

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

DATE: WEDNESDAY, APRIL 22, 1992
TIME: 9:00 A.M.
PLACE: BOARD ROOM
1151 PUNCHBOWL STREET, ROOM 132
KALANIMOKU BUILDING
HONOLULU, HAWAII

**ROLL
CALL**

Chairman William Paty called the meeting of the Board of Land and Natural Resources to order at 9:00 a.m. The following were in attendance:

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

ABSENT & EXCUSED: Mr. Christopher Yuen

STAFF: Mr. W. Mason Young
Mr. Roger Evans
Mr. Henry Sakuda
Mr. Michael Buck
Mr. Wendell Kam
Ms. Dorothy Chun

OTHERS: Mr. Randall Young, Deputy Attorney General
Mr. Peter Garcia, Department of Transportation
Mr. Hayden Burgess, Ms. Billie Haugen, Ms. Ruby Hargrave, Mr. Clayton Ikei (Item F-4)
Mr. Benjamin Matsubara, Ms. Barbara Smith, Ms. Mollie Foti, Mr. Andy Weiner, Ms. Pat Tummons (Item H-1)
Mr. Martin Luna (Item H-3)
Mr. Ed Ebisui, Mr. Walter Arakaki, Mr. Edgar Hamasu, Mr. Pat Yamada (Item F-10)
Mr. Lee Holmes (Item H-6)
Mr. Ernest Shima (Item F-2)
Mr. Merv Kimura, Ms. Marjorie Ziegler (Item H-4)

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

ITEM F-4 RESUBMITTAL-DIRECT ISSUANCE OF LEASE TO HONOLULU COMMUNITY ACTION PROGRAM, INC. (HCAP) AND WAIANAE COAST COMMUNITY ALTERNATIVE DEVELOPMENT CORPORATION, INC. (WCCADC) AS CO-LESSEES FOR A MULTI-PURPOSE COMMUNITY FACILITY AT WAIANAE, OAHU, TAX MAP KEY 8-5-2:12 AND 49

Mr. Young began his presentation by giving a brief background. At the last Oahu meeting the Board took a partial action on this matter and deferred the second part. The first part the Board approved withdrawal of a portion of a lease due to an encroachment from the City and County Executive Order and in

turn withdrew from the project itself, a portion of the area to accommodate an encroachment and take care of the horseshoe people of Waianae. The second part which the Board deferred for the purpose of allowing the parties at hand the ability to appear before the Board to present their position with respect to the proposal being made today. He then passed out a letter from Mr. Hayden Burgess, representing the Opelu Project which asks for postponement, and if not for certain considerations.

Staff in the last couple years has been trying to resolve a situation in Waianae with respect to entities occupying some lands in Waianae which is strictly for community service programs. They haven't been able to resolve it so staff felt in order to bring it to a head they should take a direct position and offer a lease on a co-tenancy to both parties, the Honolulu Community Action Program and the Waianae Coast Community Alternative Development Corporation suggesting that the lease be a co-lessee for 3.88 acres. The purpose would be for multi-purpose community facility. The term will be for 10 years and the annual rental would be 20% of the fair market annual to be determined by the appraisal approved by the Chairman. The reason for using the co-lessee proposition here is the fact that there aren't many State lands available on Oahu. To resolve this, that the Board approve the issuance of a lease to both parties as described under the terms of conditions in the submittal.

Discussion followed with concerns presented by Mr. Hayden Burgess, Ms. Ruby Hargrave, Mr. Clayton Ikei and questions from the Board.

Mr. Burgess then addressed the Board, first by introducing Ms. Billie Haugen, Mr. Aaron Enos, Ms. Puanani Burgess and Ms. Stella Pihana. He said that they would like to resolve matters with the community. Unfortunately Mr. Moses Lum Hoy is busy so they are asking for postponement.

Ms. Himeno asked Mr. Young if there would be a problem in deferring this item.

Mr. Young said that this issue has been going on for the last three years now and staff brought it to the Board. He also felt that we should hear from members of HCAP.

Mr. Burgess then brought up issue of insurance, regarding condition no. 3, the performance bond, they would need to understand how the valuation of the annual lease rent is being made. He also mentioned that they did not want to be responsible for the fire insurance for the pre-existing Army building.

Mrs. Ruby Hargrave, Executive Director of HCAP mentioned that they had the lease since the property was returned to the State from the Army. They have operated the facility as a community center. They cannot operate, they have not been able to operate since 1990 because they do not have a State lease.

Mr. Clayton Ikei, attorney for HCAP said that they did offer to Opelu Project before the HCAP lease ran out, a sublease and they ignored it. He said they would have no objection if the Board were to issue a general lease to HCAP with a proviso that HCAP enter into a sublease to be approved by the Board as to the terms and any reasonable terms that they may enter with the Opelu Project.

More discussion followed on the agencies co-existing assuming they were in a comfortable situation. Question came up about co-lessees versus co-habitation.

Mr. Young explained that they were suggesting co-leasing rather than subdivide which would be difficult because of the configuration. He also explained that as co-lessees it forces them into a marriage, they need to adhere to all the full conditions and if one of them defaults, they both default.

Discussion continued on the differences between HCAP and OPELU reasons why they preferred separate or subleasing. Concerns were mentioned about projects for the community that were being held up because of the need for the lease.

Chairperson Paty said that were they to do a sublease to Opelu, it would certainly be on a basis where there would be protection or that would keep them harmless to a degree. That it would not be subject to a reorganization that they were not comfortable with.

