goode

Jerry Edlao  
Dr. Sam Gon

**STAFF**

Russell Tsuji/LAND  
Sam Lemmo/OCCL  
Roger Imoto/DOFAW  
Carty Chang/ENG

Ed Underwood/DOBOR  
Maria Carnavele/DAR  
Roger Iwase/ENG

**OTHER**

Colin Lau, Deputy Attorney General (AG)  
William Yuen: D-2, D-14  
David Kimo Frankel, D-1  
Dennis Niles, J-1  
Eric Iwase, J-1  
Kathleen Kravish, D-11  
Julie Zimmerman, K-1  
Koa Kaulukukui, D-13  
Dr. Brian Bowen, F-1  
Michael Shoemaker, D-14

Henry Spencer, D-8  
Tony Ching, D-15  
Michael Tom, D-1  
Jim Coon, J-1  
Mary Oneha, D-11  
gentleman from AECOM, K-1  
Donald Fujimoto, K-1  
Yvonne Izu, D-13  
Eric Wezstein, D-12

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

**Item A-1      July 27, 2012 Minutes**

**Approved as submitted (Gon, Edlao)**

**Item A-2 August 10, 2012 Minutes**

The minutes for August 10, 2012 was not available.

**Item D-8 Grant of Term, Non-Exclusive Easement to Henry Spencer and Tamara C. Bexton for Access Purposes, Spreckelsville, Wailuku, Maui, Tax Map Key: (2) 3-8-001: 008 por.**

Russell Tsuji representing Land Division informed the Board that item D-8 has some history where Mr. Spencer had access, but something happened and doesn't have access now. Mr. Spencer is asking for an easement for access and staff recommends approval.

Chair Aila asked whether Henry Spencer had anything to add and Mr. Spencer said no.

**Unanimously approved as submitted (Edlao, Gon)**

**Item D-2 Request for Approval of Special Installment Agreement for Payment of Retroactive Rent under General Lease No. S-4323 to Kalaniana'ole Real Estate Investments, LLC and FMM LLC, Waiakea, South Hilo, Hawaii, Tax Map Key: 3rd/2-1-10:33.**

Mr. Tsuji related that the Lessee is asking the Board's consideration for an installment agreement for some back rent that became due because of pending lease rent re-opening arbitration.

Member Gon asked whether the applicant's representative was okay with staff's recommendation and William Yuen answered in favor.

**Unanimously approved as submitted (Gon, Goode)**

**Item D-15 Approval in Concept for the Conveyance of the Fee Simple Interest to Hawaii Community Development Authority, Authorize the Chairperson to Enter into a Memorandum of Agreement; Issuance of Management Right-of-Entry for Site Management Purposes, Kakaako, Honolulu, Oahu; TMK (1) 2-1-051:041**

Mr. Tsuji said item D-15 is to ask this Board to approve in concept the transfer of certain lands in Kaka'ako to Hawaii Community Development Authority (HCDA) and their representative is here. HCDA issued an RFP to develop the area. For expediency purposes, staff is asking to transfer all the lands that they have by fee because that is the quickest. They need 15,000 square feet to make this project work. At some point when they sub-divide out the rest they will return the excess then staff will issue a lease or Governor's executive order.

Tony Ching representing HCDA distributed his presentation handout "690 Pohukaina Project Anatomy – Transit Oriented Development" and summarized that it is to encourage people to get

out of their cars and change their pattern of living. Photos or topics were Project Site Plan, Transit Diagram, Basic Services Diagram, Request for Proposal, Pohukaina School Partnership – what Public and Private Sector will do, 690 Pohukaina Development Concept – Phases, Halekauwila Place – can be privately financed, Phase II and III, Image of building with surrounding buildings, mix of commercial and civic uses, Complete Streets Program and various views. Mr. Ching said in summary that it is their intention to strike a Development Agreement and it is essential from a market perspective that fee simple is offered and if they do it would have to go to the Legislature or ratification. They are confident that the benefits are immediate and long term that will accrue to the Department. The public benefit will be significant and the terms and agreements will be satisfactory to all. There is an MOA and will be finalizing those terms and will know after they receive their development proposals and can make a more accurate return. They asked for the public benefit with affordable units, flexibility, library, commercial, business and supermarket spaces.

Member Edlao inquired whether the Board will get to see what is going to happen after all the proposals come in. Mr. Ching said by sealing a site control to you will effectively transcribe the development proposal to the 9 member Kaka’ako Authority. He expects a Memorandum of Agreement (MOA) that will set performance targets for them that the Board would like to see. Mr. Tsuji asked whether the Board would like an informational briefing. Mr. Ching said he would be more than amenable after their evaluation process. Before the final authority action if the Board would like a final briefing as to what the proposals were. Member Edlao agreed to that. Mr. Ching summarized that they would do an informational briefing, MOA and a timeline that is appropriate.

Mr. Tsuji related that Mr. Ching has an idea of what they want done, but they need a developer to commit to it. Much of Pohukaina is non-ceded land which is why fee simple and why 80% of fair market value. Mr. Ching said it is premature at this juncture and the goal is to achieve fair market value.

Mr. Tsuji said that with this RFP this will be all private debt and will not use any State funds for infrastructure and include that in the development agreement. Mr. Ching said that 25,000 square feet will be used for civic space for a library programs which is a government function outside of the developer where potential debt service would accrue where he gave an example of a general obligation bond and borne by the State. His agency will not be enriching itself with revenue from this project. The Board will have an opportunity when he presents.

Member Gon noticed in staff’s packet there were no comments from other government agencies and understands at this stage, but asked what level of engagement he has with existing stakeholders in Kaka’ako. Mr. Ching said this is the center of what transient oriented development should be. We have set process for understanding entitlements for increased density and height might be given and going through that process now engaging with stakeholders and the like – high tech. corp., library people who are supportive, Department of Education (DOE). Member Gon clarified that he was thinking of those currently in Kaka’ako like Office of Hawaiian Affairs (OHA) or who reside there. Mr. Ching said that they communicated with the senior residents, Kaka’ako Improvement Center and other stakeholders

have seen this presentation. Additionally he reached out to the Outdoor Circle and Sierra Club to participate in their Urban Development Forums.

