

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

DATE: FRIDAY, SEPTEMBER 28, 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 9:04 a.m. The following were in attendance:

**MEMBERS**

William Aila, Jr.  
David Goode  
John Morgan

Jerry Edlao  
Rob Pacheco  
Dr. Sam Gon

**STAFF**

Sam Lemmo/OCCL  
David Smith/DOFAW  
Alton Miyasaka/DAR

Russell Tsuji/LAND  
Roger Imoto/DOFAW  
Carty Chang/ENG

**OTHER**

Bill Wynhoff, Deputy Attorney General (AG)  
Linda Chow, Deputy AG  
Paul Mancini, K-1  
William Yuen, D-2  
Laura Thompson, D-6  
Ron Terry, C-1  
Mark Murakami, D-8

Cindy Young, Deputy AG  
Ross Smith: M-1, M-3, M-4, M-5  
Diane Schweitzer, K-1  
Michael Shoemaker, D-2  
Marjorie Ziegler, C-1  
Mark Fox, C-1  
Emilia Sogin, F-2

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

**Item A-1      August 24, 2012 Minutes**

Member Pacheco recused from item A-1.

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

**Item A-2 September 14, 2012 Minutes**

Item A-2 was not available.

**Item M-1 Amendment No. 1 to Allow for Additional Floor Space to Expand Retail Operations to Concession Agreement No. DOT-A-11-0005 Retail Concession, DFS Group L.P., Kahului Airport, Tax Map Key: (2) 3-8-001-019**

Ross Smith representing Department of Transportation (DOT)/Airport conveyed that item M-1 is to expand one of the concessions.

**Item M-5 Consent to Sublease Amendment by Allowing for Additional Floor Space No. 373-264 and No. 373-265 to Expand Retail Operations to Retail Concession Agreement No. DOT-A-09-0002, DFS Group L.P. to Island Shoppers, Inc., Honolulu International Airport, TMK: (1) 1-1-03:portion of 1**

Mr. Smith said the same for item M-5, but it is also a consent to sublease.

**Item M-3 Issuance of a Direct Lease to State of Hawaii, Department of Defense, Hawaii Army National Guard, Kalaeloa Airport, Island of Oahu, State of Hawaii, TMK: (1) 9-1-13:32 (portion)**

**Item M-4 Issuance of a Direct Lease to State of Hawaii, Department of Defense, Hawaii Army National Guard, Kalaeloa Airport, Island of Oahu, State of Hawaii, TMK: (1) 9-1-13:46 (portion)**

Mr. Smith also reported on items M-3 and M-4 that the Hawaii Army National Guard needs the expanded area for their operations.

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

**Item K-1 Conservation District Enforcement File MA 09-54 Alleged Unauthorized Seawall and Stairs by Henry and Diane Schweitzer at Keonenui Beach, 'Alaeloa, Island of Maui, TMK: (2) 4-3-015:001**

Sam Lemmo representing Office of Conservation and Coastal Lands (OCCL) reported that item K-1 is an enforcement case and gave some background on it that it came before the Board before, but was deferred. There were some slight changes to the analysis since then. Keonenui Beach is experiencing signs of long term erosion. It is a seasonal beach where the sand comes and goes which is a problem area. The bay has been covered in sea wall structures. This area is primarily basalt and clay where the beach will have significant problems down the road because the back shore is clay and basalt. He related some history where this property was certified on two occasions and the reason staff is bringing the enforcement case now even though its 30 years later they have information that the stairs were built seaward of that 1980 shoreline and a

violation was committed. The attorney and landowner went back and had it surveyed and provided Mr. Lemmo a copy of it which confirms the wall was built seaward of the shoreline. There is proof of the violation, the built enforcement and included a map – Exhibit 15. Looking at the penalty guidelines this qualifies as a major penalty because this would require a Board permit or a sea wall erosion control structure. Because the owners are cooperating staff recommends a minimum \$10,000 fine and \$1,000 for administrative costs. Remove the wall and stairs in 60 days or apply for an after-the-fact conservation district use permit (CDUP). There are a couple problematic issues not in the submittal. One is ownership that they can apply for a CDUP, but whether or not the Board approves it is up to you. That brings the problem of the easement and there might be an issue of what constitutes an encroachment.

Paul Mancini representing the Schweitzers introduced Diane Schweitzer and testified reiterating the history from the May Land Board meeting. This project was originally approved by the County and now 33 years later it's a violation. Last May they suggested to the Board that the survey went awry in 1980, but they couldn't get any records and the surveyors have passed away. The Schweitzers want to comply with the law and asked for an additional 30 days. There is the complexity of taking out the wall, impacting the neighbors and the shoreline now is different from 1980. The question is what the easement area is at this point in time. He distributed a handout. If they proposed where the shoreline is they can estimate what the cost of the easement will be. Our recommendation is 120 days to process where that shoreline would be in 2012-2013 current survey and submit that for the CDUA (conservation district use application). The easement would come back to the Board to look at the question of hiring someone to look at the impacts of removing the wall. Mr. Mancini referred to a similar Kauai case. They did hire a surveyor and there is a mountain or problems and costs and asked the Board to be lenient on the fines noting that the Schweitzers wouldn't have built it if they didn't think they were abiding by the law. They asked for a \$3,000 fine rather than \$10,000.

Member Pacheco asked whether the permit they had was a County construction permit. Mr. Mancini said the approach to the State was to certify the shoreline in 1980 reiterating that they weren't able to obtain the records and noted that the County fined the Schweitzers \$100,000 which they appealed.