Responding to the Chairperson, Mr. Young said that this was the first time he had heard about reorganization. They have just been trying to get a lease out and they ask the Board to give consideration to the issuance of the lease whether it be by way of the master lease with the protection of agreement of a sublease or by way of co-lessees.

Mr. Yim asked Mr. Young if the points brought up by Mr. Burgess could be handled administratively. Mr. Young responded that it could be done administratively, but the question is, "If you go under a master lease with a sublet, that resolves that. If you go under co-lessee then they have to learn to co-exist with one another, pro-rata responsibility."

MOTION Ms. Himeno made a motion that the master lease be awarded to HCAP with the proviso that appropriate sublease be worked out with Opelu and that this matter come back to the Board for final approval. Should there be problems or concerns, that they may present them to the Board at that time also. Motion was seconded by Mr. Apaka.

Chairperson Paty added that he thought both organizations recognize that they come up with strong credentials on service to the community which is invaluable. He again asked that they try to work things out.

There being no further discussion, the Chair called for the question.

ACTION There were four ayes and one no by Mr. Yim. Motion carried.

REQUEST FOR TIME EXTENSION FOR CONSERVATION DISTRICT USE PERMIT OA-2051; SINGLE FAMILY RESIDENCE AT LANIKAI, OAHU, TAX KEY 4-3-2:01; APPLICANT: RALPH AND BETTY ENGLESTAD

ITEM H-1

Before Mr. Evans' presentation, Ms. Barbara Smith asked to address the Chair as she had to leave. Ms. Smith said she was from the Lanikai Association and thanked the Board for keeping their community informed.

Mr. Evans gave a background of the permit. He said that here was a situation where there was a moratorium placed on the property in the Conservation District by the City and County of Honolulu. He said that staff has received guidance from the Attorney General's office in the past and the guidance basically suggest that land use in the Conservation district lies in the sole purview of the Board of Land and Natural Resources. There is a caveat to that. Whenever the Board approves a CDUA it is subject to a series of standard conditions listed in the Administrative Rules. One condition requires the applicant go before the City and County Building Department and get a building permit. The C&C Building Department will send the plans to DLNR whenever an application comes in and involves the Conservation District for the DLNR to sign off. In this particular case, this is how the involvement would occur.

After review of applicant's request and reasons, staff's recommendation is for approval subject to the conditions listed.

Questions were asked of Mr. Evans regarding the effect of the moratorium upon the applicant's request for a building permit and other pertinent issues.

Chairperson commented on Ms. Barbara Smith's testimony in which she says that the staff's recommendation was tied not to the expiration date in the original time frame but to the receipt of a final permit necessary for the completion of the construction. She infers that we're giving them all the time in the world to process the plans not only through us but through the City and County. She mentions 50 years but he said he doubts it would take that long.

The Chair asked Mr. Evans, "Should it be tied to the expiration date in the original time frame or to the receipt of the permit?"

Mr. Yim asked if the standard condition of the one or two year start period, come into play here.

Mr. Evans said, "Yes, it definitely comes into play and that is the reason for coming before the Board today. We would not be opposed in terms of the staff in order to speed things up if you will, to give a specific time frame on the time extension, if for example, rather than saying the time allowed be no longer than 15 months, that could be changed to approve an extension of time for one year. That would not compromise their case at all.

Mr. Benjamin Matsubara, attorney for the applicant, said that he had no objections to the staff report. He would like to address some of the questions raised. He said that they are anxious to build a house there. The Land Use Commission requires on all applications they've approved a one year report to show what progress has been made. Perhaps a proviso could be put in whereby they would submit an annual report to staff. The reason he's tied it to the last permit approval was that he had no idea how long it would take before they had a definition as to the size of the house they would be permitted to build.

Mr. Matsubara said, "The reason why I don't know when the last permit from the City will be obtained is that, they've indicated that we need to go through an SMA hearing. We've objected to that interpretation because there's a single

family dwelling exemption. We're on appeal now to the Supreme Court on that. So until that's decided by the Supreme Court, I can't go back to the City and get a determination and it wasn't hedging to say the last required permit, because I don't know when that permit will be. But I could file an annual report to staff to indicate the progress we've done and for any reason you feel that we've been dilatory, that we've been stalling, that we aren't pursuing our goal with due diligence, call a hearing and if the extension you've granted us, a 15 months from the last issued permit. I'm willing to abide by that and to let you know what I'm doing and if you feel that what I'm doing is not sufficient, you can have a hearing. But, to help me, if you'd like to say that we can't build a house larger than the largest in Lanikai, I could begin my design and proceed and come back with the plans along with the plans of the largest house to show you that we have stayed below the required..."

Mr. Arisumi, "Mr. Matsubara, where are you with the City?"

Mr. Matsubara responded, "The City, we filed all our building plans with them. They indicated that we would have to go through an SMA hearing. We appealed that decision to the Circuit Court and indicated that there's an exemption on the rule that doesn't require us to go through the SMA hearing. We were unsuccessful there so we're on appeal now to the Supreme Court."

Mr. Arisumi, "The plan that you have, you filed with the City and County. The size of the biggest house in Lanikai or is it something close to that?"

Mr. Matsubara, "It's the same plan that I submitted to the Board."

Mr. Arisumi, "To this Board?" Mr. Matsubara responded, "Yes."

Mr. Arisumi, "And that's the one we rejected?" Mr. Matsubara, "Correct."

Mr. Arisumi, "Chances are that it may be rejected again."

Mr. Matsubara, "Correct, I would have to go back with revised plans. I think they would still say I need to go to an SMA hearing and I would still need to get clarification from the Court in regard to the appropriate interpretation of that. So in terms of the City, I haven't received anything further from them either."