**Unanimously approved as submitted (Gon, Goode)**

**Item D-1 Denial of Request for Contested Case Hearing Regarding BLNR Agenda Item D-3, January 13, 2012, regarding Grant of Perpetual, Non-Exclusive Easement to Eric A. Knudsen Trust for Access and Utility Purposes, Poipu, Koloa, Kauai, TMK: (4) 2-8-014:from Parcel 19 (Hapa Road)**

Mr. Tsuji reminded the Board of this item that resulted in a contested case that was filed. This Board previously granted an easement over Hapa Road to the Knudsen Trust and the issue was the breaking of a significant wall with historical or archaeological features. The Board approval was not for that route and was a portion of Hapa Road. Staff recommends denial of the request for a contested case.

David Frankel representing Ted Blake testified reminding the Board the 4 reasons why it was a bad idea to allow this easement to Knudsen:

1. Knudsen has an alternative access not involving State lands.
2. Knudsen's outrageous behavior in the past and he admits to destroying over a dozen historic sites.
3. It would alter the Hapa Trail experience.
4. Granting an easement would violate Chapter 343.

We asked for a contested case hearing to discuss these and other issues and how granting an easement would fundamentally violate a number of policies. Now your Deputy Attorney General advised the Board not to give our client a contested case hearing. Mr. Frankel wanted to advise the Board decisions from the appellate court in the past week that fundamentally affect the Attorney General's analysis:

1. In the Intermediate Court of Appeals has ruled that Ted Blake's suite brought to protect historic sites in the area is premature and that is not right. The Intermediate Court of Appeals did not reach the merit and the merit is the failure of the State Historic Preservation Division (SHPD) to properly comply with its rules and protect historic sites. This whole sub-division impacts historic sites.
2. This morning the Hawaii Supreme Court ruled in their client, Paulette Kaleikini's case regarding the Rail Project and the Hawaii Supreme Court agreed that our analysis on how to interpret the State historic review process which struck down the permit that was granted for the Rail Project. SHPD has not been following the proper process for looking at and protecting historic sites for about a decade now. The Hawaii Supreme Court has now rectified things. Given that context you need to re-look at this whole issue of whether an easement should be granted here.
3. Finally, last week the Hawaii Supreme Court ruled on the Na Wai Eha case in which contrary to the Attorney General's stance that Native Hawaiians who engage in traditional customary practices have the right to a contested case hearing where a project or any decision by the Board will adversely affect them. That is exactly the interest Ted Blake claimed in this case. He talked about traditional customary practices since his great, great grandfather engaged in on the trail and in Koloa which

he continues to engage in and given this interest and granting this easement would adversely affect his traditional and customary practices. Therefore, this Board should allow a contested case hearing to occur both because the Hawaii Supreme Court has ruled that Native Hawaiians have such a right in the Na Wai Eha case. Secondly, to get to the root of the issues with the regards to the historic review process as the Hawaii Supreme Court discussed in today's appellate.

Member Goode asked the Deputy AGs advised on the submittal and your points countered their points and has nothing to do with standing and has nothing to do with the facts of the easement. Are you taking issue with their points? Mr. Frankel said yes. There is a 2-part analysis – a contested case hearing must be granted as required by law. As in the Na Wai Eha case discusses is a case is required by law if it's required by constitutional due process. One of the elements at the Na Wai Eha case talks about constitutional due process requires a contested case hearing when traditional and customary practices would be adversely affected. That principle was first discussed in the Pele Defense Fund versus Puna Geothermal case and later in the PASH case and then the Na Wai Eha case last week which came out the same time as this submittal. The quote from the Na Wai Eha case was "The commission found that cultural experts and community witnesses provided uncontroverted testimonies regarding limitations on Native Hawaiians ability to exercise their traditional and customary practices in the greater Na Wai Eha area due to the lack of fresh water flowing in the Na Wai Eha streams and the near shore waters. The question before the court today which we answer in the affirmative is whether these interests constitute property interest for the purpose of due process analysis." That is the same as Ted Blake's declaration which was submitted to the Board in January 2012 discussing traditional and customary practices and discusses how he would be adversely affected. It is the same rationale.

Board member Gon 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.

9:37 AM EXECUTIVE SESSION

9:58 AM RECONVENED

Member Gon said on the advice of our Deputy Attorney General and taking into account court findings he moved to defer staff's recommendation. Member Goode seconded it. All voted in favor.

Michael Tom requested on behalf of his client asked whether they could establish a time for follow up. Chair Aila said on advice of the Attorney General's office they are reviewing the cases mentioned by David Frankel and as soon as they are finished they will provide a recommendation as soon as possible.

**Deferred (Gon, Goode)**

**Item J-1 Board Will Allow Testimony on Petition for Declaratory Ruling Filed by Trilogy Corporation on July 2, 2012, Regarding Replacement of Pier by Department and Use of Slip by Trilogy Corporation at Manele Boat Harbor, Lanai, Hawaii.**

Ed Underwood representing Division of Boating and Ocean Recreation (DOBOR) related background on item J-1 and Trilogy Corporation is here to present their side with a Power Point.

Dennis Niles testified on behalf of Trilogy introduced Jim Coon representing the company and confirmed that they have filed a petition for a declaratory ruling that changes ruling contemplated for Manele Harbor which represents a rule and thus can be implemented only pursuant to Chapter 91. The reason why they are doing that is because Trilogy has yet to have an opportunity to comment on the changes that have been underway for some time and there has been a lack of consultation. They received a document yesterday pursuant to a request of the environmental assessment (EA) that talks about impacts and there is not even a mention of Trilogy and they will show the significance of their impact and presence as an operator and employer on Lanai. They are looking to Chapter 91 as the vehicle for allowing the operator to have the opportunity to comment on these changes before they occur. The time they filed their petition came the same time the annual permit had not been renewed, but all permits were renewed and there has been no change to the status quo. He asked what the process is to give Trilogy an opportunity to be heard before these changes unfold.