It was asked by Member Edlao whether they had already hired a surveyor and Mr. Mancini confirmed that they already did, but Mr. Bruce Lee's task was to look at the 1980 shoreline and the wall and where it is in relationship to it which Mr. Mancini had submitted to the Board. No one has looked at this certified shoreline, but noted there is one regarding Kahana Sunset.

Chair Aila asked whether the reason for the shoreline certification is to find out how much the easement would be. Diane Schweitzer said it's difficult for them to make a decision when they don't know if it's going to be a trillion dollars for the easement then they would tear it down, but preferred an after-the-fact permit and needed the facts to weigh that.

Member Goode asked you are looking to doing an after-the-fact leaving the wall as is or considering moving the wall. Ms. Schweitzer said no, it's a well-built wall. Member Goode asked looking at the survey the wall was built makai of the 1980 certified shoreline. Mr. Mancini confirmed that, if it's correct. Member Goode pointed out that it appears the wall and

stairs were built beyond the reported property lines. Mr. Mancini said there is a portion that looks like that. Usually the property would be identified as reclaimed land by the State. Because once you have the shoreline anything makai you are safe on reclaimed lands. Member Goode said this new certified shoreline will set a new makai boundary of the property and will show how much area to set in the easement.

Member Pacheco asked they want to go back and look at the shoreline again, but we have all these walls and encroachments. How does the Department deal with re-certifying the shoreline because it's possible the shoreline has been changed because of the structures? Mr. Lemmo said it's a complicated situation looking back in 1980 and the ownership, but that doesn't matter because we have to look at it today. In 1980 it was seaward of the shoreline and would consider that area the area of encroachment which complicates matters if you want to argue that insertion that they own that. The problem is where is the shoreline today to assert ownership seaward of the shoreline? He made some references to where the water splashes and where the 1980 shoreline is. They could say they don't have encroachment and staff is saying in 1980 there was encroachment. We do need to have a shoreline certification done to move forward with a CDUA and to determine where the current shoreline is for the ownership and jurisdiction - is it County or State. They can't get a shoreline certification because of the pending violation. If you want to go in that direction you have to confirm the violation and authorize them to apply for a shoreline certification so that when they file their certification application it won't be rejected.

Member Morgan asked can't get a CDUP without a shoreline certification. There are two requests and one is to reduce the fine and the other is to increase the time period to 120 days and how does he feel about that. Mr. Lemmo said that the purpose of the 120 days is to removal or after-the-fact application. If they are going to seek a shoreline certification as information for them it is going to take longer than 120 days.

Member Goode asked whether they need an EA (environmental assessment) for the CDUP. Mr. Lemmo said to be determined. Member Goode said it might drag to a year. Mr. Lemmo said it's not a really complicated issue that former land boards have approved easements, shoreline projects in major populated areas. It has a long history of being scrutinized by the government. But, they probably need more than 120 days if they are going to seek a certification. As to the fine, he believes them when they say they hired a contractor and trusted that contractor, but the contractor built the structure in the wrong way. He won't argue about that. The first time they got into this case staff couldn't get the owners attention on this for a while and don't know why that was. When Mr. Mancini stepped in he aggressively moved this case along. It's up to the Board.

Member Morgan asked how about a \$5,000 compromise to throw it out to the Board that he believes a lot of good faith efforts were made way back when the structure was done.

Member Edlao said he was concerned because the applicant says he will take an additional 30 days and Mr. Lemmo says it will take longer than that. He asked whether the owner has something that is faster. Mr. Mancini said to get someone out there to give a proposed shoreline that this is where they think it is give a reasonable period of time of 30 days. To get the State to come out and look at it is problematic and can't control that, but once the State comes out and

says you're wrong and it should be here at least they have a proposed one like in the Kauai case. Then they come back here looking for the easement on that designation and then you would approve the easement, but that easement wouldn't be finalized until the shoreline was finalized and you get an appraisal too. That was the procedure he was looking at. Get the shoreline certified by the owner's surveyor to get the State's response. The State has been out to Kahana Sunset recently and they have an idea of where the shoreline is from Kahana Sunset. Mr. Mancini mentioned a couple neighboring shoreline certifications within the past 5 years. They would come back to the Board with the State's reaction to their certification and that will determine based upon the analysis of what it will cost doing a number of appraisals of how you do it describing the process. Do an estimate to determine whether it is cost effective, time effective, emotionally effective to take it out.

Mr. Lemmo said he is talking about the bond process where they delineate it and gives us some security that if they got their shoreline certification they would pay us the lease rent.

Member Morgan asked about recommendation #4 says 3 months and this would go to 4 months and it also says "apply." Could they comply by the applying part without you actually approving anything at least and at least they comply with the recommendation and you would come back to the Board if there are other things to be looked at. Is that correct? Mr. Lemmo acknowledged that.

Member Gon agreed saying as long as there was good faith effort to take the steps to do the application that is what was asked for within the 3 month or proposed longer period.

Chair Aila asked what about the violation. You can't apply if there is a violation? Mr. Lemmo said no, you can. We are moving towards resolution. To be honest he doesn't know what the Schweitzers want to accomplish. He is thinking more what might help them with the County issues because from his perspective everything seaward of that 1980 shoreline is a violation and encroachment. Let's do an assessment of the seawall and stairs and charge them for that. And, have them deal with the County however way they need to. If the shoreline is washing up over the wall then the shoreline could be worth more. Member Morgan said then it is their call. Mr. Lemmo said yes, staff is not demanding it in the recommendations.

