

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

DATE: FRIDAY, OCTOBER 25, 1991
TIME: 9:00 A.M.
PLACE: BOARD ROOM
KALANIMOKU BUILDING, ROOM 132
1151 PUNCHBOWL STREET
HONOLULU, HAWAII

ROLL CALL Chairman William Paty called the meeting of the Board of Land and Natural Resources to order at 9:05 a.m. The following were in attendance:

MEMBERS: Mr. John Arisumi
Mr. Herbert Apaka
Mr. Christopher Yuen
Ms. Sharon Himeno
Mr. T.C. Yim
Mr. William Paty

STAFF: Mr. Michael Buck
Mr. Gordon Akita
Mr. Roger Evans
Mr. W. Mason Young
Mr. Ralston Nagata
Ms. Dorothy Chun

OTHERS: Ms. Linnell Nishioka, Deputy Attorney General
Mr. Peter Garcia, Department of Transportation
Mr. Mitsuo Shito (Item H-4)
Mr. Ron Agor (Item H-2)
Mr. Brian Takeda (Item H-5)
Mr. David Penn (Item H-5)
Mr. Ken Sakai (Item H-6)
Mr. Ron Grant (Item H-1)
Mr. Zoltan Rudolics (Item H-1)
Mr. Michael W. Perry (Item H-7)
Mr. Michael Park (Item H-7)
Ms. Nancy Convard (Item H-7)

Items on the agenda were considered in the following order to accommodate those applicants and interested parties at the meeting.

ITEM C-1 APPLICATION FOR FISCAL YEAR 1992 RURAL COMMUNITY FIRE PROTECTION FUNDS (KAUAI/MAUI/HAWAII COUNTIES AND CITY AND COUNTY OF HONOLULU)

ACTION Unanimously approved as submitted. (Himeno/Yuen)

ITEM D-1 APPROVAL TO AWARD CONTRACT FOR JOB NO. 95-KP-D1, RECONSTRUCTION OF HANAIEI PIER, PHASE II, KAUAI

ACTION Unanimously approved as submitted. (Apaka/Arisumi)

ITEM D-2 PERMISSION TO HIRE CONSULTANT FOR JOB NO. 85-OP-D2, KAHANA VALLEY STATE PARK, PARK IMPROVEMENTS, OAHU

Mr. Akita informed the Board that staff was recommending approval to hire a consultant for the Kahana Valley State Park improvements.

Responding to Mr. Arisumi, Mr. Akita said the estimated amount for the consultant is \$10,000.

ACTION Unanimously approved as submitted. (Arisumi/Himeno)

ITEM H-4 CDUA FOR SINGLE FAMILY RESIDENCE AND RELATED PROPERTY IMPROVEMENTS, KUMUELI, MOLOKAI, TAX MAP KEY 5-6-10:24; APPLICANTS: MITSUO AND GENEVIEVE SHITO

Mr. Evans made the presentation of Item H-4 to the Board and he also pointed out to the Board that this is the first applicant coming to the Board since the new ruling was made regarding non-conforming use. Staff did much research of old documents and feels that the applicant meets the criteria of kuleana use. Mr. Evans then passed out to the Board members a copy of several old documents (written in Hawaiian).

Mr. Yuen asked why was this property in the Limited Subzone.

Mr. Evans said that their understanding is that this property was placed there back in 1978 relative to flood problems but he did not know the history of floods in the area.

Mr. Arisumi's question was, "Being that this is located in the flood zone, what happens then."

Mr. Evans responded that if this were not to qualify then staff would recommend denial. Because it qualifies under non-conforming, they feel they have to allow the house. One of the conditions is that the State is going to be held harmless.

The applicant Mr. Mitsuo Shito said he was born and raised on Molokai and understands that with the approval that the State will be held harmless should the residence be affected by floods or tidal wave.

ACTION Unanimously approved as submitted. (Arisumi/Himeno)

ITEM H-2 CDUA FOR SINGLE FAMILY RESIDENTIAL USE AT HAENA, KAUAI, HAWAII, TAX MAP KEY: 5-9-03:29 (LOT 148); APPLICANTS: HOLBROOK W. AND NANCY S. GOODALE; AGENT: RON AGOR, AGOR/LATHAM ARCHITECTURE

Along with staff's recommendation for approval basically on a Haena Hui lot, Mr. Evans said that staff would also like to ask for the Board's consideration in a modification to their approval relative to Section B. APPLICATION (which he passed out). He pointed out that there is also a violation. Staff would like to suggest that the application be handled in two parts.

Relative to the Violation, they feel there are four separate violations. Staff is recommending the standard \$500.00 per violation for a total of \$2,000.00.

Staff is asking that the Board consider approval of the basic application subject to the conditions with this one modification on Section B. 2. That the applicant comply with Part A, VIOLATION. Failure to comply with this condition will render this Conservation District Use Permit null and void.

Mr. Apaka asked if there was a house on the property previously because in the submittal it notes that Mrs. Goodale indicated that the family lived there for over 30 years.

Mr. Arisumi asked why the two rock walls were separated in the violation.

Mr. Evans said when the staff first looked at it, there were numerous violations in this case and when they went through with the analysis on this case, they found that things had occurred on the property but some things had occurred before the Conservation Law went into effect and they felt although these things had occurred, they had no basis for the fines. As a result, there were no violations as far as that goes. They then took a look at what had occurred on the Conservation lands after the law took effect. They found that the first things that transpired on the property transpired in 1970, the driveway that was built in 1970, the clearing for the driveway about 1970, the rock walls that were built in 1970, so they narrowed it down from the initial reports that came in from the departmental staff. These four aspects that were found were built around 1970 and that is the reason for the violation. The rock walls were separated and that is the reason for two rock walls.

Mr. Yim asked, "Normally property in the Limited Subzone, staff will recommend denial. In this particular case, there's a special court order back in 1967 for this particular parcel in a special situation is that why you're recommending approval?"