Jim Coon conveyed his appreciation and gave his company's background that this affects 120 families and their survival. They presented the first photo which he described showing slips 22-24 at Manele Harbor and the history when these slips were silted in and unusable. Originally they docked at slip #1 which is the public loading dock where they primarily moored their boat. Slips were seldom used and there wasn't any conflict. He described what the shoreline was before and before it was dredged they saw it quickly silted back in. His company hand built a groin to reduce the silting and wrote letters to DOT to do this which led to this project. Mr. Coon met with Hal Campbell, DOT and the engineers about this project and allowed his company to expand his footprint there to take pressure off of the rest of the harbor, but you would have to pay for it yourself and they agreed to that in 1985. His company proceeded with building this dock and he described the process. They moored their 3 vessels there with complete transparency with the State for over 26 years. Mr. Coon described the passenger rest stop. When DLNR took over Harbors from DOT they converted all their revocable permits (RP) to long term leases and DLNR were willing to do that, but they (Trilogy) had to build a facility that would service the harbor facility with use beyond their running boats out there. In conjunction with working with the community and the architect for the hotels they built that pavilion close to their pier to allow their customers a place for lunch. This was to give them a more stable business environment.

Mr. Coon showed their 2 largest boats and the Trilogy pier 2 months ago. This was never a public loading dock. He described how the pier on the left was built when the original contractor had to leave and found another welder to finish the work. They operated this way until the tsunami. In 2002, DLNR engineers told them that their pier is deteriorating quickly and needed to do repairs. They started, but had to stop to get permits which they got from the State and the

Army Corp of Engineers. They finished construction in 2005 and he described how they fixed it. The tsunami washed out some of the footings collapsing a section of the pier making it unsafe to load passengers on, but one section was not affected.

Mr. Coon related that the State put in a proposal to expand the ferry dock and he pointed out the various docks on the Power Point. Mr. Niles said this was a request that they came up with after conversations with Mr. Underwood and this exhibit is to illustrate how this proposal would affect Mr. Coon from using their assigned berth. Mr. Coon said at the meeting on Lanai March 30th they presented a picture with ferry boats at the pier and that would stop him from gaining access to his slip and prevent him from operating his business. He spoke with Mr. Underwood who didn't see any problems in the future and didn't seem to impact Trilogy. After reading about the Manele Bay small boat ferry it mentioned his dock as the public loading dock which is not the case because the public loading dock is dock #1 which he pointed out on the Power Point. Boats do tie up and use their dock when Trilogy's boats aren't there, but it's still not public.

Mr. Niles asked Mr. Coon to explain how they accommodate the needs of Expeditions. Mr. Coon described where Expeditions tie off at pier 23 noting that if Trilogy hadn't done the ground work in fixing that pier Expeditions would not have been able to put in their dock on the other side. They were always told that Trilogy and Expeditions have the same use agreements where they have annual renewable permits. They always work together and never had a conflict with Expeditions.

Chair Aila asked if they needed to load or if there was a second ferry would they do the same. Mr. Coon said they would work with them, but slip #1 is the loading dock set up with ADA access for the ferry and works for both of them.

Mr. Niles said the Federal assessment mentioned the possibility that the Trilogy side of the pier would be used on a longer term basis for maintenance of one of the ferries. The Federal document contemplates 2 boats being astride this pier for a significant period of time and not just for a few minutes. Mr. Coon said that has never entered in any of their conversations with Expeditions.

Mr. Niles said they brought in a document, the DOT/FTAF application for the Federal funding for this application and consultation of affected shareholders and asked Mr. Coon whether he had any consultation with regard to these documents. Mr. Coon said only recently because they asked what is happening here because no one has asked what their impact will be. Just recently when they started to address this, Member Edlao had a meeting on Maui and that was the first time Trilogy, Expeditions, Ed Underwood and Eric Iwase got together and under covered more and more information and it's getting worse. The only thing that was said was you might have to move because of inclement weather and now they might have to move for boats to repair. Trilogy has always operated pono (right) and he doesn't know why they are being mischaracterized. He reiterated how this document says Trilogy's pier is the public loading dock and it has never been that. It's disingenuous to present this as such making their slip unusable. Mr. Coon pointed out that slip #1 is already modified to accommodate the ferry and is already the public loading dock referring to the EA. They are giving 2 different spins on the public loading dock and Trilogy's dock.

Mr. Niles said the merits is not whether the agency got it right or wrong is talking about the process. Given the impacts the point of the petition is to ensure there is an opportunity for Trilogy to come in and make the argument should the Department press ahead in designating this slip/dock as a public facility. Subject to the 30 minute of use, that sort of thing so we are here to talk about the process that would be open and fair and Trilogy has not had that opportunity. There is time to present a complete record for this Board to consider how Trilogy's interest can be accommodated with what needs to occur there in order for the ferry to operate efficiently. That is the bottom line – accommodating these competing interests.

Mr. Coon pointed out that Lanai has limited employment opportunities and that Trilogy is the second largest private employer on that island employing 53 families on Lanai. They have not impacted the harbor negatively and used it appropriately. They gave the State revenue. They are well respected in the Lanai community. It doesn't make sense to put them out of business when there are viable alternatives and they are willing to work with the ferry.

Chair Aila asked him to go over their operations. Mr. Coon described that they provide all the ocean activities for the 4 Seasons Resorts – snorkel, sails, dive charters, sunset sails and they are available 7 days a week. Two vessels come from Lahaina to pier 24 and they are the only company who has an agreement with Castle and Cooke to have commercial access into their beach parking and they pay them to maintain that, but they don't use it on weekends or holidays. They occasionally come to Manele on Saturdays, but they never go to Hulopoe. Trilogy accesses the harbor 6 days a week – Monday to Saturday. He described event tomorrow where they don't charge the community. They have 2 trips a day, one early in the morning and one at noon and they often raft together until 4:30pm when they leave. The loading dock is open from then on. They have boats that need access all throughout the day, but most times it's used at night by transient boats that leave in the morning. If other boats are there they can't get access to their slip and those boats move out of their slip. There have been no conflicts and Trilogy and Expedition gets along great and they both ferry passengers to Lanai.