Member Goode asked Mr. Mancini whether they are comfortable with the 1980 shoreline for our purposes. Mr. Mancini said they don't think that is where the shoreline is based upon everything that is there and they want to take a look at where it is. He referred to the Kahana Sunset line which makes it a bit behind the wall if that is where the shoreline is at that point in time. They can identify the square footage based upon the 1980 certified shoreline and calculate that based on what the shoreline is now. We can determine if that is a significance difference by some evaluation method and then they can determine whether they want to go with the new shoreline.

Member Morgan asked whether they could do that within 120 days. Mr. Mancini said he believes so.

Member Goode asked whether he had any idea what the square foot value is. Roughly 500-600 square feet based on the 1980 map is his guess. We're talking hundreds and not thousands. Mr.

Mancini said if you think its cost effective and time effective and would like the ability to make that call. They had some recent appraisals on the property and have a fairly reasonable idea on the square footage on a 55 year lease. They would like the opportunity to go that route.

Member Edlao asked if we do go forward with the 120 days and would everything else kick in. Mr. Mancini said they will either provide the plan to remove or provide an application of the permit

Member Edlao summarized agreeing with the reduced fine and allowing the 120 days and see what happens. Mr. Mancini noted that they want to get this over with as quick as possible for the client because it is a serious emotional problem and has to be put behind them. If its 60 days they will do it in 60 days, but they have a mountain of problems with the County and isn't something to be taken lightly.

Member Edlao made a motion to reduce the fine to \$5,000.00 with additional \$1,000 for administrative costs and extend the 3 months with another 30 days for a total of 120 days. Member Goode seconded that. All voted in favor.

**The Board:**

**Made a motion to reduce the fine from \$10,000.00 to \$5,000.00 with the additional \$1,000.00 administration fee and add 30 days to the 3 months for a total of 120 days. Otherwise, staff's submittal was approved as submitted.**

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

**Item D-2      Resubmittal: Consent to Sublease General Lease No. S-3624, 69 Railroad, LLC, Lessee, to Hui Malama Ola Na Oiwi, Kirby Kuoha, Sub-lessees, Subject to State's Participation in Sublease Rent Profits, Waiakea, South Hilo, Hawaii, Tax Map Key:3<sup>rd</sup>/2-1-12:26.**

Written testimony from William Yee was distributed to the Board.

Russell Tsuji representing Land Division noted that item D-2 is a resubmittal and said there were written objections from Bill Yee that staff had amended their Board policy and Mr. Tsuji disagrees with that. The matter that came before the Board at the last meeting was a housekeeping matter where he read the title "modification of staff recommendation of Board action in January 6, 2001, item D-8 as amended regarding the sublease rent participation policy." The purpose of this modification was to make the staff recommendation in the Board submittal consistent with the Board's directives at that 2001 meeting and practice and participation in the State's rent policies. That is not an amendment of the policy or the Board's policy from 2001. Specifically the Board's own language at the time when they looked at the staff proposal said they are going to approve this, but this is what they added. Furthermore, the following formula that was presented to the Board generally reflects the intent of the Board regarding calculation of sublease sandwich profit and will serve as guidelines in subsequent calculations. The Board authorized its staff to use their discretion in representing the State's interest in applying these formulas to address the valued sublease arrangements that may not fit neatly into the formula.

That was the Board's language in 2001. Staff went back to have that portion in the formula match what was actually directed by the Board and they have done several participation of rent policies in the past. You cannot sublease without the Board's consent. Staff is not recommending a denial of this. The consent is not unreasonably withheld and we think we should be participating in the rent and in this case at least 33% of the sublease rent. There are more than two subleases in this structure and this is for the two that is coming before the Board right now. Based on the facts in the submittal and what was brought to the Board a few months ago goes is why they should be sharing in the sublease rent.

Member Pacheco said he was just confused looking in the submittal, HRS 171-36(a)6, when he reads this it appears to him that they can do the sandwich rents provided further in the case that the Lessee is required to pay a percentage of his gross receipts and that is what triggers our ability to do sandwich rents. He asked whether that was not correct. Mr. Tsuji said no. You're reading it as we can only ask for participation if there is a percentage rent clause in the sublease rent. Member Pacheco confirmed that it's actually in their lease because they have the older leases. Mr. Tsuji said his reading of this is a percentage of the sublease rent. The participation in the context of the landlord, the State's participation is a percentage of the sublease rent only if the Lessee is collecting percentage rent. It is more a participation in the form of the end of sublease rents that the Lessee would be receiving. That is the way it is written. Looking at the last part that provided further the Board has the right to review and if necessary revise the rent of the premises based on the rental rate charged to the sublessee which is the Lessee's tenant including the percentage rent if applicable and the rent may not be revised down. This whole provision only applies to only if there is percentage rent that the Lessee is charging to the subtenant. Looking at it from the landlord, percentage rent is just a method of calculation of what he will get where he cited an example.

Member Pacheco asked are they only able to go after these sandwich rents like this where there are subleases on the property when they come up for approval by our Board. Like in this case the Lessee has other subleases that weren't getting any participation in the sublease rent. Is there a mechanism where the Department can go back and get those sandwich rents or can we look at other properties that have subleases in the State and do that with this authority? Mr. Tsuji said he doesn't recommend we do that because at the time it went through right or wrong they did request the Board's consent in the past and they obtained that without conditions and even without a request for participation. He didn't think it would be fair to go back and try to undo that transaction. The current request for consent is what staff is bringing before the Board and not going back to try and undo the prior consents because that isn't fair.

(Deputy Attorney General (AG) Bill Wynhoff departed and Deputy AG Cindy Young took over.)