Mr. Arisumi, "You're saying that you want guidance from this Board, the largest house in Lanikai in that area, you want the size so that you can make a plan according to that square footage."

Mr. Matsubara, "I can bring you, when I submit my revised plans and the square footage it contains, I can also bring you the plans of the largest house in Lanikai just to show you that I haven't gone beyond that. Of course, our design would be submitted to staff so that it could be reviewed to see that it's not obtrusive. But that would speed up the process for us."

Mr. Yim, "Any idea of the largest size home in Lanikai?"

Mr. Matsubara, "I don't think we could go over 10,000 square foot."

Mr. Yim, "Your plans were rejected by the Board. What size area was that?"

Mr. Matsubara, "If we include the pool, the decking and everything else, that was 15,000 to 16,000 square feet. So if it's 10,000 square feet for example, we would show you that, here's a house it's 10,000 square feet and there is a house there that has 10,000 square footage. Of course, our plans would be submitted to your staff."

Mr. Arisumi, "In comparison with your original plan, and now if you say you're going to build a 10,000 square feet, what kind of a difference would that be?"

Mr. Matsubara, "Thirty-three thousand if you look at the land area which we got approval for upon which to build a house, but under roof and the pool and the deck area, we're talking about 15,000 to 16,000 square feet. The one that was rejected."

Mr. Arisumi, "So you're cutting down another third."

Mr. Matsubara, "Approximately."

Mr. Andy Winer, attorney for the Lanikai Community Association and also a resident of Lanikai said that he had been asked to represent the association to comment and expand upon some of the views presented and the staff report. "The basis that appears for the staff report's recommendation for an extension is that it was a reasonable request. The concerns that we have with that analysis is that the staff report given before you now indicates the land use within the Conservation District is controlled by this Board and then the issue becomes one of whether the moratorium had an actual affect on the applicants that are before you today. The thing that is missing here is that there was no actual attempt by the Englestads during the three years that they had to actually had to go and see if there would be a problem with the moratorium. It was never challenged. The other thing that we would ask you to consider about the moratorium is that it expired in March 1991 and in the year since that time, no effort to go back before the City and County to see if the permit was even possible. So, we believe that the idea that there is a reasonable component to this request is not true based on the building permit. I think that the point that Ms. Himeno made is, in asking Mr. Evans about the reasonable basis. We don't know what the City and County would have done. We don't know if they would have enforced the moratorium on land that's controlled by this Board and it is an open issue as to whether or not that's a reasonable basis to seek an extension of time. Now as far as Mr. Matsubara's comments, he suggests an annual report be allowed so that in essence an open added extension would be allowed and we must suggest that that basically makes a mockery of the whole three year time limit. Because in a sense, the request is an opened extension to go from year to year to year and the whole basis of the three year requirement to make sure that the whole notion that a permit is issued in the Conservation District is consistent on what is going on in the neighborhood and to allow an open ended extension completely, that's the whole purpose of having a three year time limit to begin with."

Ms. Himeno, "Would that be the case even if the Board looks at the annual report, assuming that's what we do. And we say, hey look this guy is not

moving fast enough, he's stalling, he's waiting for a new Board to come into play or whatever. That the Board can call this matter before them and take appropriate action?"

Mr. Winer said that the problem the association would have if the Englestads were given permission to build based on the largest house in Lanikai is the fact that there are homes on the flat lands and on the hillsides.

Mr. Winer then went on to talk in great length about the criteria for deviation which is in Section 13-2-21, C1.-4. which is the basis for the request and what is required for deviation is going to be allowed. The first requirement, is there a practical alternative that exists, and basically there is no construction underway. Practical alternative is to require the Englestads to come and file for a Conservation District Use Permit and at that point in time it will be allowed to look at all the criteria that are necessary to determine whether they are attempting to build up on a very fragile part of the Lanikai hillside and should they be allowed to continue. Second criteria, we believe that the deviation will result in adverse effects on the environment. The third requirement, whether or not the deviation cannot conflict with the objections of the subzones. The argument there has been since the CDUP has already been issued, that there is no conflict. The final thing is that whether or not deviation is consistent with the public's health, safety and welfare. And once again, the landslide, flooding runoff concerns of the association members is of very much concern. So in wrapping up the comments from the association, we don't believe that any of these four criteria was met. Because of that under the rules of the Board, we don't believe an extension should be allowed. As for these issues, the one thing the association's attorneys would like to request is a contested case hearing in the event that it is necessary to go forward with these issues."

Mrs. Mollie Foti, Lanikai Association Board member said she had a brief statement that was written by Tom Cestare who could not be here this morning. She then proceeded to read Mr. Cestare's testimony into the record which said generally much the same concerns of the previous speaker. His testimony stated that the Lanikai Association firmly believes that the Petitioners are not entitled to an extension of time to complete construction. However, if the Board is disposed to grant an extension it should exercise its authority and condition the extension on:

1. Construction being completed within one year;
2. Adherence to all of the requirements contained in Chapter 183 HRS and Chapter 13 HAR;
3. A downsizing of the proposed home; and
4. Redesignation of the homesite at a lower elevation consistent with the surrounding structures and existing construction.