Chair Aila said if they use Federal monies to fix the pier that you have maintained all these years there are some Federal requirements that is no exclusive use of that pier. Mr. Niles said they have had conversations with the Federal grant administration and Mr. Underwood and they tried to identify that particular condition so they can understand what the Feds are requiring as a condition of this funding that would impact the maintenance of the status quo. He received both MOAs and the FTA agreement itself yesterday and didn't have time to go through it all. A Ted Matley is the Federal official who is overseeing this project and trying to find out if there is a concern and what is it. An irreconcilable conflict Trilogy's use as it has been using and what the Federal requirements are. Chair Aila I haven't seen it. This use even if it's for commercial purpose serves a transportation function. Mr. Coon's operation is no different than what the ferry does because Expeditions sells passage to tourists that go to the very beach that Trilogy takes their customers to. The only difference is Expedition doesn't have to pay Castle and Cooke for the privilege. Otherwise, it's the same activity providing ferry like service between the 2 islands and that is why he is having a hard time understanding there is something in the funding documents that preclude maintenance of this status quo that has worked well for decades. Mr. Coon said his boats are classified as passenger ferry boats. We are not PUC



regulated because they only do round trip regulated, but they move about 40% of the people to Lanai than Expeditions does in a given year. They hope to find compatibility on that level so that is not an issue. The Chair and Mr. Coon discussed that the rock groin would need some revetment work but is outside of Trilogy's area. They displayed a photo of Expedition's boat. Mr. Coon related having to bring in a couple cranes at their expense to fix the tsunami damage and have not depended on the State or anything. They are good citizens that paid their way. Mr. Niles said that as they go through a fuller process Trilogy wants an opportunity to weigh in on some solutions.

Member Goode said he has been on the Board for 3 years and it's the first time he's seen a declaratory ruling and their request is not to use their dock as a public loading zone which seems to be the core of it. Mr. Niles said right. The characterization under the boating rules if you re-characterize it there are certain restrictions, but there is an Administrative Rule that if it's a public loading dock you are limited to 30 minutes at the pier including the water column. There is the implication that other tour boat operators would want access to it which would result in chaos. We want the Board to declare the type of change that needs to be in the rule making process.

Member Goode asked how much is it to repair the dock. Mr. Niles said we need to differentiate what it would cost to repair the tsunami damage and the significant development the Feds are contemplating which is a 2 story structure on the pier so we have to distinguish between repair and upgrades. Member Goode reiterated his question. Mr. Underwood said about a million that the rock groin was severely damaged and the footings the whole thing would have to be removed and reinstalled. Member Goode said it sounds like more than what it originally cost. Mr. Coon said a bit more, but if you include the pavilion it's not. The only public loading dock on Lanai does have a 30 minute limit – slip #1.

Mr. Underwood said staff is trying to work with Mr. Coon who has been a good tenant and been there a long time. The crux of the issue is way back when the loading dock that Trilogy built was on an agreement with DOT and exchange for building this loading dock they were allowed to raft or moor up additional vessels and take some strain off of the public loading dock. That worked up until recent tsunami damage, but prior to that in 2004, we had a structure report that the pier should be condemned. It's in very poor condition. When the tsunami came it undermined the rock groin, the footings, the steel beams and all underneath are completely rotted out, gone. It needs to be rebuilt. The problem with the Federal money is there is a Stat match. There is nothing in the Hawaii Administrative Rule (HAR) that would allow us to give preferential treatment to one operator if we build this dock with State money. The proposal is to do it with the Federal ferry money and part of the reason why that money was granted was it would give the ferry operator another place to moor during inclement weather or when business picks up because in the Hawaii Revised Statutes (HRS) exempts the ferry operator from all permits and exempts them from paying all fees. They have preferential use of the docks. They looked at whether they could use the FEMA money, but FEMA only granted \$50,000. We are looking at a million dollar rebuild here. If we take the boating special fund and rebuild this dock then under what rule or law are we going to grant Mr. Coon's preferential use of this dock above everybody else? What if we lease them that dock with submerged lands a resolution from the

Legislature similar to Castle and Cooke when they planned their dock area. They build the dock and they lease it according to Chapter 171. This is what we are wrestling with right now.

Member Goode asked in the meantime you are progressing with your project and you work on the EA. Eric Iwase said the EA is done already and was approved as a categorical exclusion under the Federal NIPA process. Staff is in the process of contracting a design consultant for engineering to start the design phase work. Member Goode asked you got a categorical exclusion even if they are adding a building to it or is it a rebuild. Mr. Iwase said it is a rebuild. No shade structure is involved. Because they wanted to go with a categorical exclusion it kept the same footprint of the existing pier and will not be increasing the size of the pier. It will be a brand new pier structure supported by piles which is a substantially stronger structure.

Chair Aila asked whether there were any Federal prohibitions of Trilogy's continued use of the pier or the need to have exclusive use for the other ferry company. Mr. Iwase said that the ferry would have preferential use of the dock during PUC regulated times when they are supposed to be there. The ferry is different from Trilogy where they are PUC regulated where they have a set schedule that they have to follow and maintain. But, when the ferry is not there the pier can be used by other users. The Chair said you are implementing the rule at that time where everyone has use of the pier. Mr. Iwase said that is correct.

Chair Aila asked we have the opinion of some structural engineers of the pier that it is unsound or is it ok under certain conditions. Mr. Iwase described the pier as 60 feet long; the outboard 40 foot portion is not safe and needs to be replaced. The inboard is still usable and is being used now. Only the Trilogy crew is using the outboard portion.

Member Gon asked what is your take of precedence of pier #1 as the public loading dock versus any other. Mr. Underwood said pier 1 has historically been used as the loading dock, but that doesn't mean we can't designate other docks in the harbor which is more a harbor management on how they want to reconfigure boats for moorings, etc. In the 1970s there weren't very many boats there, but now it's being used very heavily and there are additional commercial operators in there. Member Gon asked so the designation of a public loading dock is there a process to that. It seems that their argument was a process wasn't taken into account existing use of what to that point was a privately created pier. Mr. Underwood said designating a public loading dock I do not believe is covered under the rule making process. It is more a harbor management function. Because they changed that around like when they came before the Board for the Ala Wai where they decided to create a loading dock in other areas of the harbor for commercial.