Member Goode asked whether they have a prior consent request after the 2001 policy. Mr. Tsuji said they may have. Member Goode asked how many. William Yuen (representing 69 Railroad, LLC) said there were 8. Mr. Tsuji said 10 with today's approval. Mr. Yuen said 8 total. Mr. Tsuji said so 6 so far. He is not disputing those with no consents given. This is why staff tried to make it clearer at this last meeting because my own staff would look at the formula and plug it in

and they figure that is all they got to do. This is to help staff understand as well to make it clearer.

Member Goode asked it's a 55 year lease to 2016 and 4 years from now what happens. Mr. Tsuji said the statute for extensions maybe amended to allow them to – with original 55 year leases can go up to 65 years if they meet the conditions of the extension. A lot of times they need extensions to hire attorneys or pay back the loans. There is that ability to request that and he doesn't believe they have done that. Member Goode asked if they don't ask for the extension then it goes back out. Mr. Tsuji confirmed that it comes back to the Department and goes back out. Member Goode asked with a new modern lease. Mr. Tsuji acknowledged that and explained this is an old lease since 1961. He related the Kanoelehua area in Hilo industrial having a lot of leases and all expiring at various times where staff was looking at this area anticipating them expire in the near future. They are still evaluating on what to recommend to the Board because a lot of it is non-conforming that a lot of property are small. One idea is whether to consolidate.

Member Pacheco referred to page 2 of the submittal, the underlined second part of that talks about the participation of the subleases pertaining to improvements that were advertised and relationship to sublease rent and the occupier are using the premises for their own business. In this case how does that tie into our policy from the sandwich policy that it hasn't changed and we're arguing that we didn't change that, but changed the recommendation. How does that tie into to our ability on what our policy is? Are you basically saying those improvements are owned by us because they have been there so long? How would you come up to a relationship to the sub-lease rents than the Lessee's expenditures? Mr. Tsuji said and reiterated you are looking at page 2 and that is amending staff's recommendation portion of the submittal that went before the Board in 2001 to take into consideration the Board's directive back in 2001 when they approved and amended staff's proposal referring back to the language he read earlier. He related some situations that fit this scenario where the actual Lessee isn't occupying the property. If they did the auction today you have to qualify/propose you are operating an industrial use. Retail wouldn't necessarily qualify.

Member Pacheco asked whether 69 Railroad stated they were going to do an industrial business when they acquired the lease. Mr. Tsuji said he doesn't know if it went before the Board. Michael Shoemaker (69 Railroad property manager) said they had a consent from the Board and it said they weren't subject to sublease participation which was signed by the AG. Member Morgan asked whether it was for all subleases and Mr. Shoemaker confirmed for all sub-leases. Member Morgan said it would be appropriate to bring that consent here. Mr. Shoemaker reiterated what was stated in Mr. Yuen's letter repeating that they do not participate in sub-lease rents that staff has made this argument in their 3 letters to staff. Mr. Tsuji asked when you signed the document from the State saying it's ok for you to acquire the property and not be subject to sub-lease rent participation and Mr. Shoemaker confirmed that.

Member Pacheco asked to take page 2 and exhibit 1 which summarized that they case participate in sub-lease rent. Under which one A, B or C are we applying to this property? Mr. Tsuji said it's not there. That is what they amended. A, B or C was an excerpt of the staff's recommendation to the Board in 2001 and the Board approved as amended with that language.



Member Pacheco asked these 3 things are current established Board policy on sublease rent participation. Mr. Tsuji said it is the staff recommendation portion of the policy. Staff brought to the Board what they recommend on the policy and to please consider approve. The Board said approve as amended and added the language. These formulas may not fit every situation and staff asks they continue good land management practices. Staff considers the age of the improvements and not limited to depreciate as advertised, etc. Staff has tried to be consistent with the directive since 2001 and made the recommendation to the Board for participation for a portion of the sublease rent.

Member Pacheco asked he understands how they came to what to charge them for the sublease rent, but wouldn't this only apply when our participation set in 2001...he doesn't see the trigger for the Board to come into the lease. Mr. Tsuji said it doesn't say that they will ask for participation and Member Pacheco said right. He feels like they are going back and changing the terms of their legal contract. Mr. Tsuji said that is what they are arguing because the lease doesn't say you can take a share of my sublease rent and therefore you cannot. When you are asking for it would be an amendment and Mr. Tsuji doesn't believe that is true. If that was the case they would allow them to sublease without a consent, why get a consent? Come before the Board to get consent. He related other landlord/tenant situations. The question is what are you consenting to. This situation they want the consent and the State wants a share in the sublease rent and not with holding the lease.

Member Pacheco asked whether anywhere in their lease that requires them to operate an active business on the property. Mr. Tsuji said he doesn't believe it says that and will revise that when they go to auction. It is presumed the Lessee has already qualified and already gone through that process and that is where you usually catch it. What staff has found they are going to recommend to amend for current leases that actually say that because it's usually caught in the auction package when you have to fill out the application. The Chair said this is a usual one and Mr. Tsuji acknowledged that.

Member Pacheco asked what the Department's process is when leases are acquired through foreclosure. What does the State vet that person applying to even qualify to even have that lease? Mr. Tsuji said when he was Deputy AG he went to bankruptcy court and asked the court to go back to the Board to get a formal consent and related the judge wants to get the money. There were more discussions regarding bankruptcy court and another situation.