Mr. Evans said that was correct. The actual court case started around 1964 and the State of Hawaii, Department of Attorney General was a party to the case. That's why this is a special situation. It's the only one they're aware of in the State.

Mr. Yuen asked if the Board approved this, how much grading, cutting and filling is allowed and is it spelled out in the application.

Mr. Evans said that it was not, it would be a second part of the application. What is before the Board this morning really is the land use, to allow or disallow a single family residence.

Mr. Yuen expressed concern where it mentions eradicate the rodents prior to clearing the site. He said that he did not want people to get the idea that the Board approved the clearing of the whole site.

Mr. Evans said that they could add a wording in the condition, "prior to any clearing of the site" they would need to check with DLNR.

Mr. Ron Agor, Agent for the applicant responded to inquiries of the Board. He

said that there were no residents on this lot. There is a lot adjacent to it that is owned by Mrs. Goodale's family and she spent some time there. While living there they did some work on this particular property.

Mr. Apaka asked if the driveway in the photo serves the other residence.

Mr. Agor confirmed that they built the driveway in violation. He said that he believed at one time that the owners had intended to build on the property and they went ahead and built the driveway to have easy access if they were to start building.

Responding to Mr. Apaka, Mr. Agor said that he had read all the conditions and had discussed it with the applicants and they are well aware of the violations and the amount of the fine involved. He said that his clients had no objections.

ACTION Mr. Apaka moved that staff's recommendation be approved as amended to take care of the clearing. Seconded by Mr. Arisumi, motion carried unanimously.

ITEM H-5 CDUA FOR A DRAINAGE OUTLET EXPANSION AT KUKUIULA BAY, KAUAI (SHORELINE OF KUKUIULA BAY, KOLOA, KAUAI); APPLICANT: A & B PROPERTIES, INC.

Ms. Himeno asked to be excused because of a conflict, Chairperson so noted.

Mr. Evans referred to a letter from the Native Hawaiian Advisory Council of 10/25/91 which is testimony to the Board. They indicate that the Division of Water Resource Management has no comments regarding the activity but they're reviewing the balance of the overall project proposal. They suggested that it appears some of the proposed construction may occur within a stream channel and as such there may be a permit required. They believe the relationships between the various board and departmental permitting functions are what they say is not clearly explicated. In this case they do concur with the comment of the Historic Preservation Division.

Having read the testimony, staff feels their concerns can be accommodated and are accommodated to their recommendation basically in that the applicant would be required to get any other permits that they not have at this time from other agencies.

Mr. Evans referred to Condition No. 5 on page 5 of this submittal, "If there are further permitting requirements by the Federal, State, County or within this department or the Water Commission, we feel comfortable that Condition 5 would take care of that concern.

Responding to Mr. Yuen, Mr. Evans said that there was no public hearing held as this was not commercial or they didn't look at it as commercial.

Chairperson Paty pointed out that in the Analysis of the submittal it referred to a Public Hearing held on this proposal and the applicant submitted certified minutes of that meeting.

Mr. Evans clarified and stood corrected that this was a commercial project. A

Public Hearing would be required to allow the public to testify. Staff feels that if a Public Hearing has been held and applicant submits a copy of the minutes (transcript) of the hearing, that negates the Land Board having to go out and have a separate Public Hearing.

Mr. Yuen asked if the comments of the Public Hearing were available to the Board members.

Mr. Evans asked if this could be deferred and he would make the transcripts of the Public Hearing available to the Board.

Mr. Yuen felt if the Board were going to use a Public Hearing that was held in front of another body, he felt they should be able to read the comments of the public.

Chairperson Paty suggested that the applicant and others present be allowed to testify today since they are here.

Mr. Brian Takeda of R. M. Towill said that they were representing the properties. He said a Public Hearing was held between April 18, 1990 and July 12, 1990. They were able to read a copy of the transcripts and they had submitted them to the DLNR for their review and use. Based on the lack of any adverse comments they were granted a waiver from another hearing.

Mr. Apaka commented that this CDUA was for an outlet but was there anything else tied to the outlet.

Mr. Takeda explained that this was part of a drainage system master plan to help improve the existing drainage conditions of the Kukuila Coastline. He then cited sections of their application which explained what their proposal would do. Their proposal is to improve the drainage pattern by providing for a system of drainage swales and culverts. They hope to reduce the amount of discharge by some 34,000 cubic yards per year so that the sediments entering the bay would only be about 4,400 cubic yards. They believe that it would constitute a significant and major improvement in the water quality along the coastline. Mr. Takeda continued to answer questions of the Board regarding the culverts and other areas.

Mr. Apaka asked if the Board approves this today will they need to come back to the Board later.

Mr. Evans responded that they would not need to come back to the Board because there is a master plan. In terms of the public, they were involved in the Environmental Impact Statement in which they talked not only of the drainage system but of the whole project. He informed Mr. Apaka that this application had nothing to do with the marina.

Mr. Yuen voiced concern where Historic Preservation says that the mitigation work has yet to be satisfactorily completed as a requirement of the SMA and asked what was the problem there.

Mr. Takeda said that they were working with Nancy McMann, Historic Preservation Office and also with the County of Kauai to satisfy their

requirements.

Mr. David Penn of the Native Hawaiian Advisory Council said that they were a non-profit organization to assist Hawaiians in becoming aware of legal rights and operations of the legal system. Their funding comes from Administration for Native Americans under the U. S. Department of Health and Welfare. He called the Board's attention to testimony they submitted on Items E-1 and particularly E-2 and F-2 which is coming up later. With regard to this item he stressed that their purpose is not to support or to oppose the project but merely to gather information and to put forward their concerns to the Board. Basically regarding stream channel alterations, they wanted to know whether Division of Water Resource Management had or had not determined that this was stream channel alteration and they were very aware of the condition that has already been placed in the staff recommendation of the CDUA. They concur with the Historic Preservation Office's recommendation.

Mr. Evans commented that staff could work out the conditions whereby before approving the construction plans, before they start work, they would have to satisfy the concerns of the Historic Preservation Office.