Mrs. Foti then said, "As for my own comments, I am very concerned with the fact that they are requesting that the time frame be based upon the issuance of the last permit necessary for construction. I'm very familiar with a fairly good size home that is in the process of construction in my immediate neighborhood. It's about an 8000 square foot home. The original building permit was applied for and issued in August of 1990. They have since applied for and received at least five or six additional permits for change here and a change there. To put

in a gate here, to put in a wall there, they could extend those building permits indefinitely by saying that, 'Well this is the last permit required for completion. We need this permit more than prior to completion.' We would not necessarily be predicated on the first permit which they received from the building department, if this is allowed. That is simply another open-ended invitation to allow the building process to continue on for years if they so desire."

Ms. Pat Tummons, member of Lanikai Community Association said she wanted to respond to some of the remarks made earlier. She said that the request for deviation must fill four conditions, it only fills three. Second, as far as the suggestion of the annual report be required of the applicant, she did not have much faith in people filing annual reports and gave examples. As far as the largest house in Lanikai as was stated earlier, it is inappropriate to use beach front houses or even houses on the flat lands as a standard. In addition she felt it was inappropriate to use houses that have been built in the urban district as a standard by which to allow houses to be built in the Conservation District. The Board of the Land and Natural Resources is under far greater stringent restrictions than the City and County of Honolulu is. However, in the Conservation district you have a greater burden. You have to make sure that housing is appropriate to the subzone and the other requirements are more or less secondary to that, therefore I don't think it is appropriate at all that you look to the Lanikai Hillside to determine how large this house can be, if you even grant it and I frankly believe the opportunity has been provided by the applicant to give you a reason, a very legitimate reason to deny this CDUA. If they want to continue to build, there is nothing to prohibit them from coming forward with a new CDUA.

Mr. Matsubara responded, "As far as the annual report, I'm sure if I don't file an annual report that's required, your staff and the Lanikai Community Association would certainly bring it to this Board's attention. In terms of challenging the moratorium rather than abiding by the moratorium and not filing plans, I'm not going to address much concern over that except that if the moratorium was in place, it ended in March 1991 and we submitted within a month, full construction plans both to the City and this Board, I don't think we're dilatory in any respect and it's all in the application that I filed with you, regarding to what action taken."

EXECUTIVE Ms. Himeno addressed the chair saying she had several legal questions to ask
SESSION of counsel and moved for an executive session.

Chairperson addressed Mr. Winer saying, "Before we do, I assume that your request for a contested case is officially before us and you're setting it up as a member of that community there?"

Mr. Winer replied, "That's correct."

Mr. Matsubara asked to comment on that, "I believe under your rules and regulations the CDUA is in place. Under your rules final approval of the plans is with staff and Board, I think that's an administrative function and just let me add that as my position in regard to whether or not we're reopening a contested case again on an issue that had already passed."

Motion was seconded by Mr. Yim and carried.

10:40 a.m. - 10:50 a.m.

Chairperson Paty called the regular meeting of the Land Board back to order.

DEFERMENT Ms. Himeno moved that this issue be deferred until the Board can get a legal opinion from the Attorney General's Office as to whether a contested case hearing is permissible. Motion was seconded by Mr. Yim and carried.

REQUEST FOR TIME EXTENSION FOR CONSERVATION DISTRICT USE PERMIT KA-2262 FOR THE CONSTRUCTION OF A SINGLE FAMILY RESIDENCE AT ALIOMANU, KAUAI, TAX MAP KEY 4-9-05:5; APPLICANT: RICKEY B. CARLSBERG; AGENT: B. MARTIN LUNA, CARLSMITH BALL

ITEM H-3

Mr. Evans made the presentation of Item H-3 with staff's recommendation that the applicant be assessed a fine of \$500.00 for two violations, a total of \$1,000.00; and that the Board revoke the Conservation District Use Permit KA-2262 pursuant to Condition 9; that the Board deny the time extension request to initiate construction pursuant to Condition 8 as the permit is no longer valid; and that the applicant restore the land to its natural condition.

Mr. Yim asked how would the applicant restore the land to the natural conditions. During the discussions it was explained that staff would be working with the department's Enforcement Officers, as they did a site inspection of the property at the time the application was submitted to see if it could be restored as it was before. This is a standard recommendation.

Also the applicant could come back to the Board tomorrow as this is private property within the Conservation District but there would be a different set of circumstances.

Question of the access trail was brought up.

Mr. Evans responded that the construction plans that have been submitted for approval do not show any kind of a trail. There's a caveat on the deed document that states, excepting and reserving therefrom a trail over and across this land near the highwater mark. So it looks like there was a trail. Relative to any historical significance of that trail he said he could not answer any questions. Staff is recommending denial of the permit because of Condition 9 which said, "Failure of any of these conditions makes the thing null and void." This was one of the conditions. If there were problems with this, we felt that there should have been something, they would come back, meet with us and work it out.

Mr. Arisumi asked if there were someone from the department checking on this trail.

Mr. Evans said that the Historic Preservation Division and the Na Ala Hele staff would be asked to check this out.

Mr. Martin Luna, attorney for the applicant began by apologizing to the Board for the non-compliance but he wished to point out that it wasn't a situation where it was an ongoing violation. It was a situation where they did clearing, a little grubbing and they informed staff. Staff informed them by letter that they might be in violation so they stopped all work. Because some grading was done, his client had to grass the area to prevent erosion. He said that this was purely inadvertent or they would not have written the letter to the staff nor would they have completely stopped except for the grassing of the area to prevent erosion.