Member Gon asked on your question that the rent is silent with regard to the sublease rent which flies in the face of 69 Railroad's statement referring to Exhibit B, third paragraph and that suggests to him that there was no indication by the Department one way or the other whether or not 69 Railroad will be exempt or not exempt from the State's participation in sublease rents. Is there any other letter or communication from the Department at the time that gives an indication to 69 Railroad that they would be exempt from sublease rent participation? Mr. Tsuji agreed it doesn't say in the lease and said what he probably read was this sentence or maybe he read the submittal that went back before the Board in July that emphasized that as well. The 1961 lease has an additional paragraph about participation policy and this doesn't have it. As far as direct communication that you are exempt he doesn't know of any and he certainly did not and he doesn't know of any document as described by 69 Railroad that when the Board signed off on

the assignment from foreclosure to 69 Railroad that he would be surprised that they would. Member Gon said the fact that it's silent then it doesn't give any statement. Mr. Tsuji said what they would go back to is Board's consent.

Mr. Yuen said he has a letter from 2003 to Mr. McCully from Gordon Haight the Land Agent and he attaches the submittal that went to the Board for the consent to assignment of lease and it does say in the lease no participation in sublease rents. Mr. Tsuji said the lease does not have a provision for sublease sandwich. Member Gon said that is different from exemption. Mr. Tsuji read the submittal in 2003 and it advises the Board to approve from A to B. Mr. Yuen said the profits refer to the sublease rents.

The Board secretary made copies of the 2003 submittal.

Member Morgan said the lease can be construed as a negative or a positive it means it doesn't allow it or its silent which is always the gray area. Mr. Tsuji said the intent was to allow subleasing or you wouldn't require a consent. Member Morgan said that subleasing is one thing and sandwich profits is completely different thing. Chair Aila said that is different from what he heard in the bankruptcy proceeding that there was a document or order preventing and asked whether he was referring to that type of document. The 69 Railroad representatives said this is a consent.

Member Goode asked whether they came in for subsequent subleases. Mr. Tsuji said they did and approved, but they did not participate.

Mr. Shoemaker introduced himself and testified that since 2003 he managed all the subleases and each time they submit 5 copies to DLNR and in the past they received consents from DLNR and for the past 5 years they did a number of subleases and they never received a consent or a response. The only response was this one in 5 years and his tenants begged him for one because they need to move forward. He had not control and didn't give consents. Mr. Shoemaker has letters documenting all of that.

Member Goode asked in 2006 there was a reopening of the rent that happens every 10 years and he assumed you participated in that. In that process was an appraisal done? Mr. Shoemaker acknowledged that. Member Goode asked they would look at neighboring parcels and State parcels and were the appraisals done looking at what the market rents were for industrial properties in the area. Mr. Shoemaker said yes. Member Goode asked whether they were single users or multiple users. Mr. Shoemaker showed the report and said it was a variation and a lot of the industrial areas are both. Some are operators like us that just sublease, but it's very common for people to operate a portion and sublease the remainder. Member Goode said what he is getting at is it was appraised with the thought that there will be a lot of sublessors which means they are getting the dollar for the parcel. Mr. Shoemaker said that is what the appraisal is meant to do and when the lease rent was adjusted that it went up substantially. They serve an important function by purchasing the property out of foreclosure. If you pass rules that does not allow subleasing of the property that will eliminate mortgages because it depends on market and you cannot have a mortgage without the right to foreclose to put that property on the market. Without a market that includes the right to sublet you diminish the value tremendously because

you restrict it and it will be difficult to make that property function. It's a major issue for the mortgage industry. This is a standard business practice. Member Gon pointed out that there is none of that in this recommendation. Mr. Shoemaker said no, but it's hard for them to sit by that it's just another business. It would be different if they were going for another lease. Our lease does not allow sublease rent and they proceeded on that basis...

Member Morgan said you use the term it does not allow and it says it does not provide for. Mr. Shoemaker said you can argue it, but for them it's pretty solid that the State gave them their word that the sublease does not provide for rent participation. Member Morgan said does not allow is not accurate and it says it does not have a provision for.

Member Pacheco said he has a problem with this because he has leases and they are fortunate to not have a percentage of sales included in their rent while many of the tenants in their complex do. If his landowner came back and wanted to charge a percentage of that is what we are doing to our tenants. He is not against the Department maximizing on our lands, but he is having a hard time seeing the justification and the legal basis for us being able to do it because we are using a Board policy to change a legal contractual contract. Mr. Shoemaker said they retained Mr. Yuen and on his advice what you are doing is in violation of the United States Constitution by re-writing our contract from 1961 which states the rent and cannot charge them more rent.

Member Morgan said he agrees that they have agreements with cell towers and they wrote in there that they want to participate if they sublet to somebody else and is in the contract, but this is a silent contract. If there is money on the table you don't want unfair distribution of the profits, but you have to have that clear in the contract.

Member Pacheco asked from the document you gave us from July 25, 2003 this is the Board submittal for the consent and on page 3 it says and he read it ...the intent of the signee to operate in a similar manner. When 69 Railroad went into this was there any intent to operate a business that fits the industrial zoning outside of managing subletting industrial businesses. Mr. Shoemaker said no. Member Pacheco asked that is what you are in the business and why you bought the foreclosure. Mr. Shoemaker said and the State was fully aware of that. Mr. Tsuji said that the lease did not require it. Member Pacheco said the reasons for the argument are for us to participate.