Mr. Penn concurred.

Mr. Yuen asked if this culvert were necessary for the master planned community to go forward, the drainage portion.

Mr. Takeda responded affirmatively saying that it was considered part of the larger drainage master plan. The area that's going to be put into housing is currently fallowed land and considered waste or pasture land.

Mr. Yuen asked that when you talked about the decrease in sedimentation, is it taking into account that land that has been cleared for urban type use. Mr. Takeda replied, "Yes."

Mr. Yuen addressed Mr. Evans regarding the Analysis which says, "The drainage system may have a beneficial effect on the bay by helping to reduce sedimentation into the bay although this is an unsubstantiated claim." He asked him to elaborate on that.

Mr. Evans explained that it was a representation made that they cannot find reason to disagree with but from the analysis standpoint, they cannot substantiate it. They're not in a position to question the veracity of the statement, particularly after the number of reviews its been through.

Mr. Takeda said that the figures that were derived were based on the U. S. Soil Conservation Service prompting them to take a look at what kind of drainage improvements would lead to. During storm runoff conditions, these areas overflow, so these outlets lead to the ocean. The current conditions indicate that as the water goes towards the ocean then it picks up a lot of sediments and because this area had been in previous fallowed use, a lot of the sediment would continue historically to go toward the ocean. This is something new in that the drainage flows would be intercepted by a series of drains and swales as well as culverts and capturing of all these sediments going to be the primary means of reducing the amount of sedimentation going out to the ocean. They

will have a series of settling ponds. They plan to have those grassed over areas to capture water and to retain it.

Mr. Yuen asked what other kinds of permits did he need.

Mr. Takeda said the permits were as follows:

1. They are applying for a Department of the Army, Section 404 Permit as part of the culvert construction. They have to show how they plan to control erosion before, during and after construction.
2. Coastal Zone Management (CZM) Permits to insure that there are no adverse environmental or other ecological impacts.
3. Section 401, Department of Health, Water Quality Certification will require them to do a series of water quality monitoring, not only whether or not they will be decreasing the turbidity of sediments going on into the bay or also whether or not they will be having impact as far as potential discharge of herbicides.
4. They have just received approval from the County of Kauai on a shoreline setback plans related to this culvert, it was received on September 12.
5. There is a (NPDES) Non-Point Discharge Elimination System Permit which they are applying for through the Department of Health.

DEFERMENT

Mr. Arisumi moved to defer this item to allow the Board members to review the transcripts of the Public Hearing. Seconded by Mr. Yuen, motion carried.

**CDUA FOR THE CONSTRUCTION OF KEALAKEHE SEWAGE FORCE
MAIN, KEAHUOLU, NORTH KONA, HAWAII, TAX MAP KEY: 7-4-8:02;
APPLICANT: DEPARTMENT OF PUBLIC WORKS, COUNTY OF HAWAII;
AGENT: R.M. TOWILL CORPORATION**

ITEM H-6

After presentation of Item H-6, Mr. Evans recommended approval by the Board.

Mr. Ken Sakai of R. M. Towill Corporation said he was representing the applicant, the County of Hawaii, the Department of Public Works. They have reviewed the conditions and accept the conditions as set forth by staff.

They have already implemented some action should the Board approve this application. They have asked the contractor if he plans to use explosives. At the present time he is not sure if he will be using explosives because of the safety conditions and it would be very costly. He may use the conventional excavation techniques. Regarding the condition on archaeological sites, they have completed their service stake out of the alignment, a 100 foot wide strip and they have retained the firm of Cultural Service Hawaii to perform the studies and investigations for them. They see no problems with the other conditions.

ACTION Unanimously approved as submitted. (Yuen/Arisumi)

CONSERVATION DISTRICT USE APPLICATION (CDUA) FOR PROPERTY CONSOLIDATION AND RESUBDIVISION, INCLUDING AN AFTER-THE-FACT APPLICATION FOR THE DESTRUCTION OF A COCONUT TREE, MANOA, OAHU, TAX MAP KEYS: 2-9-33: 24 AND 2-9-34:15; APPLICANTS: MR. AND MRS. GREGORY REESER & KAMEHAMEHA SCHOOLS/BERNICE PAUAHI BISHOP ESTATE; AGENT: MR. DEAN T. YAMAMOTO, DWYER, IMANAKA AND SCHRAFF

ITEM H-1

Mr. Evans said that the issue before the Board this morning is a Conservation District Land Use, and the consolidation and re-subdivision of the property. They have tried to make their analysis germane to the issue.

Mr. Ron Grant said that he was representing the Reesers, one of the parties who owns the property on which the house was built. He said that Mr. Reeser expressed his regret that he could not be here. Mr. Reeser has been forced to sell the property and is now living on the mainland.

He said that they received a copy of staff's recommendation a week ago. He said the good news was that staff has recommended to the Board that, 'yes' this be approved.

Mr. Grant then used drawings to point out the problem areas. He said the problem area is the long narrow piece of the house on the top. He said that the house was built very close to the border of the lot. Mr. Reeser has had to contact Bishop Estate and request permission to buy from them the little area so that he would not be encroaching.

He said the good news in the recommendation to the Board is 'yes' we'll get to re-draw the line, we'll get you the permit issued and Mr. Reeser can buy the property from Bishop Estate and he won't have an encroachment problem and won't have a setback problem with the City. The bad news is that the staff is recommending Condition No. 4 as a condition of approval that both Mr. Reeser and the Bishop Estate abdicate their non-conforming use status, for instance should the house burn down, he would not be able to rebuild and if Bishop Estate wanted to use that as residential land, they could not, they lose their non-conforming residential use status.

Mr. Grant said that Mr. Reeser had to sell his house to build this one and should he want to sell this house, he would not be able to get full value of the house if the buyers had knowledge of the condition.

He said they have also talked to Mr. David Hamada at Bishop Estate on this project. If this condition is imposed, then Bishop Estate would lose non-conforming use of this parcel and is not going along with the abdication. He said he was representing both the Reesers and the Bishop Estate in making this application. Bishop Estate is going along with the application to help the Reesers but if it's going to have such a negative impact they can't go along with it.