Member Edlao said his hope is these guys can work together with Trilogy to find a way to accommodate them reiterating Mr. Coon's testimony doing a lot of things for the community on Lanai and Maui. Mr. Underwood said that is their goal and they want to continue working to come up with some way. Member Edlao said that there was a lack of communication as Mr. Coon mentioned and was part of the problem which is why he is upset and keep him in the loop. He will be available any time to meet.

Chair Aila asked how many PUC ferry operators are there employed from Maui to Lanai. Mr. Underwood said he believes there is only the one. The Chair said under the Federal scenario

they would be given preferential use of the pier if we fix it with Federal money and asked what if Trilogy were to work out an agreement with Expeditions. Member Edlao said they already have the verbal agreement with Expeditions. If that is what it is going to take some sort of agreement then that is fine to satisfy both. Mr. Underwood said the gentleman agreement works because Trilogy built the piers and been able to use it, but we're coming in using State and Federal funds to build it, how do we work a gentleman's agreement just between Trilogy and Expeditions. What about all the other commercial operators coming in? Member Edlao said that is a management problem. Chair Aila said you have pier #1 and Mr. Underwood confirmed that they have already made repairs to it. Member Edlao noted that it is only these 2 operators and not 10 other guys asking what about me. Work something out with these 2 guys and Mr. Underwood said he is more than happy to work within the law and happy to do it.

Member Goode agreed with Member Edlao that you guys need to work it out. You can't take someone who has worked this hard and Lanai is a very small community and spent money to improve State facilities and you got to find a way. Don't know if this petition is the right way. Try to find a solution and they are willing parties. Mr. Underwood said he agreed, but this will disrupt operations where boats may not be able to moor in the harbor throughout the day, but it won't stop their operation at all. The question is whether to moor off shore during the time period or there are ways they could double things around. Their operation is not affected or hopes to minimize any affects.

Member Edlao said it is a management problem and you guys in the harbor need to get together. Expeditions was cool about it, but was concerned too. You are talking about a family business that has been in operation many, many years and that you guys need to work this out. Mr. Underwood said that is what they want to do.

Chair Aila said that it is the Board's intent to use the Ferry money to repair the pier. That money has a very short time span right? Mr. Iwase said that the money is available. Carty Chang representing Engineering explained if it's a Federal grant Federal money will always be in jeopardy. It is not a set time, but whether the money is moving. The Chair said the longer it's out there it will be in jeopardy.

Deputy Attorney General Colin Lau said this is a non-action item and no action is needed.

**Item D-11 Approval in Principle for Issuance of Direct Lease to Waimanalo Health Center for Community Service Purposes; Issuance of Management Right-of-Entry; Waimanalo, Koolaupoko, Oahu, Tax Map Keys: (1) 4-1-009:279 and 282.**

Mr. Tsuji conveyed that item D-11 is primarily an expansion of the area of the existing lease, but they still have to approve the 343 and once that is done staff will bring this back to the Board for consideration for final approval and combine with a neighboring lease.

Mary Oneha, CEO for Waimanalo Health Center introduced herself and Kathleen Kravish and testified that they approve this item.

Member Gon asked what is the benefit of this approval. Ms. Oneha gave a description of Waimanalo Health Center services and are looking to expand. Member Gon asked rather than an approval outside of “in principle” how does this benefit those services and after elaborating more Ms. Kravish confirmed that “in principle” allows them to use the space for parking and a EA to ensure the land is appropriate to build on the second lot in the future and to replace the existing building. They understand bringing this before their neighborhood board and planning committee asking to permit their use of that property.

Member Gon asked whether she accepts staff’s recommendation and Ms. Oneha said yes.

**Unanimously approved as submitted (Gon, Goode)**

**Item K-1 Conservation District Use Application (CDUA) KA-3625 for the Kekaha Landfill (KLF) Phase II Expansion by County of Kaua'i, Department of Public Works at Kaumuali'i Highway, Waimea, Kekaha, Island of Kaua'i, TMK: (4) 1-2-002:009 & (4) 1-2-002:001**

Sam Lemmo representing Office of Conservation and Coastal Lands (OCCL) briefed the Board on item K-1 giving some history. Phase II opened in 1993 and went to 2003 and were to close the landfill, but then Hurricane Iniki struck and used it as refuse dump which was expanded and extended the landfill for some time. Now they are seeking to expand the life of that landfill, but also to expand it laterally and vertically described in the submittal. Three proposed expansions to fill the gaps between Phase I and II, raise the elevation of the landfill and expand laterally some other parts. Staff is considering because it is use of conservation land and need to think about this carefully. This would give the applicant an additional 1.5 million cubic yards of solid waste capacity. They say they need the additional capacity and time while they search for another landfill site. The applicant did an EA which the County accepted, published a final EA, staff sent out for agency comments, and they did receive some from OHA like whether or not they considered alternatives and heard concerns of environmental effects. This is considered non-conforming use since it was built before the district was established and don’t have a right to expand in non-conforming use which is why they are asking the Board because it is for a public purpose use. Staff feels it is not unreasonable to have a dump in a conservation area and are doing a good job of recycling efforts. This is not a permanent situation and may close this dump some day like Kailua which was in a conservation area. Staff recommends support including a number of conditions. He pointed out the initiation completion condition that it takes 1 year to initiate and staff modified the condition to read they have 6 years to complete. The landfill will reach capacity in 6 years.

Member Goode asked where the conservation line is on the map whether it goes mauka. Mr. Lemmo said it goes through the site and another gentleman from the audience said it goes straight through the middle.

Member Gon asked when the zoning is conservation or ag. This gentleman said it is half in conservation and half in ag.

A gentleman from AECOM introduced Donald Fujimoto from County of Kauai testified that the EA conducted several years ago was for 3 phases and the current landfill outside of the CDUA will reach capacity soon in ag land as well as the rest of phase II.