Mr. Yuen said their feeling was Mr. Tsuji's characterization of the modification to the policy merely stating what the true policy is since 2001 the State was operating with the policy in the addition that you adopted a month ago was the policy with respect to other sandwich leases that come before the Board in the 10 year period the Board has consented to subleases one of the older leases without requiring the sub-lease rent as consideration for the consent. In that regard the policy modification or policy change is an *ex po facto* of law that prepares the contract between the Board and the Lessee contrary to Article 1, Section 10 of the U.S. Constitution. The lease merely requires industrial use and doesn't say the Lessee has to be the industrial user or his tenants have to be industrial user or anybody on the property has to be the industrial user. The rent increase participation has a condition of consent and under that circumstance that general law is construed that a consent should not be unreasonably held. Indication of the proposed sublessee is not an industrial user that would be a reasonable grounds refusing consent, but

unless the lease expressly provides for participation in sublease rents the State cannot use that as a condition for consent. Mr. Yuen cited the Kahua Ranch case in 1963. They also believe if the State is relying on a policy change the State under Chapter 91 would have to go to rule making to implement a policy change otherwise it's a violation and for those reasons they believe that the State should not require payment of a portion of sublease rents as a condition for the consent. Even if you take this policy or the modification to the policy in consideration the State has not obtained any information from the Lessee as to the expenditures and whether the improvements may be old, but the State has not asked what the expenses are to upkeep or whether the Lessee is still depreciating these expenses or not and what the true cost of providing this space is to the tenants. If the State is going implement this policy at least the State should be making that kind of analysis before you arbitrarily say we are going to sublease they want it all proper.

Member Pacheco asked our Board can set policy as long as they can't congregate the rule or law, to set policy we don't have to go out to rule making that there is statute and rules that have processes, but the Board can make policy. Mr. Yuen said the Board can make policy, but what Chapter 91 says is that if you are going to adopt a policy and everyone has to be treated in a certain way because this is our policy you have to follow the Administrative Procedures Act in setting that policy. If you are interpreting the policy you are interpreting on a case by case basis then you don't need rule making. If it's policy this is the rule everybody has to follow then you have to follow the procedures.

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 Gon seconded it. All voted in favor.

10:45 AM EXECUTIVE SESSION

11:04 AM RECONVENED

Mr. Tsuji said while the Board was in executive session staff printed the August 24<sup>th</sup> Board submittal modifying the staff recommendation to match the policy in 2001 and reminded the Board in that submittal staff went over the additions to the varying sublease rents for consent to sublease and asked the Board to consent and participation and in all of those situations they had the exact same lease which did not say we cannot sublease without consent. Referring to Mr. Yuen's argument if you participate in the sublease rents and cannot do it as a matter of law without a rule and he disagrees with that and he would agree with that only if the statute itself 171 did not say anything about subleasing and in our lease form you need the Board's consent before they agree to sublease. Here not only does it say the Lessee shall not sublet the whole or any part except by approval of the Board for sublease rent scenarios here it gives you the expressed statutory authority. He disagrees that a rule is required because the statute authorizes it.

Member Morgan asked you were saying there were other circumstances and they had a sandwich in there and the Board approved it and the attorneys accepted it. Was it prior sandwiches or was

there prior no sandwich? Mr. Tsuji said his recollection they were only approving one sublease and not multiple pointing out some examples – Mt. Ka’ala and HECO as an example.

Member Morgan said he was uncomfortable with the last minute change of practice of getting in a sandwich.

Member Pacheco said he feels the same way that we are applicable to maximize the value of our lands and moved to consent to sublease and strike item #1 from the recommendation. Member Morgan seconded that. All voted in favor.

**The Board:**

**Approved as amended. The Board decided to consent the sublease but not condition the consent on taking a share of the sublease rents; and therefore struck or deleted recommendation number 1.**

**Unanimously approved as amended (Pacheco, Morgan)**

**Item D-6 Final Approval of an Exchange Between the State of Hawaii and Tiana Partners and Hawaiian Humane Society for State-Owned Springing Executory Interest in Land at Niu, Honolulu, Oahu, Tax Map Keys: (1) 3-7-04:01, 02, 20 and 21 and Privately-Owned Land at Niu, Honolulu, Oahu, Tax Map Key: (1) 3-7-04:02, for Proposed Addition to the Honolulu Watershed Forest Reserve.**

Mr. Tsuji summarized that the property is out in Niu Valley and Tiana and the Hawaiian Humane Society (HHS) each have a percentage interest in it, but there was a restriction to use it for education purposes. HHS doesn’t have that purpose and if you don’t use it for education it will go to the State for a park. State Parks says they do not have an interest or a need for it to be a state park. This has been in the works for years now with Tiana and HHS to work out an exchange for the State to be receiving will be set aside for an addition to the Division of Forestry and Wildlife for Forestry Reserves.

Laura Thompson testified that this is family property, an ahupua’a from King Kamehameha and their family wanted to keep it the way it is not developing it. They wanted to educate the public on the fauna and flora and respect. They have been trying to untangle the various gifts to various organizations and thanked the Board for considering this and asked for the Board’s approval.

Member Gon commented that this looks like an extremely important addition to the Forest Reserves and he made the motion to approve that recommendation. Member Morgan seconded it. All voted in favor.

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

**Item C-1 Request Approval of the Ka’ū Forest Reserve Management Plan, Acceptance of the Final Environmental Assessment for the Subject Plan and Issuance of a Finding of No Significant Impact for the Proposed Project, TMKs (3) 9-7-**

**001:001, 009, 013, 014, 015, 016, 017, 018, 019, 020, 021, 022; 9-6-006:009, 010, 015, 018; and 9-5-015:003 (por.), Hawai'i**

Written testimonies from Marjorie Ziegler and Rick Warshauer was distributed to the Board.