Mr. Grant cited Section 183 (b) and gave examples while using photos of the property to try and prove his point that they are not trying to change the use of the land. Should Bishop Estate withdraw from the application then they will not be able to buy that parcel from the Bishop Estate. In that case, the Reesers will

have to tear down a portion or all of the house to move it because it does encroach and is within the setback area. If they have to tear it down they have to come back to the Board to do that and that will impact on the area. He said that he thinks the statute does not require and maybe even prohibits the condition that has been suggested, but in any event he feels that this Board has the discretion not to impose that condition and they would ask that it not.

He then read a statement from Mr. Reeser addressed to the Members of the Board in which he apologized for his absence at this critical meeting. He said that he was not asking the Board to feel sorry for him or to grant him any special favors for himself or for his family as he is fully responsible for the mess he finds himself in. However, a little compassion and little understanding on your part would not seem too much to ask. In 1987 when he purchased his home at 3101 Huelani Place he had no plans to ever be in a position where he had to sell his home in order to avoid bankruptcy. It has been suggested to the Board that you force me to give up my rights of non-conforming use as a condition of granting me the means to remove the setback problems from my property. He did not know that his house was in violation of setback rules since 1961 when it was originally built. He did not know the adjacent property line was so close to his house nor did he try to build his dream house knowing these things. He concluded by saying that these are his problems and his responsibility to solve them. He only asked that you do not take away the only means that he had to do so.

Mr. Grant said that he had nothing to add. Regarding disputes over the driveway, he said he could report on status of their efforts to resolve those problems. He would like to agree with Mr. Evans that that is not a matter to be appropriately decided by this Board but would defer to their choices.

Mr. Yim asked Mr. Evans to react to Condition 4.

Mr. Evans said that it was disturbing, not because of Mr. Reeser, but disturbing because of the counseling he's been getting. Firstly, no one, least of all staff has indicated to counsel or counsel's client that he's being forced to sell his property. No one has ever suggested that he's being forced to give up his "non-conforming" right. Simple false. If this client, this applicant wants to keep his non-conforming use, very easily done, withdraw the application and move the house. Any time you have a parcel of land that once a statute takes effect, you subdivide that parcel or you consolidate that parcel with another parcel and then subdivide it, or even consolidate it with another parcel and leave it consolidated, you have changed the basic parcel from what it was when the law came into effect. Any change in that parcel loses its non-conforming status. It should be made clear we don't want to force this person to do anything. It's the last thing we want to do is force him to sell his property. The last thing we want to do is force him to give up his non-conforming use. If that's what he wants to do, then we suggest this application be withdrawn and the house moved so it sits on only that parcel of property.

Mr. Yim addressing Mr. Evans asked, "Your recommendation is based on law that they lose non-conforming status. From what I heard from counsel he seems to have a contradiction from that interpretation. Are you reading from the same chapter?"

Mr. Evans responded, "I'm not only reading from the same chapter, I'm reading from numerous A. G. written opinions that we've had in the past. We're reading from the same statute, he's reading it a lot different from me."

Ms. Himeno asked, "When you say you have those A. G.'s opinions the way this department has handled this in the past, etc. and we have a situation, it's difficult to find one that's identical to the one today, but similar, to where the Department is taking the position, you do this you lose your non-conforming status?"

Mr. Evans replied, "Fazendin. Consistently for ten years, you have two parcels of land, you consolidate it, you lose the non-conforming. You have one parcel of land, you subdivide it, you lose non-conforming." Mr. Evans said he would use his argument whereby Bishop Estate has 10,000 acres in one parcel. What is occurring on those 10,000 acres today is non-conforming use. It's in the forest reserve. Now, within that forest reserve, 10,000 acres, they come in and subdivide it into one acre lots, 10,000 one-acre lots and because they do that, they keep their non-conforming use, his argument, they keep it. Now that they've kept it, we come in for one house on each of these lots under the non-conforming use. One of the major arguments used 10 years ago, why is this non-conforming use lost?

Ms. Himeno asked, "What about his argument, that the piece of land, the parcel of land we're actually talking about, that one piece or sliver, that piece has not changed? You don't find that persuasive?"

Mr. Evans replied, "If it has not changed, why are we here. The only time we come before this Board in a CDUA, the statutes clear, new, different or change of use. If one of those three things didn't happen, we wouldn't even have this application before us. Stated clearly in the statutes, we do have a change and the change here is the change in the legal boundaries of two lots."

Mr. Yuen commented, "This probably relates to what we've talked about Class I and Class II non-conforming situations. A lot of these concerns have to do with whether he would get to rebuild the house if it burned down, which is not the major concern of the purchaser. He could lose his Class II non-conforming status and still be, I don't think we take the position that if somebody's house burns down that was non-conforming under Class I, that we would not let the person rebuild. What I mean by this is, somebody has a 50 acre lot with the house on that's non-conforming. That's Class I, non-conforming. If that person always gets to continue an existing use, that house burns down, say they's in a limited subzone, he comes to the Board, I don't know if we've acted on a situation like that. (Mr. Evans injected he took a big jump in logic.) I kind of doubt that the board would take the position if that was not a continuation of use to rebuild a house that had been destroyed by natural forces on a 50+ acre, Class I of a non-conforming lot situation. So if he changes his boundary, I think he can still rebuild on your lot if you have a disaster."

Ms. Himeno said that his bigger problem is Bishop Estate.

Mr. Evans also expressed that Bishop Estate would be the bigger problem. Where the jump in logic occurred was that, if you take away my non-conforming use and my house burns down, I cannot rebuild. That's not what's being said

here. If you take away my non-conforming use, my house burns down, I cannot rebuild under non-conforming, now I have to come in under a conditional use like a house in a general subzone or the resource subzone. Then I come in and ask under a conditional use to rebuild and the Board grants it.