Mr. Luna continued, " I can understand the staff's recommendation as we've gone through the staff report a number of times. We have complied with every requirement at this point, the problem has been on the trail. We had a time hiring an archaeologist to do the research for us. Then we finally got an archaeologist and he did prepare a report, I think in October of this year. We submitted the report, the report came back which said we had to get an archaeologist that was certified. The people that we hired originally was the Bishop Museum. The staff member that left the Bishop Museum was doing the work, carried on the work and we had not realized that at the time he was not one of the certified people on the DLNR list. Since then he's hired somebody else, one of the other archaeologist that is certified on the list. The report was prepared March of this year which modified the October report and I don't know why it had not been submitted to staff. However, I did get a call from the archaeologist, he has been working with the staff person on the Historic Preservation Division, Nancy McMahon who does cover Kauai. Nancy called me on Monday saying that she had worked with Aki Sinoto and agrees with Aki that there's no trail, they could not locate a historical trail on the property. However she said she did not have time to write up the report and she would contact Cathy Tilton of Mr. Evans' staff, they might have had conversations since Monday and acknowledged that Nancy had talked to her about the trail."

Mr. Arisumi asked, "So everything else is in order? You've got the construction plan and the deed recorded?"

Mr. Luna responded, "Yes."

Mr. Apaka asked Mr. Evans, "When the applicant has gone that far and on the brink of getting approval, and there's a matter pending some kind of written documentation and staff has knowledge of what's occurring, those reports need to come back to you. What comment would you have if you know that, ok it should be here but hasn't arrived, are you still going ahead and say that you violated all these things and that with this violation you're going to lose your permit?"

Mr. Evans responded, "The Board approved the application on September 8, 1989 and the applicant's attorney did ask for a determination whether time extension to initiate construction was necessary relative to Condition 8. That started a whole new ballgame. How you want to treat that, there was an inquiry by the applicant's attorney prior to the one year coming into effect. In the past, what we've said is, 'If you initiate a request for a time extension before the time period runs out, then we've treated that one way. If you initiate the request after the time period runs out, we treat it a different way. How you want to treat

this one, you approved this project in 1989, September 8. There was correspondence August 28th of 1990 and specifically that correspondence was to request the determination as to whether a time extension to initiate construction was necessary. That led us going with the violation and everything popped up then. We're saying the time extension is moot because your condition that was in there said, failure to comply with any of the conditions, this CDUA is dead. They failed to comply with the conditions. Specifically to have the construction plans approved, they weren't; to have it recorded at the Bureau of Conveyances, it wasn't; then more so they went through the violations. We're sitting here, not even concerning ourselves with the time extension, because of the moot issue. This CDUA is dead."

Mr. Yim asked, "In this case where that condition says null and void, have you had any prior experience similar to that as to what the Board did, any precedence to effect the null and void condition?"

Mr. Evans said, "There may have been some cases where the wording was in the past, that the Board could void a CDUA and we would come in and then the applicant would come in and the Board chose not to void it. But this language says 'shall be'."

Mr. Arisumi said that what bothers him doesn't make sense for the Board to deny this when everything is in order. Should the Board deny this then they have to go back and landscape the whole area and by now it should be full of weeds. So, if it's just a matter of a letter which we should be receiving from whoever the archaeologist is on Kauai, then he thought one of the better things to do is just defer this matter until the applicant gets the letter then act on this issue.

Mr. Yim commented on Mr. Evans' concerns regarding the problem that is facing the Board, one of the standard conditions was not adhered to and that involved the application becoming null and void. That is another problem the Board has to contend with, does it become null and void without Board action? Legal advisor, under those circumstances, whether moot, does null and void take effect immediately without Board action. How do we translate that particular condition? Does null and void take effect immediately without Board action unless there's an issue before the Board where they can overrule that condition.

Mr. Evans addressed Mr. Arisumi saying that, "When you suggest that everything is in place, if everything is in place that means the standard conditions have been met. The Board places a standard condition on all permits, not only on Mr. Luna's client. If he can sit here and show you an approved construction plans, these are construction plans that haven't been approved and would likely not be approved because they're not in place, because there is a condition relative to a shoreline trail. That condition relative to a shoreline trail shows up in the deed document. The Board put the shoreline trail condition, it doesn't even show up in the area plans. What we do, we sign this off without the shoreline trail and the first thing he's going to do is say government, notwithstanding what the deed said, here's government signature, just shows no trail."

Mr. Arisumi said he understood that a certified archaeologist went in there and looked at the whole area and found no trail.

Mr. Evans explained that there was a question whether there was a historic trail and that would be very different from a shoreline trail. If there was no shoreline trail there then how would it show up as a requirement in the deed document?

Mr. Luna asked to explain. He said that their preliminary title report, that shows this as an encumbrance on the property. The way it reads is that it was supposed to be determined when it was first granted in 1930 when the property was subdivided and it was supposed to have been determined by some agency on the trail and apparently no such determination was made as far as what the archaeologist could find. I guess he went over the property quite extensively for further research. I would be concerned if the Historic Preservation Division had disagreed with him but they agreed with Mr. Sinoto as to the absence of any marked or designated historic trail along, paralleling the shoreline.

Mr. Evans said, "As I indicated to you in my initial presentation, relative to the trail question, what we do when the trail comes on the construction or site plans, is that we would ask two separate entities in the department to take a look at it. One being Historic Sites, the other being Na Ala Hele, that entity that is functioning with one of its primary purposes as looking at shoreline trails statewide. So to suggest, that simply because Historic Sites doesn't have a problem, relays the fact that what about this other entity, because in the designation of the trail it was to be in the deed document, it was to be designated by the commissioner of public lands back at that time."

Executive Session Mr. Yim moved for an executive session to consult with legal counsel. Motion was seconded by Ms. Himeno and motion carried.

11:40 am to 11:55 am Chairperson Paty called the regular meeting back to order.