David Smith, Acting Administrator for Division of Forestry and Wildlife (DOFAW) related background on the request and acceptance for item C-1. This comprehensive management plan is part of an on-going effort on the part of Forestry and Wildlife to create management plans for all their areas. It includes watershed protection, wildlife management, TDP restoration and public recreation and other public uses. Staff requests the Board to approve the management plan.

Member Gon commented that the Ka'ū Forest Reserve is a great resource of native and non-native forest and is pleased to see management planning and hope to see implementation of that in the future. Hope for more expanded areas with non-native species.

Marjorie Ziegler representing Conservation Counsel for Hawaii testified that they are pleased and are in support and urged the Board to accept this. She related not only Ka'ū, but Kona is having some great partnerships with landowners and stakeholders, too and other areas. Ka'ū was the missing link with the forest bird habitat and protected species. She pointed out her comments in her written testimonies and asked the Board to look at the Hawaii Administrative Rules because some of them are not allowing them to accomplish these protections in the area. Also, their organization is pro-responsible hunting and game management and is sensitive to hunters' concerns. She distributed a newsletter, Kahea which she described.

Ron Terry, DOFAW contractor testified recognizing people who worked on this and was proud to work on the team with them.

Mark Fox representing The Nature Conservancy of Hawaii (TNC) testified in support of staff's submittal relating their participation on the Big Island. Not only weed control, but maintaining roads for access across public land for recreation and hunting. It was a great opportunity for them to participate and asked the Board to approve this.

Board member Gon disclosed that as a staff member of The Nature Conservancy, Ka'ū is nested within the larger State lands of the Ka'ū Forest Reserve and stand not to benefit in any substantive way.

Mr. Fox noted that TNC has a 3,500 acre preserve within the preserve which is exciting for them to work with the Department in managing their preserve in conjunction with the Forest Reserve.

Member Pacheco said they received written testimonies and related when he first went to Ka'ū where they fence all around and outside of that it continues to degrade and TNC is in the same situation seeing non-management. We can't do the whole piece because there isn't any money. They could start here, but what can we do to minimize that deterioration that is going to happen surrounding that so they don't end up with one 12,000 acre piece with everything surrounding because it won't serve our long term goals especially for all our other native species. Mr. Fox

said not on the immediate surrounding land and immediately outside the 12,000 acres. What he can say generally he thinks we need to seriously support the Department and the government in their rain forest management plan. It is not just looking at those core forested areas like Ka'ū, it is looking at the core forested areas around the State that we need to manage well. Part of that includes fencing, animal control, but part of that includes basic management. You are not going to get animal populations to zero or weeds to zero, but you will begin to get a handle on them and promoting game management in appropriate areas. He is not going to say 12,000 acres today and another 40 within 10 years because he isn't qualified to answer, but they know what they need to do to manage their core forested and watershed areas. It is an important step in the right direction. If more fencing is going to occur in the future in Ka'ū that is the decision that would go through the kind of rigor and process as this one went through as well – engaging the community, looking for the right places to expand fencing if that is the right thing to do for Ka'ū, but simultaneously looking for improved access for hunting and game management. It's not easy.

Roger Imoto representing DOFAW testified that the forest reserves were created to protect our water supplies and is what they are trying to do with this management plan confirming the hard work that went into it. This plan will be implemented and it's done. There is \$510,000 right now to help implement the plan. As to Member Pacheco's question about the rest of the area, they are actively getting rid of the cattle in there which is a major detriment to the forest out there. They have received more monies for that through their forestry watershed monies and encourage getting more access for hunters to get into the area where they recently acquired \$175,000 to help with that access working with State and private partnerships.

Member Pacheco said he supports the recommendation wholeheartedly and look forward to a new year for Ka'ū Forest that they need to preserve it. He made a motion to approve as submitted. Member Gon seconded that. All voted in favor.

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

**Item D-8 Grant of Term, Non-Exclusive Easement to The Gas Company, LLC for Gas Transmission Lines Purposes, Honouliuli, Ewa, Oahu, Tax Map Key: (1) 9-1-014:seaward of 002 and (1) 9-1-074: seaward of 036.**

Mr. Tsuji conveyed item D-8 to resolve an encroachment issue. The shoreline has moved in and the gas line is encroaching on State land. Staff recommends the Board approve the easement noting as the Department has done in these kinds of scenarios they are going into legislation to allow the Board's discretion to allow the granting of these easements at less than fair market. Since the shoreline has moved anything seaward is an encroachment.

Mark Murakami testified he is here as the agent for The Gas Company, but he is the attorney for the landowners who are seeking a shoreline certification because the James Campbell Company is seeking a design for the drainage channel which goes right through this area. They couldn't get the shoreline certification because of the encroachment and they worked with The Gas Company to seek this easement to submit the shoreline certification and go on with the permit process.

Member Gon asked whether he was ok with the recommendation and Mr. Murakami answered in affirmative.

Member Gon commented it is the complexity of our dynamic shoreline what we run into as a result of the changes in those boundaries. He doesn't know they could do as State policy to say new developments that are close to a certain distance or easements of the certified shoreline to anticipate this in the future it's bound to happen. But, every time he sees these complex issues come up he thinks what they could do as an intelligent body for the State to minimize these in the future. Maybe nothing. Every time you are a certain distance to the shore you would have to anticipate this will happen.