**EXECUTIVE
SESSION**

Mr. Yuen moved for an executive session to consult with counsel on this.

Mr. Grant said he could respond to some of Mr. Evans' comments. He also said that he had no problem with the Board going into Executive Session and he would be glad to let the Board use the copy of the Statute, the HRS, that he brought.

Ms. Himeno addressed the Chairperson that she would second the motion but that perhaps they could allow Mr. Grant respond with his legal arguments before going into an executive session as it might be helpful.

Mr. Grant said he felt it important that he read a portion of the statute to the Board from Section 183-41, entitled Forest and Water Reserve Zones, Subsection B:

"Neither this part nor any regulation of this part shall prohibit the continuance of the lawful use of any building, premises or land for any trade industrial, residential or other purpose for which the building premises or land is used on July 1, 1957 or at the time any regulation is adopted under the authority of this part that takes it back."

He said that he believed that is what Mr. Yuen was referring to as Class I non-conforming use. So if you have a parcel of land and it is being used for a purpose, residential, industrial, trade or other purpose, the statute cannot prohibit a continuance of that use. The regulation cannot prohibit the continuance of that use. The situation we have here is, the property that was being used as residential on both sides of the line, if we are continuing that lawful use, the residential use, it doesn't really matter if we redraw the boundaries because the statute talks, not in terms of line drawing, it talks in terms of use, what you are using this property for. Both sides of the line are still being used exactly the same way and under the statute, you cannot prohibit the continuance of that lawful use. You cannot take away the residential use of that property. He felt it's a red herring to throw in the encroachment. It makes a little piece of the roof unlawful and that's totally different than what this statute is talking about. Statute talks general use. It doesn't say, is this house encroaching, is that coconut tree improper. It talks in terms of the entire nature of the use and nobody is changing it. But you would if you impose this condition, you would if you forced them to abdicate non-conforming use rights which they now have. That is what he understands the statute to say. He mentioned that he has not seen any written Attorney General's Opinion. He said that he was told staff had consulted with the staff of the Attorney General's Office and they had received an oral opinion but that was confidential communication between counsel and client and they were not at liberty to share that.

The Chairperson called for any additional questions. The Board then

proceeded to go into an Executive Session.

10:32 a.m.-11:05 a.m. Executive Session

Chairperson Paty called the regular Land Board Meeting back to order.

Ms. Himeno addressed the Chair saying that during the Executive Session it came to light that there were a number of legal issues as well as factual issues that she would like to have more work-up done before the Board renders a decision and understands there is some time to defer this matter.

DEFERRED Ms. Himeno moved to defer this matter to the next meeting in Maui. Motion was seconded by Mr. Arisumi and motion carried.

Mr. Grant asked if the Board or was staff going to do more research. Ms. Himeno informed him that Mr. Evans' staff would be doing additional research.

Mr. Yuen said that they had a factual question whether either parcel was in the Forest Reserve in 1957 and which would place it in Class II, non-conforming. If it weren't, then neither parcel will qualify as Class II.

Mr. Zoltan Rudolics addressed the Board saying that he used to own both parcels prior to selling it to Mr. Reeser and Mrs. Nakagawa. He felt there should be some testimony that needs to be given on this matter and was wondering how he could do that if the next meeting were going to be held on Maui.

The Chairperson informed him the opportunity would be for him to provide input to Mr. Evans' office and see that it becomes a matter of record.

CDUA FOR AN AFTER-THE-FACT REVETMENT AT KAILUA, MOKAPU, OAHU, TAX MAP KEY: SEAWARD OF 4-4-39:34; APPLICANT: MICHAEL PERRY

ITEM H-7

Mr. Evans explained that the original application referred to a seawall that may not really be the case. He then passed out photos to the Board explaining that this is a matter where the property owner may have ostensibly made some improvements that would protect that property owner's private property. Unfortunately the improvements were made on State owned land. Subsequently, that property was sold to the current owner and the specific improvements that occurred on State land were in the form of a revetment that would tend to serve to stabilize the private property. Their specific improvements consisted of a revetment. It varies in terms of depths on the State owned property. There's been a number of expressions, 'public concern', about the use of public land to protect someone's private property, and this has been particularly exacerbated in the form of seawalls that have occurred statewide.

Staff's recommendation is in two parts. One a Conservation District violation, second an encroachment under our Land Management Chapter. As a result of that aspect, we are recommending a fine that you see before you. We also analyzed the application and on that we are recommending approval subject to the conditions you see.

We are asking for \$1500.00 in fines, basically in terms of Conservation, the seawall construction, the revetment, which also incorporated the backfill, secondarily \$500 for the encroachment. We'd like with your permission to modify our application to read that which I just passed out this morning, "that the Board approve the after-the-fact revetment located at Mokapu subject to the following: and No. 2 would read, "That the applicant comply with Part A, VIOLATION. Failure to comply with this condition will then render this Conservation District Use Permit null and void." He wanted to make it clear to the Board that under Condition No. 12, we do not see this as precedence setting. We want to specifically delineate, should you approve this, it is not to be considered precedence setting by either the staff, the Land Board or the general public.

Ms. Himeno questioned Mr. Evans that it says the revetment encroaches about 230 square feet into the Conservation District, now how many feet from mauka to makai does it extend?

Mr. Evans referring to the photograph, said it might give them a better idea of the revetment and how far out it goes. It's not a straight area but a jagged or meandering line. The first point is 7.5 feet out and then coming in it's 3 feet.

Staff's analysis was then discussed that normally the Land Board frowns on private landowners using State land to protect their property, that in this case there are unique circumstances that this does not really impede access by the public to go over the revetment and use those extra 7 feet or 3 feet. There's nothing to prevent the public from doing that. We don't know what the effect on the environment would be if they ordered the revetment to be removed. The effect on the adjacent properties and the unique characteristics.