Before making his motion, Mr. Apaka commented that the Board was quite concerned that if one or more conditions are not met and the condition calls for the application to become null and void, however that doesn't meet that it will be self-destructing. It gives the Board the opportunity to examine all the issues of the application and other particular circumstances that might not have come to life and as far as the violations are concerned, there should be a fine although the applicant did not have intentions to violate.

ACTION Mr. Apaka's motion is as follows:

1) Fine reduced to \$500.00.

2) A new set of construction plans should be submitted to the Board with the trail on it; right now there's no trail on the map but it should be on the new submitted map.

3) If those conditions are met, the time extension for one year, up to April 1993 will be allowed to start construction.

Motion was seconded by Mr. Arisumi and motion carried.

ITEM F-10 SAND ISLAND MASTER LEASE

Mr. Dean Uchida made the presentation of Item F-10. He said that this was a follow-up of a Board action that was taken back in December 1991 on a master lease to the Sand Island Business Association (SIBA). Back in December, staff asked the Board to approve the concept of a master lease and allow staff, the Attorney General's office, SIBA with their attorneys, the lending institutions and their attorneys to try and work out the details of the master lease and return to the Board on an agreement that would be acceptable to all parties. Unfortunately he informed the Board that they do not have an agreement that is acceptable to all parties at this point.

Staff is providing information to the Board and included in the submittal today are some of the areas where there were significant changes on the development agreement to this master lease document as well as identify two areas that remain outstanding and needs to be resolved between this department, SIBA and the bank.

Mr. Uchida then touched upon the four areas for the Board's information. In the first area there has been a change between the Development Agreement and the Master Lease's area regarding rental reopenings and the annual increase percentage and compromise.

The second area of concern related to assignment premiums. This area still remains unresolved as far as SIBA and the bank is concerned. Staff's position is currently recommending 90% of any excess of first assignment and 50% thereafter up to year 2025 and once it goes to 2026, it goes to market and staff will adjust and hit the Board's sliding scale on the assignment premium formula.

The third area of concern relates to the sublease policy which hasn't been agreed upon as yet. The Board has adopted a sublease policy evaluation where staff will look at the sandwich position. It's intended to prevent a tenant from becoming a landlord and staff was attempting to apply that to the subleasing of the lots at Sand Island. The bank and SIBA has agreed to the formula in concept, the only outstanding issue on that is time, the rate of return to be allowed on a sublease. The sublessor would be allowed some reasonable rate of return based on his investment in the improvements on the property, that's a market rate, whatever the appraiser says. What the bank would like to do is tie it to some kind of fix index, such as the prime lending rate or a three year lending certificate. He felt it could be resolved at staff level.

The fourth area of concern relates to assignment of the subleases. The Board's desire has always been to somehow protect the interest of those people and businesses that are or have been on the waiting list approximately in excess of 10 years in some cases. Staff is having a difficult time making that a requirement of the master lease, the exact wording is still being worked out between the legal counsels of the parties.

Mr. Arisumi expressed his concern that the people on the waiting list be accommodated first before going out to the market.

Mr. Uchida said that was basically the four areas where there were major shift

from the Development Agreement to the Master Lease, there's been some adjustment along the way that were minor.

Ms. Himeno asked where were the areas of disagreement right now?

Mr. Uchida answered, "I think it's how much the premium is going to be on the first assigned. We're saying 90% to the State, 10% to the tenant. They may come in with a different figure." He felt the applicants could answer that question better.

Chairperson Paty asked, "With respect to that, how would the value of the business fold into that, you take the inventory and the improvements etc., how does the value of the business play in that factor, the goodwill of the business?"

Mr. Uchida said, "If the assignment were for the sale of the business with the lease, the way the law is written, it doesn't allow for a deduction in the goodwill, in the business' name so it's not taken up as a line item." He continued to explain using an example.

More questions were asked of Mr. Uchida by members of the Board. To make it rather clear, for the record, Mr. Yim asked Mr. Uchida to use the blackboard and walk the Board members through as to how the 90% works, the deduction and how it goes to the bank.

Mr. Uchida obliged and used the blackboard to illustrate how the 90% would work.

Mr. Yim asked, "What happens if a tenant cannot prove the improvement figures and inventory to be \$50,000.00?"

Mr. Uchida answered, "Then it's not going to be a deduction. He gets smashed into the premium amount."

Mr. Yim asked if that was clearly in the Master Plan agreement.

Mr. Uchida said that in order to make the deduction, they're going to have to provide the receipts to show its worth.

Mr. Yim asked, "I'm more or less now concerned with the as detailed procedure as how you're going to do things, as far as staff, and it's clear in your mind as to how you're going to implement the Master Lease so that in the future there will be minimum disagreement between SIBA and the State as to what, how you interpret the provisions in the Master Lease. Such as, for the record, on page 10, Section 6.2 Existing Permittees. SIBA shall offer original Tenant Leases to all eligible permittees within the Industrial Park, provided that (a) all other requirements under the revocable permit have been fulfilled; (b) ownership has not been changed or expanded etc. Just how is that going to be monitored, that what is stated does happen or does not happen? How would you know?"

Mr. Uchida replied, "We're going to have to look at each of the tenants as the subleases are issued to make sure that ..."

Mr. Yim interrupted to ask further, "What is meant by that? Do you get a copy of things coming to the office? How would you know, because we have track records that things happening at Sand Island and elsewhere, where the people who are supposed to have the revocable permit or lease elsewhere don't operate or somebody else doing it and we don't even know and maybe 5 years we catch them? So, now I'm saying what is the actual process for which your office knows what's going on there and not catch it maybe 10 years later. How would you know that they're doing it?"