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

**Item F-2 Request for Approval of Special Activity Permit No. 2012-86 for Emilia Sogin, University of Hawaii at Manoa, Hawaii Institute of Marine Biology to Take Stony Corals Samples and Place Temperature Loggers for a Study on Climate Change Impacts on Corals Around the Islands of Oahu and Molokai**

Alton Miyasaka representing Division of Aquatic Resources (DAR) briefed that Board that item F-2 is a special activity permit to take samples of coral noting a lot of unknowns of coral health and how to measure its responses to bio-stresses.

Emilia Sogin, the applicant testified that these samples will be studied to see how to characterize them.

Member Gon asked about the type of study and Ms. Sogin said it's the same partner for the survival of coral.

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

**Item L-1 Approval to Execute Amendment No. 2 to Agreement (Feasibility Cost Sharing Agreement) Between the Department of Army and the State of Hawaii Department of Land and Natural Resources for the Ala Wai Watershed Feasibility Study**

Carty Chang representing Engineering Division conveyed that item L-1 is to delegate the Chairperson amendment #2 agreement cost share between the Department and the Corp of Engineers. He related some background from staff's submittal with respect to the Ala Wai Watershed and Flood Control that there has been some changes to expand the scope to the original McCully/Moiliili area to encompass Palolo and Makiki as well. There have been some increases in scope and cost. The total cost is \$9.2 million where 50% is borne by the local government and in this case it's the State and the County. A portion of that can be borne by in kind credits as well. For cash for the local government is about \$1.96 million and \$2.6 million is in kind credits. There are legal documents requiring the State's chief legal counsel to certify and authorize the State of Hawaii which is formal requirements the Army Corp requires. Staff is



conducting an EIS to satisfy 343 and the NEPA process for the feasibility and planning stage. After that they will go into the design phase. No changes to the recommendation.

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

**Item F-1 1) Request Approval to Use NOAA Funding from the Western Pacific Fisheries Management Council (“WESPAC”) to Develop, Implement and Improve Upon the Current Division of Aquatic Resources (DAR) On-Line Commercial Fisheries Marine Licensing and Reporting Systems; and 2) Authorize the Chairperson to Enter into any Related Agreements as Needed**

Mr. Miyasaka related that item F-1 is for NOAA is trying to get Federal funding to give to us about \$450,000 to upgrade our on-line recording capabilities. They have to apply for a Federal grant which is the first step to secure...Chair Aila asked it's for the fishermen's reports and also the timing. Mr. Miyasaka confirmed that and also dealer reporting as well to try to get as many reports on-line as possible.

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

**Item D-5 Issuance of a Right-of-Entry Permit to Kahana Canoe Club, for Canoe Race Purposes at Pukoo, Molokai, Tax Map Key: (2) 5-7-007: seaward of 017, 066, and Hulopoe Bay, Lanai, Tax Map Key: 4-9-017: Seaward of 002.**

**Item D-7 Sale of Government Land to Hawaiian Electric Company for an Electrical Substation Site, Honouliuli, Ewa, Oahu, Tax Map Key: (1)9-1-17: Portion of 110.**

Mr. Tsuji asked to withdraw items D-5 and D-7.

**WITHDRAWN**

**Item D-1 Consent to Assign General Lease No. S-5811, Jackson Thong and Mandy Thong, Assignor, to Douglas K. Awai, Jr., Assignee, Kamaee-Wailua, North Hilo, Hawaii, Tax Map Key: 3<sup>rd</sup>/3-1-04:02.**

**Item D-3 After-the-Fact Consent to Assignment of Grant of Perpetual, Non-Exclusive Easement No. LOD S-27655, Florence M. Schultz, Martha Ann Rice, and Colleen McCorriston-Smith, Assignors, to Bret Patrick Hoffman, Assignee; Amendment of Grant of Perpetual, Non-Exclusive Easement No. LOD S-27655 to Run with the Land Identified as Tax Map Key: (2) 5-7-011:017 and Add Current Comprehensive General Liability Insurance Requirement, Ualapue, Kona, Molokai, Tax Map Key: (2) 5-6-002: Por. of 001 and 034.**

**Item D-4 Consent to Assign Grant of Perpetual, Non-Exclusive Easement LOD No. S-27747, Walter Charles Schachter and Sara Catherine Harrold (also known as Sara Catherine Harrold-Schachter) Assignor, to Terry J. Korpi and Terry**

**L. Korpi, Assignee, Ualapue, Molokai, Hawaii, Tax Map Key: (2) 5-6-002:Por. 026; Amendment of Grant of Easement LOD S-27747 to Allow Easement to Run with the Land Identified as Tax Map Key No.: (2) 5-6-002:021, also situate at Ualapue, Molokai, Hawaii.**

Mr. Tsuji said he had no changes to the rest.

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

**Item M-2 Amendment to Prior Land Board Action of July 22, 2009 Under Agenda Item M-3 by Authorizing a 10 year Lease and Waiver of Written Personal Guarantees from the Applicant's Investors, Regarding Issuance of Direct Lease to Liquid Robotics, Inc.; Situated at Pier 1 North Shed and Adjacent open, paved area, Kawaihae Harbor, Kawaihae 1st, South Kohala, Island of Hawaii, Tax Map Key: 3rd Division, 6-1-03: portion of 23.**

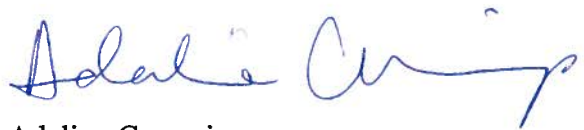
Chair Aila asked whether anyone was here for this item and no one responded.

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

**Adjourned (Gon, Morgan)**

There being no further business, Chairperson Aila adjourned the meeting at 11:43 a.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