Mr. Evans said yes, the Board does have a policy and the policy Statewide indicates that a private property owner should be allowed to protect his or her private property. However, that private property owner should use their own private property to do so. Now that's the general policy. Here we have a case that's a little unique, uniqueness in effect that if this one were taken out, it's possible that there's no beach there and if you have no beach there, you'll have rocks. If you have rocks, you'll probably have less public use of the area than you have now. We have concerns, if there were environmental damage to be done, that environmental damage is already done, the thing is already there. Whether it was there properly or improperly, violation or not it is done. To take it out may cause further environmental damage. There is nearby to this property, public access from the road down to the waters edge. People do come down there and they walk on the beach and they do use the beach. There is no claim here at all that this is a private beach for private use. It is infact, used by the public. So, staff doesn't see a public gain by forcing this landowner to rip this out. We're not talking about a seawall, we're talking about a revetment. There is a uniqueness here, that is not carried forward in other cases.

Ms. Himeno said she unfortunately was not able to go on the site inspection, but the pictures presented are quite good and show that the revetment may well be a misnomer. She asked Mr. Evans if they have looked at the possibility of getting an easement.

should the Board approve this, there would be a necessary second step. The fact that it is on State land and some form of land disposition would have to be granted by the Division of Land Management. A very preliminary indication, very tentative if the Board approves this, then he may consider an easement. The second thing that is very important and he wanted to make it very clear to the applicant, should the Board approve this, it goes through the process at OCEA, it goes through the process in Land Management, liability will not be with the State and the State will be held harmless.

Mr. Yuen pointing to the photo said that it showed the whole thing, the revetment covered with sand and was that a typical condition.

Mr. Evans said that in that area there may be more sand on a general basis.

Mr. Yuen referring to the 230 square feet, a portion of the revetment that is covered by sand, do we have a qualified engineer who reviews these seawalls for us and gives us an opinion on what the effect of accretion or the erosion of sand?

Mr. Evans said that he would have to defer to our Division of Water Resource Management. Staff sends the application out to the various divisions for their review and they have all the engineers in their division. In the past they have expressed concerns relative to their functions where the County has come in and wanted, for example, create more beach at Kualoa.

Mr. Arisumi asked, "What happens if Mr. Perry wants to take that out and move it back to his property?"

Mr. Evans said that its hard to say to an individual, "Don't take something out." But in this case, because of the uniqueness, he said you may actually do more environmental damage.

Mr. Arisumi said that was the concern he had. If Mr. Perry decides to take it out and put it on his property, what is our position?

Mr. Evans replied that he would have to be consistent and is saying to the Board one of the unique aspects of this is, if there was environmental damage, it's already done, if this individual takes it out there may be more. But if the applicant wants to take it out, he has to be consistent and say, may be it should not be taken out.

Mr. Arisumi said his concern is the easement they're talking about, we allow him and now he has to purchase the easement. If he can't afford it then he may want to take it out and it may cause more damage.

Mr. Michael Perry said he understood the Board's concern and he had also had that concern whether he should leave it the way it is or remove it. All the environmental assessments, the coastal engineers, the informal talks with the federal people and everyone else have confirmed the findings of the staff and he supports this.

Mr. Michael Park of the University of Hawaii, Department of Urban Regional Planning said that he has been working on shoreline management issues, in

Planning said that he has been working on shoreline management issues, in particular shoreline erosion for about two years and he would first like to confirm Mr. Yuen's and Ms. Himeno's comments regarding the lack of substantive review and critique of the environmental assessments of these coastal engineering structures that are proposed to the Board numerous times. The OCEA has no qualified high staffers to review the engineering assessments that are presented to them regarding these literal processes and potential impacts of coastal engineering structures and therefore their analysis of the impacts to these structures tend to be very superficial and usually incorrect. He said that he understands staffing problems and doesn't necessarily hold them at fault for this.

He elaborated on a possible civil engineer who will through normative or casual observations claim without substantial evidence that there are certain erosion patterns in the area. He also questioned the basis for the original seawall. He said that he couldn't necessary disagree with the staff's comments regarding environmental damage by removal of the wall but he thinks that one of the biggest problems dealing with shoreline erosion in the state is that you have a number of property owners who completely ignore the law and their public duty and just out of personal agrodisement, wish to protect their private property no matter what the effects might be on adjacent properties or on the beach front. He said he doesn't believe it's the Boards responsibility or infact he thinks it's a shirking of their responsibility if they allow such encroachment on public land to continue as it has over the past. We're going to see many more of these on the outer islands in particular, Kauai in particular as it becomes developed on the ocean front. The continuing impact of these seawalls will lead to more conflict not to mention environmental degradation of the beach resources.

Ms. Himeno asked Mr. Park if he had a specific concern to this particular property in this particular issue that is before the Board.

Mr. Park said that he disagrees that they have demonstrated that there will be more environmental damage by removing the existing wall by leaving it there. He said he would contend that the reason the sand has built up on the revetment is because of the location of the sewage, or of the storm drain on the adjacent property. It acts as a groin and collects sand. Whether the wall was there or not, that beach would be bigger than it normally would if long shore movement would be allowed. He said that Mr. Evans has presented a case that vertical seawalls are more damaging than horizontal seawalls and that's generally true cause you have a much greater reflection of wave energy when you have a vertical seawall when you do a gentler sloping wall. But no mattter what the slope of the wall, if you have large faced boulders which are able to reflect wave energy, they would undercut the sand that faces the boulders. We've seen pictures that show the wall completely covered at the present time but that doesn't necessarily mean that that's always going to be the condition. If, in the event wind patterns change, which they have over long periods of time, and predominant drift of the sand is slightly different, that wall might indeed act to scour sand from the beach in front of it. And in that event, he believed that it would not be unreasonable for the Board to require a condition that the wall be removed if future negative effects be demonstrated.

Ms. Himeno said that she thought there was a condition to that effect.

in the future, the revetment shall be removed at the applicant's expense.

Mr. Park said that would be satisfactory.

Mr. Yuen asked Mr. Park if he had a review protocol that should be used for reviewing revetments and seawalls.

Mr. Park responded that he was in the process of developing one for the island of Kauai at present. It should be finished in a couple of months. He said he would be happy to share a copy with the Board and staff of DLNR.