Mr. Uchida asked Mr. Yim if he were referring to the issuance of the sublease or the actual operation of the sublease area.

Mr. Yim said, "I'm trying to use this and others as examples, how would staff know. It says, SIBA shall offer original tenant lease to all eligible permittees within the industrial park. How do you know that's happening and that these permittees have fulfilled all the requirements, they're not delinquent and they're not subleasing to somebody else, etc.?"

Mr. Young answered, "We have the original permit documents and we know to whom it's been issued to and when the subleases come to us, then we'll match it up to what we have in the office."

Mr. Uchida mentioned that the mechanics of this issue have not been discussed with SIBA as yet. He felt that the SIBA people would be wanting to work with staff to make sure that their list jives with their list before they start issuing subleases.

Mr. Yim said, "I'm more concerned with under section 6.2 on B. page 10, changing names ."

Mr. Young said that the permit documents identify exactly whose the permittee and that is the permittee for which the sublease will be issued to and that is the original document as approved by the Board, remain the disposition of the permit.

Mr. Yim said, "Again on page 11, same kind of question, section 6.5 require certain kind of improvements, minimum of Two Hundred Thousand Dollars (\$200,000.00) in construction within 5 years. Just how would you know that this is happening or not happening?"

Mr. Uchida responded, "The improvement requirement is normally a standard condition on all of our leases."

Mr. Yim said that he understood that but was concerned as to how staff would know that this sublessee had actually constructed a \$200,000.00 construction within the 5 years.

Mr. Young: First of all it calls for plans and specs to be submitted to and approved by the Board of directors at SIBA. And I would think that along with the plans would have an invoice with the construction building permit to show the cost of the building. We have worked up mechanics but I suspect that information would be provided to us as part of the Master Plan.

Mr. Yim: So from time to time you will be checking the list, you don't have the information, you will assume that there's no construction going on.

Mr. Uchida: All the information will be computerized and report data will be retrieved on regular basis.

Mr. Yim referred to page 13, Section 9.1, Transfer of Master Lease. "How will that take place? Is it possible?"

Mr. Young said that it would be possible because every lease that is issued, there are certain criteria within the statute to allow an assignment. It goes on to further say that it's subject to the consent of the Board.

Mr. Yim, "So the master lease can be assigned?"

Mr. Young said, "Yes it could."

Mr. Yim: Is there anyway, when you talk about the potential windfalls, is there anyway that SIBA in transferring the Master Lease to make a windfall profit?

Mr. Uchida: SIBA is not making profit right now or for being the Master Lessee, so I cannot see how anyone would want to step in their shoes and just manage the thing without making any money.

Mr. Yim: On the same section 9.1., that paragraph toward the 2nd to the last line in that paragraph. Actually it's the third to the last line. The last word below, 'not unreasonably or capriciously withhold said consent,' following is what I meant to ask, 'or require the payment of any moneys except a reasonable service charge ...' What is the intent of that, it implies as if potential money can be made but if so, the State cannot get part of that piece except for a reasonable ...

Mr. Uchida: If you continue reading the line, it says, 'and the premium as described in Section 9.3. below.' If there was anybody getting any money out of that deal, the premium would kick in under assignment. For all practical purposes we don't see that as happening.

Mr. Yim: Going to Section 9.2. Transfer of Tenant Leases. Except as herein expressly or otherwise provided or with the prior written consent of SIBA, no Tenant lease ... etc., how would your office know what's going on pertaining to the transfer of tenant leases?

Mr. Uchida: "This is where the assignment premium formula kicks in, in which case the staff is recommending that we allow SIBA to manage that and just inform us. Under existing Master Lease arrangements, everytime they have an assignment, they need to get consent from the Board. We're asking that the Board deviate from that position in this case, right, but we still would be informed of assignments."

Ms. Himeno: If SIBA doesn't do what they're supposed to do, then they're in trouble with the State. That's the hammer that the State has over SIBA.

Mr. Uchida: SIBA's agreed, they want to make sure that they have an understanding of how the formula applies and they'll just apply it.

Mr. Yim: Let's look at page 14, Section 9.5. Transfer of Ownership and therefore the assignment of lease did take place. According to this particular paragraph, it allows the tenant to sell or transfer ownership up to 49% and still not considered that to be an assignment of lease. Is that correct?

Mr. Uchida: That's correct.

Mr. Yim: It's just a matter of semantics now, a small matter but I want to make sure it's correct. Look at the exact wording in there just before the 49%, sells or transfers more than 49%, what does that mean?

Deputy A.G. Young: You could read that to mean that, you could transfer in the aggregate up to 49% of the business and not trigger the assignment premium clause.

Mr. Yim: It doesn't say that. It says more than.

Mr. Uchida: It does say that. If you keep reading the sentence, more than, then you go down .. (interrupted by Mr. Yim)

Mr. Yim: Is there another word in place of 'more' to make it clearer? Legal Counsel, is that sufficient as is, with no way of misinterpreting?

Deputy A.G. Young: We can take a look at that.

Mr. Yim: Section 9.6. Misrepresentation. (Mr. Yim read out the section.) He asked if the process is self-executed, automatic or does it have to go SIBA to say that it is terminated or does it go to the Board to say that it's terminated.

Mr. Uchida: It goes to SIBA because it's terminating the sublease and the sublease is going to be issued by SIBA.

Mr. Yim: My concern is that SIBA are the same people. It's not a third party group watching the activities of the people subleasing. How would you know that SIBA is calling a spade a spade and not covering up anything?