Julie Zimmerman representing AECOM testified is in the existing footprint of the landfill. She referred to condition 15 and the current Kauai County code Section 22-7.6 which she read – Mining, quarrying and landfill operations is subject to operate in accordance to all Federal, County, State government regulations are exempt from the grading in the building permit. Unless required by such other government regulations, laws or any permits issued. They would have to do it even though it says it meets other exempts. It was her understanding it wasn't the purpose of recommendation 15 to necessarily require that and just require as necessary.

Member Edlao said that was put there if there should the County require. The 2 AECOM representatives said that was their understanding, too. Ms. Zimmerman said there only question was the last line says “unless required.” Recommendation 15 is requiring. Member Edlao pointed out saying the permittee “shall” and not “will.” Donald Fujimoto asked if they may add after “shall” if necessary. The gentleman from AECOM suggested or any necessary permits required. The way condition 15 is worded if you get any required grading permits.

Member Goode asked what language would work for them. The gentleman from AECOM said to leave in section A and after permit “shall obtain any necessary County permits prior to final construction.” Member Edlao suggested the permittee may obtain as necessary, but AECOM reiterated the above per the County's counsel.

Member Goode asked whether the time limit is 1 year and as long as 6 years. Mr. Fujimoto said that it's challenging to get a Department of Health permit and cannot start construction until they clear that and 1 year from the Board's approval is a little tight realistically, but they are under the gun and will make every effort to expedite that construction. If they can't make the time can they come back for an extension or should the Board give them more time. Member Goode said it would be easier to give you more time now of 2 years. Mr. Fujimoto agreed to that and they discussed that. Six years is sufficient and could extend.

Member Gon moved that staff's recommendation be accepted except for amending item 5 by adjusting 1 year to 2 years and item 15 “the permittee shall obtain any necessary County permits prior to any construction.” Member Edlao seconded that. All voted in favor as amended.

**Unanimously approved as amended (Gon, Edlao)**

**Item D-13      Withdrawal of Request for Contested Case Hearing by the Office of Hawaiian Affairs Regarding Agenda Item D-26, December 10, 2004 Meeting; Sale of 65-year Lease at Public Auction of Water Rights for the Use of the 'Blue Hole' Diversion and Portions of a Water Transmission System, Lihue-Koloa Forest Reserve (Wailua Section), Wailua, Lihue, Kauai, Tax Map Key No(s). (4) 3-9-001:001 & (4) 3-8-001:001 for Hydropower Generation, Non-Polluting and Non-Consumptive Use.**

Mr. Tsuji related some history regarding item D-13 where OHA (Office of Hawaiian Affairs) requested a contested case and since then they agreed to stipulate rather than through a contested case based on studies by KIUC. Both parties are in agreement.

Pua Kaulukukui, Land Manager with OHA distributed a letter that was e-mailed yesterday and confirmed that they do withdraw the contested case recognizing KIUC's cooperation.

Yvonne Izu representing KIUC testified she was here for any questions and they are very happy.

**Unanimously approved as submitted (Gon, Edlao)**

**Item F-1 Request for Authorization and Approval to Issue a Papāhanaumokuākea Marine National Monument Research Permit to Dr. Brian Bowen, University of Hawaii, Hawaii Institute of Marine Biology, for Access to State Waters to Conduct Genetic Survey Activities.**

Maria Carnavaele representing Papahanaumokuakea/Division of Aquatic Resources (DAR) reported on item F-1 that this initial activity was approved in 2006 and this is a renewal with 3 additional species of fish added. This activity will allow them to compare with the Main Hawaiian Islands. The proposed use of clove oil has been removed from the activity this year. It was staff's opinion that the applicant be allowed to enter and conduct these activities.

Dr. Brian Bowen testified that the Board approved their activity last year and the shallow water work was done, but on the first day of the debrief work one of their diver's started convulsing and all diving was cancelled and they are in reset mode now. It was a health issue with the individual.

Member Edlao asked about the use of clove oil and Dr. Bowen said it was decided they needed an environmental assessment and DOH needs clarification because it can be considered a surface water pollutant which they are working on. Instead they are looking into traditional ahuhu fishing which is a fish narcotic in the tea family and is being researched at U.H. Chair Aila said that they need this because the fish are hiding in the reefs. Dr. Bowen confirmed that they fish away from the reefs and fish on the surface using spears to collect them.

Chair Aila pointed out that the genetic studies will lead to connectivity if these fish are related to those in the Northwest Hawaiian Islands or in the Main Hawaiian Islands or are related to other fish. Dr. Bowen acknowledged that and if the fish in the Northwest Hawaiian Islands re-seed those fish in the Main Hawaiian Islands.

Member Gon asked what his favorite finding was. Dr. Bowen said the Alenuihaha Channel between Maui and Big Island where it is famous for rough water and the larvae can't make it across which makes the Big Island an independent managed ecology. Chair Aila pointed out that there are specific species associated with Maui, Molokai, etc. Dr. Bowen said that Molokai is and Maui is separate from Oahu.

**Unanimously approved as submitted (Goode, Gon)**

**Item D-12 Authorization to Hire a Consultant for Remediation of Lead Pellet Contamination at Kaimalino Beach, Kailua, Koolaupoko, Oahu; TMK (1)4-4-039:seaward**

Mr. Tsuji conveyed some history on item D-12 where this area had a skeet range many years ago and the pellets are now washing up on the shoreline. Department of Health (DOH) had concerns with little children picking up the pellets and because of that staff decided to proceed with this. There are funds to do it. The clean-up is a vacuum cleaner going up and cleaning up the pellets and there will be a study in the ocean on the source. He read the recommendation Sub "A" and asked to refer to Exhibit A

Member Gon asked whether it's precedent to remediate lead pellets on rocky coastlines. Mr. Tsuji explained that this whole thing was taken care of by DOH, but they probably ran out of funds. Chair Aila said that the ocean has a way of moving things around since lead is heavy.

Eric Wetzstein, principle geologist with AMEC testified that they had submitted a proposal. In answer to Member Gon's question and what The Chair mentioned that this is a unique site and they've done a lot of skeet clean-up using gravity, but in this case they estimate about over 500,000 lbs. of skeet shot over the years and a lot is off shore. The ocean is a natural separator. A marine survey will find pockets redistributed. There is short term a solution on the beach, but there needs to have long term solutions. There are much better management practices today and the Honolulu Skeet Club no longer exists today.