Mr. Yuen said that because none of the Board members could do a technical review of a scientific question, that some qualified engineer in the field has taken a serious look at the issue beyond getting the application. If it can't be done by the DLNR staff then the applicant should be required to do it.

Mr. Evans said he would discuss this with the Chairperson in terms of the department, departmental expertise and staffing.

Mr. Park added a caveat to Mr. Yuen's suggestion, he said that often the environmental and engineering assessments are performed by the same firm that's been contracted to do the work, the design work. He believes that there would be an inherent conflict of interest there despite professional ethics. It's really very dangerous to have the same people that are designing a shoreline protection project, being the ones to analyze the impacts of it and he believes an independent assessment is very vital.

Mr. Yuen said he hears what he is saying and thinks that this is a problem of Environmental Impact Statements in general and the problem is the government agencies, for them to duplicate, maybe not necessarily on an application of this scope, but on a lot of projects, there's a lot of work that has to be done on the EIS level and that's typically borne by the applicant and it costs a lot of money and the best that can be done on the government level is often just to spot check it. He would hope that we would have people to do that who are qualified and see that it looks like its been done properly.

Mr. Park thanked the Board for the opportunity to comment.

MOTION Ms. Himeno moved to approve Item H-7 as modified by staff. Mr. Yuen said he would like to make an amendment to Condition No. 11 which talks about public health, safety and welfare if it is determined that it is causing adverse erosion to the beach in the future to be more specific. If it is determined that it is causing significant beach erosion in the future, we can also ask for removal. This is the beach immediately fronting the property.

DISCUSSION Mr. Yuen said that when he read Condition No. 11, it sounded like it could be interpreted to mean only if the revetment itself became a public hazard to be removed. He wanted to make it clear that if it adversely affects the beach, the Board can require that it be removed.

Regarding the violation, Mr. Arisumi questioned the type of backfill as the photo shows only sand.

Mr. Perry addressed the Chair, saying that the person that did the environmental assessment was present.

Ms. Nancy Convard asked the Board to look at Exhibit A-5 in the staff's report. She said that it is obviously all covered with sand and rock. She was involved in the construction. The previous report showed that it's a natural sand bottom, basalt stones, with the hand-placed stones on top. It's just a natural built in back and the backfill is essentially sand and stone.

AMENDED MOTION Mr. Arisumi also asked to amend the motion by reducing the fine to \$1,000.00, total.

ACTION Chairperson called for the question and motion as amended was unanimously carried.

ITEM E-1 REQUEST TO AMEND APPROVAL TO PLAN AND CONDUCT 100TH ANNIVERSARY OBSERVANCE OF THE OVERTHROW OF THE HAWAIIAN MONARCHY

ACTION Unanimously approved as submitted. (Himeno/Arisumi)

ITEM F-1 DOCUMENTS FOR BOARD CONSIDERATION

Item F-1-a Assignment of Sublease, Hawaii Farmers Cooperative Association, Assignor, to Armstrong Produce, Ltd., A Hawaii Corporation, Assignee, Kaakaukui, Honolulu, Oahu, TMK 2-1-60:9

Item F-1-b Consent to Assignment of General Lease No. S-4644, Tokai Rayon Co., Ltd., A Japan Corporation, Assignor, To Pearl Kai Corporation, A Hawaii Corporation, Assignee, and Consent to Mortgage, Kalauao, Ewa, Oahu

Mr. Young passed out information to clarify the lease that the \$24 million is for all three properties and they are requesting that the consent to mortgage is only reflected to \$12.2 million which is attributed to the lease and further, that the State of Hawaii be indemnified and held harmless on any liability with respect to the two other properties which will be incorporated into the mortgage loan. If the Board so agrees, that staff recommends that the Board not only assign the lease and consent to the mortgage as amended.

ACTION Ms. Himeno moved to approve Item F-1-a as submitted and Item F-1-b as amended by staff. Seconded by Mr. Arisumi, motion carried unanimously.

ITEM F-2 REQUEST TO WITHDRAW DITCH EASEMENTS A AND H FROM GENERAL LEASE NO. S-3827 AND SUBSEQUENT DELETION OF DITCH EASEMENTS A AND H AS AN ENCUMBRANCE ON PARCELS 2, 3, 4, 12, 50, 51, 54 AND 55, TAX MAP KEY 4-6-11, KAPAHI FARM LOTS, KAPAA, KAWAIHAU (PUNA), KAUAI

After Mr. Young's presentation, Mr. Yuen referred to the written testimony submitted by the Native Hawaiian Council this morning. They felt that they didn't think it's a good idea to withdraw these easements because the State might want to use it to transport water in the future.

Mr. Young responded that as part of the process of this application, staff did send it around to the County Public Works Department as well as the Division of Water and Land and all affected State agencies that had an impact on this. All of these were originally agriculture lands which they would use waters from East Kauai and Lihue Plantation to provide water to the different agriculture lots. Subsequent to that, these lots went out of agriculture and were built into residential. The drainage system was intended for agricultural activities which was sugar. It no longer exists and the current drainage is along Kuamoo which is the roadway fronting this and the ditches are no longer being used. After receiving comments from the County Public Works, from East Kauai Water and those in the area affected by this staff had no objection to the deletion of the easement.

Discussion continued as Mr. Yuen said he was not familiar with the area and could not understand why the owner could not traverse his own property.

Mr. Young explained for some reason in the old deed it did not give him the right to traverse. It reserved in fee to the State. He then pointed out where the area in question was located and answered questions as to the size of the present lots.

ACTION Unanimously approved as submitted. (Apaka/Himeno)

** Chairperson Paty was excused from the meeting at 11:45 a.m. The remainder of the Land Board Meeting was then conducted by Vice-Chair Arisumi.

COUNTY OF KAUAI REQUESTS CONVEYANCE IN FEE FOR DRAINAGE PURPOSES, GOVERNMENT DITCH RIGHTS-OF-WAY, WAILUA HOUSELOTS, 4TH SERIES, WAILUA, KAUAI, TAX MAP KEY 4-1-14:10 AND 48

ITEM F-3

ACTION Unanimously approved as submitted. (Apaka/Himeno)

ITEM H-1 See Page 12 for Action.

ITEM H-2 See Page 4 for Action.

AMENDMENT OF CONSERVATION DISTRICT USE PERMIT MO-2416 FOR A SINGLE FAMILY RESIDENCE AT WAILAU, MOLOKAI, TAX MAP KEY 5-9-5:16; APPLICANT: SARAH SYKES

ITEM H-3

After his presentation, Mr. Evans said staff was recommending approval, but the caveat in this is that she only be allowed one structure, but no two structures.

Mr. Yuen asked if the applicant had seen the conditions. Mr. Evans said he could only say they she was sent a copy of the submittal with the conditions. Generally he would say, 'yes,' but said that the applicant spends half the year in the valley.

Vice-Chair Arisumi asked if there was an SMA to which Mr. Evans said he would have to check the files. After discussion, the Board felt the matter should be deferred to the next meeting which would be held in Maui to give the applicant the opportunity to be present.

DEFERRED Mr. Yuen moved that this item be deferred to the next meeting in Maui.
Seconded by Ms. Himeno, motion carried unanimously.

ITEM H-4 See Page 2 for Action.

ITEM H-5 See Page 7 for Action.

ITEM H-6 See Page 7 for Action.

ITEM H-7 See Page 16-17 for Motion and Action.

ITEM J-1 **PACKAGED FOODS CONCESSION, HONOLULU INTERNATIONAL AIRPORT, OAHU**

ACTION Unanimously approved as submitted. (Himeno/Apaka)

ITEM J-2 **GIFT, APPAREL AND LUGGAGE CONCESSION, HONOLULU INTERNATIONAL AIRPORT, OAHU**

ACTION Unanimously approved as submitted. (Himeno/Apaka)

ITEM J-3 **JEWELRY AND SHELLS CONCESSION, HONOLULU INTERNATIONAL AIRPORT, OAHU**

ACTION Unanimously approved as submitted. (Himeno/Apaka)

ITEM J-4 **METERED TAXICAB SERVICES CONCESSION CONTRACT, KAHULUI AIRPORT, MAUI**

ACTION Unanimously approved as submitted. (Himeno/Apaka)

ITEM J-5 **GIFT AND APPAREL CONCESSION, LIHUE AIRPORT, KAUAI**

ACTION Unanimously approved as submitted. (Apaka/Himeno)

ITEM J-6 **FLORIST CONCESSION, LIHUE AIRPORT, KAUAI**

ACTION Unanimously approved as submitted. (Apaka/Himeno)

ITEM J-7 **GIFT, PACKAGED FOODS, JEWELRY AND SUNDRIES CONCESSION, KEAHOLE AIRPORT, HAWAII**

ACTION Unanimously approved as submitted. (Yuen/Apaka)

ITEM J-8 **APPLICATION FOR ISSUANCE OF REVOCABLE PERMITS 4813, ETC., AIRPORT DIVISION**

ACTION Unanimously approved as submitted. (Yuen/Himeno)

ITEM J-9 RENEWAL OF REVOCABLE PERMITS 3270, ETC., AIRPORT DIVISION

ACTION Unanimously approved as submitted. (Yuen/Himeno)

ISSUANCE OF LEASE BY DIRECT NEGOTIATION, HARBORS DIVISION, KAUNAKAKAI SMALL BOAT HARBOR, MOLOKAI (MOLOKA'I ICE HOUSE, INC.)

ACTION Unanimously approved as submitted. (Yuen/Himeno)

ISSUANCE OF A DIRECT LEASE, HARBORS DIVISION, RADIO BAY, HILO HARBOR, HAWAII (UNITED STATES OF AMERICA, DEPARTMENT OF TRANSPORTATION (UNITED STATES COAST GUARD))

ACTION Unanimously approved as submitted. (Yuen/Yim)

ISSUANCE OF A DIRECT LEASE, HARBORS DIVISION, PIERS 7 AND 8, HONOLULU HARBOR, OAHU (UNITED STATES OF AMERICA, DEPARTMENT OF TRANSPORTATION (UNITED STATES COAST GUARD))

ACTION Unanimously approved as submitted. (Himeno/Apaka)

ISSUANCE OF A DIRECT LEASE, HARBORS DIVISION, MAALAEA SMALL BOAT HARBOR, MAUI (UNITED STATES OF AMERICA, DEPARTMENT OF TRANSPORTATION (UNITED STATES COAST GUARD))

ACTION Unanimously approved as submitted. (Yuen/Yim)

DIRECT NEGOTIATION AND ISSUANCE OF A VENDING MACHINE CONCESSION LEASE, HONOKOHAU BOAT HARBOR, KAILUA-KONA BOAT HARBOR, KEAUHOU BOAT HARBOR, HAWAII (COCA COLA BOTTLING COMPANY OF HAWAII)

ACTION Unanimously approved as submitted. (Yuen/Yim)

CONSTRUCTION RIGHT-OF-ENTRY AND LEASE OF EASEMENT, KAWAIHAE HARBOR, HAWAII (AKANA PETROLEUM, INC., CHEVRON U.S.A. INC., HAWAII ELECTRIC LIGHT COMPANY, INC., PACIFIC RESOURCES TERMINALS, INC. AND UNOCAL)

ACTION Unanimously approved as submitted. (Yuen/Yim)

GRANT OF EASEMENT, KAHULUI AIRPORT, MAUI (MAUI GAS SERVICE)

ACTION Unanimously approved as submitted. (Yuen/Yim)

DIRECT SALE OF LEASE FOR WAREHOUSE AND A PARCEL OF LAND, PIER 19, HONOLULU HARBOR, OAHU (MCCABE, HAMILTON & RENNY CO., LTD.)

ACTION Unanimously approved as submitted. (Himeno/Yim)