Member Gon made a motion to approve staff's submittal by adding the declaration amendment. Member Edlao seconded that. All voted in favor.

**The Board:**

**Approved as amended. The Board amended the Recommendation Section of the submittal by replacing the original recommendation to read as follows:**

**RECOMMENDATION: That the Board**

**"A. Declare that, after considering the potential effects of the proposed request as provided by Chapter 343, HRS, and Chapter 11-200, HAR, this project will probably have minimal or no significant effect on the environment and is therefore exempt from the preparation of an environmental assessment pursuant to the exemption notification attached as Exhibit A; and**

**B. [A]uthorize the Chairperson to negotiate and execute a contract and any supplemental agreements to address unforeseen conditions and to exercise options as provided in the contract for the above referenced project, subject to funding and review and approval by the Department of the Attorney General."**

**In addition, Exhibit A [Exemption Declaration] was added to the submittal which is attached to these minutes as a separate document. The Board approved all other aspects of the submittal.**

**Unanimously approved as amended (Gon, Edlao)**

**Item D-14 Modification of Staff Recommendation in Board Action of January 26, 2001, Item D-8, as Amended, Regarding Sublease Rent Participation Policy. The Purpose of the Modification is to Make the Staff Recommendation Consistent with the Board's Directives and Practice in Determining the State's Participation in Sublease Rents. (Statewide)**

Mr. Tsuji noted that the Board didn't go back to amend staff's recommendation on item D-14 and instead asked staff to continue using good land management practices even though the 3 that came before the Board may not fit all the circumstances. If you look at staff's recommendation it wouldn't necessarily fit participation, but taking into consideration with permission from the Board to continue using good land management practices – evaluate facts and circumstances and bring it before the Board for consideration which is what staff has been doing. They cited examples (in the submittal) and even if the structures were built by the tenant themselves. A lot of times staff allows the tenant to advertise over the term of a loan and depreciate since it is a structure. We had situations where 40 years into a 65 year lease the sub-lease rent was higher than the ground rent we're receiving and the extent of the ground use was very minimal and had no impact to the operations of the Lessee. Then we have free ground rent and make a \$2,000 a year profit. Staff didn't think that was the purpose of public lands. Also, there are situations where the land owner is acting as the sub-lease sandwiched position and that would never happen in any of our option leases because people need to qualify – show you are a farmer, have an industrial lease, etc. Foreclosure and bankruptcy proceeding and the new person coming in may not be a farmer or in industry, but in those cases the bank just wants their money. In some cases the current Lessee isn't operating anything and should be a factor in considering sharing the rent. Staff is looking at all avenues to generate increased revenue funds to continue Department programs.

Member Goode asked in our lease over the years it's changed to say if you sub-lease you got to before the Board for approval and is not an automatic right to sub-lease. Mr. Tsuji acknowledged that and said almost everyone requires a consent. When this sub-lease rent policy went into effect the AG's recommended adding a provision here that it may be subject to the sub-lease rent policy and attach it. Some of the leases started 65 years ago and wouldn't have that provision. The statute was subsequently updated to allow for sub-lease rent participation giving the discretion to the Board to evaluate the circumstances. It is not a mandatory thing. Staff tried to understand the scenario, analyze it and present it. It would be easier to just attach this and that's it, but he cares about the money and is always evaluating it for the Board.

William Yuen testified on behalf of 69 Railroad LLC who is a Lessee who would be affected by this policy. Michael Shoemaker is the principle and is here to present testimony. Mr. Yuen wanted to point out to the Board the problem in adopting a policy like this is that they believe it would present a unilateral reaffirmation or a change in the existing lease. The Hawaii Supreme Court has ruled in the State versus Kahua Ranch in a 1963 case when the Land Board puts a lease out by public auction it cannot unilaterally reform or amend the terms of the lease because the terms of that lease was put out as part of notice of public auction and bidders reliance on the terms that were advertised. The effect of this policy on the lease does not have a requirement



that the Lessee operate a business on the premises is affectively penalizing the Lessee who does not operate a business on the leased premises. While a Lessee from the 1960s or 1970s at least have the premise to operate a business. The economy changes, times change, and circumstances change, but the Lessee is entitled to provisions of the lease just like the State. You can't go back 40 or 50 years later and change the terms of the lease just because you feel that the State didn't get a good deal. In the case of 69 Railroad that lease does not contain any restriction on requiring the Lessee operate a business on the lease. If we adopt this policy you would be penalizing the Lessee who sub-leased and made improvements and continues to pay to maintain. The State may regard as Lessee profit, but a Lessee chooses to go into this kind of business based on the lease provisions.

Michael Shoemaker testified that he is a realtor in Hilo for over 35 years and had a real estate license for 25 and he is the manager of 69 Railroad, LLC. The landlord business is a legitimate business having been around for thousands of years. He related many businesses could not operate without the services of the landlord and the situation in Hilo in the 1960s after the tsunami where property was not replaced with fee simple property. Now most are DLNR or Hawaiian Homes leases. Without the leasehold with landlords coming in leasing out smaller portions business could not operate. We don't want sandwiched rents that would be going to the State of Hawaii, but the leases are negotiated on the basis of market. The market rent is provided to the State then the landlord takes the risk of building the property and leasing it and that's the natural flow of things. They picked up the property in foreclosure, but the prior tenant was sub-leasing the property and failed and weren't able to lease it out. It wasn't a guaranteed business and was painted as a speculative thing, but it was the opposite being a frozen asset and something they cannot sell. It only had 4 years remaining on the lease. They purchased 69 Railroad, put in a lot of money fixing it which was in serious disrepair and did the best they could. They leased it out and provide their tenants with a space and they give a guarantee on a lease. He can't go back to the tenant if he is doing well and ask for more rent. We have a lease with DLNR and they have paid their rent on time and consider themselves good tenants and they run a legitimate business providing a service to the community.

Member Goode asked whether his lease has a provision about coming to the Board for sub-leasing. Mr. Yuen confirmed it does and presently there is a request for consent to 2 sub-leases that has been deferred and they are assuming if this Board adopts this policy they will use it in determining the terms to consent to. Member Goode said that is not on the agenda today. It is an amendment to existing laws. Mr. Yuen acknowledged it is an amendment to an existing policy. Mr. Tsuji said this is the staff submittal where the language is to approve as amended. This is going back taking that language and modifying the staff submittal that was prepared that preceded the actual Board meeting and action. To say it's amending a policy is not correct. This is a housekeeping matter – a modification of staff recommendation to Board action...its amending the write up that staff prepared.

Member Goode asked this amendment of staff's recommendation...Mr. Tsuji said he doesn't think is necessary. It's approving your formula except this. Go back and modify the 3 formulas listed above still allowing all the facts and circumstances. Member Goode said this tells staff to get more flexible then look at the particular situation. Mr. Tsuji said staff doesn't look at the wording a lot of times, but look at the formula and they keep reminding them.

Member Goode pointed out Lessees like 69 Railroad would find it more favorable to have language like this. Mr. Tsuji acknowledged that because you are looking at facts and circumstances. That is what staff tries to do which he described.

Mr. Yuen commented that the policy presently adopted by the Board is that if the Lessee is sub-leasing space improvements that were constructed by and owned by the Lessee, not by the State, the Board shall not receive any portion of sub-lease rents. The suggested amendment or modification is to allow the Board to participate in a portion of the sub-lease rents and in no circumstance will that participation be more favorable to the Lessee than the present policy. Mr. Tsuji said this is the language approved by the Board. Member Goode said it is item C which says no participation in this case it could go the other way. Mr. Yuen said what the lease says before the August 24<sup>th</sup> meeting is that this Board can now determine whether it chooses to participate. Mr. Tsuji clarified to Mr. Yuen that this actually is what the Board approved in 2001. Mr. Yuen said they pulled up the website and Mr. Tsuji said you got to look at the minutes.

Member Goode said he understands Mr. Tsuji's point and staff will have to apply the formulas and send it to the Board. He approved staff's recommendation and Member Edlao seconded it. All voted in favor.

**Unanimously approved as submitted (Goode, Edlao)**

**Item C-1 Memorandum of Understanding between the Division of Forestry and Wildlife and the United States Department of the Interior, National Park Service for Providing Mutual Aid in Fire Prevention and Suppression Activities**

Roger Imoto, representing Division of Forestry and Wildlife (DOFAW) briefed the Board on item C-1 and staff recommends the approval. He gave some history that these agreements last for 5 years and this is a renewal. Mr. Imoto related the last big fire they had on Mauna Kea. It provides training for their staff.

Member Gon asked whether this MOU was based on a previous one and Mr. Imoto confirmed it was and this one was approved by the National Park Service and the AG's office.

**Unanimously approved as submitted (Gon, Goode)**

**Item L-1 Declare Project Exempt from Requirements of Chapter 343, HRS, and Title 11, Chapter 200, Hawaii Administrative Rules, Job No. H10C658B, Wailua River State Park Comfort Station Improvements at Smith's Landing, Wailua, Kauai, Hawaii**

**Item L-2 Certification of Election of Koa Chang as a Director of the Olinda-Kula Soil and Water Conservation District.**

- Item L-3** Certification of Elections of David Morgan, Brian Cordero and Richard Towill as Directors of the Windward Oahu Soil and Water Conservation District
- Item L-4** Declare Project Exempt from Requirements of Chapter 343, HRS, and Title 11, Chapter 200, Hawaii Administrative Rules, Job No. F75B646C, Hapuna Beach State Recreation Area Parking and Roadway Improvements Kona, Hawaii.

Carty Chang representing Engineering Division said there are no changes to items L-1 to L-4.

**Unanimously approved as submitted (Goode, Gon)**

- Item D-3** Forfeiture of General Lease No. S-4453, Jonathan P. and Mary Nani Spies, Lessee Lot 24, Panaewa Farm lots, 2<sup>nd</sup> Series, Waiakea, South Hilo, Hawaii. Tax Map Key: 3<sup>rd</sup>/2-4-49:08
- Item D-4** Forfeiture of General Lease No. S-4312, Gary J. Rubio and Karen L. Rubio, Lessee, Waiakea, South Hilo, Hawaii, Tax Map Key: (3) 2-2-058:026.
- Item D-5** Issuance of Direct Lease to Kaʻanalike, also known as Kaʻanalike\*, for Educational Purposes, Kalaoa 4th, North Kona, Hawaii Tax Map Key:3rd/7-3-04:05.
- Item D-6** Rescind Prior Board Action of November 10, 2011, Item D-5, Consent to Sublease of General Lease No. S-5511, New Cingular Wireless PCS, LLC, Lessee/Sublessor, to SprintCom, Inc., Sublessee, Humuula, North Hilo, Hawaii, Tax Map Key: (3) 3-9-002:015.
- Item D-7** Forfeiture of Revocable Permit No. S-4701, Randolph Castro, Permittee, Kaupo, Maui, Tax Map Key:(2) 1-7-002:Por. of 015.
- Item D-9** Quitclaim of State's Interests, if Any, over the Lane Adjacent to King Street to the City and County of Honolulu, Honolulu, Oahu, Tax Map Key: (1) 1-7-003.
- Item D-10** Issuance of Right-of-Entry Permit to Hawaii Explosives & Pyrotechnics, Inc. for Set up and Firing of Aerial Fireworks Display on September 8, 2012, Waikiki, Honolulu, Oahu, Tax Map Key: (1) 2-3-037:021 (Portion).

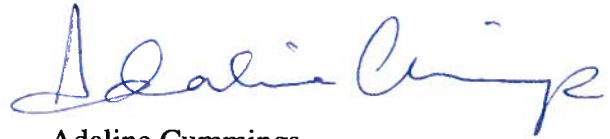
Mr. Tsuji had no changes to the rest of his items.

**Unanimously approved as submitted (Edlao, Gon)**

**Adjourned (Gon, Edlao)**

There being no further business, Chairperson Aila adjourned the meeting at 12:12 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