Mr. Uchida: I cannot guarantee that we're not going to know. The way that we're finding things out is when we do a check. Upon finding a misrepresentation, they take Board action.

Mr. Yim: Section 9.7. Right to Verification and Audit. "Can we not say, like deleting the words upon the reasonable request and just say, 'SIBA you shall provide,' does that make a difference of the interpretation of that section?"

Mr. Ed Ebisui, attorney for SIBA explained that he drafted this particular provision and the inclusion of the word reasonable means it wasn't any limitation to the Board's powers, all they're saying is that give us some time to gather the information to you. It wasn't meant to limit. They just want reasonable time to provide it.

Mr. Yim: I would appreciate to have the information on every assignment.

Mr. Ebisui: The other consideration was that we were trying to eliminate duplicate effort.

Mr. Yim: You may eliminate duplicate effort in all areas but not in this. This is a critical one. This is the heart and soul as far as I'm concerned of this whole discussion and I see it on the board there the difference of \$360,000.00 and \$72,000.00. This is the guts of it to make sure that things happen correctly and because again the track record of government, maybe not for anybody, getting proper information. Guys that have lease ag land are not farming, okay, and they have some other furnace farming and charging big bucks for it and the State don't know that. Guys have been using that land out in Sand Island and not doing anything but subletting under the door, somebody else making some money out of that, we do not know. That is why I'm so cautious about this master lease.

Staff I hope I make a point, that as you develop the details as to how you're going to get the kind of information in orderly fashion, on time as a double check because the bottom line is, you're giving away one of the major control this board has when all the assignments don't come before the Board for consent, as would have been, as I understand, for all other similar cases have to come before the Board for consent. But in the Sand Island case we are deviating, am I correct.

Mr. Uchida: That's our recommendation to the Board. The Board is free to make them come before the Board for consent. The Board need not adopt the recommendation. Staff is trying to build safeguards to take care of the concerns that is being brought up which is the request for independent audit.

Mr. Yim: Up to now the Sand Island people have been getting R.P.'s. What is the current ground rent?

Mr. Uchida: 11¢ a square foot per month.

Mr. Yim: From the information that you have received under the proposed Master Lease, which is for the first five years, the ground rent is 4¢, the assessment is 4.7¢ and the management fee is 1¢ per square foot per month. That's a total of 9.7¢. So today they pay 11¢, which means that automatically they are already saving the difference 1.3¢ per square foot, per month. One way to look at the arrangement under the Master Lease is, the State is subsidizing the infrastructure cost. Instead of receiving 11¢, we receive only 4¢. Of the 11¢, 4.7¢ goes to the bank to pay for the infrastructure. That amounts to, assuming the square footage is around 2,000,000, we're talking about subsidizing the construction cost for the first five years over \$5 million dollars. In addition to that, instead of getting 11¢, we're getting 4¢, part of the 11¢ no longer there. Which means 1¢ that goes to management fee, that's about \$200,000.00 per year to SIBA to run the office. That's State money again. If we did not have this Master Lease agreement or anything else, everything as status quo, we'd be receiving 11¢. I say this for the ears of SIBA to let them know how some people are looking at this Master Lease, that they should be very happy as to what is being proposed before this Board, it's major subsidy

as I see it. In addition to that, no matter how you look at that premium split, even on the 10% is getting State money because no way can you tell me that they are earning that \$72,000 and more when you talk about 50%, \$360,000.00. Over and above of what I've just said, that the State to me is subsidizing the whole Sand Island deal by not charging 11¢, but 4¢. Now the 49% transferred the ownership before it triggers assignment of lease up to now, do you have any other precedence except the 49% figure? What is the current figure that the State uses when they start triggering the assignments.

Mr. Uchida: We don't have any.

Mr. Yim: What has been the past practice? What will be the range for which you say that you transfer 'x' amount of ownership, you consider the assignment?

Mr. Young: Any percent. You could go as high as 100% and low of 1%. Any time an assignment occurs you have to come before the Board.

Mr. Yim: In essence there is no set policy that if the transfer ownership comes up to 100%, automatic consent in assignment?

Mr. Yim: Mr. Chairman, I just want to take some time to just point out some of the things that I see from my perspective for the ears of SIBA as to where I'm coming from. That already what they're receiving is very, very generous without even talking about the premium.

Chairman called for more questions. There being none, he then invited the applicant and representatives to come forward.

Mr. Ed Ebisui, attorney for SIBA said present with him is Walter Arakaki, President of SIBA, Edgar Hamasu, Executive Director of SIBA and in the audience were Pat Yamada and Harvey Chun of the Bank of Hawaii.

Mr. Ebisui: We have received and reviewed the staff recommendation and they have one primary area of concern and that relates to the calculation of the premium. Before proceeding further I would like to point out one thing and that is the 50% division here, is actually part of the development agreement, the prior agreement and also complies with the existing policy with respect to division of premium. I was under the impression that on the assignments in the first year, it's 50% and in the next 5 years it becomes 45% that goes to the State. Then each 5 year increment it goes down by 5% so that at the end of 50 years during the lease, you have zero premium. It's a sliding scale that Mr. Uchida was referring to previously.

Mr. Ebisui: SIBA is in total agreement with the intent of the anti-speculation laws. We believe that lessees of State land should not be allowed to realize windfall profits, realize that due to the favorable lease rents granted by the State. Our concern really pertains to the so-called goodwill. Goodwill is an asset that accumulates separate and apart from favorable lease rents. It accumulates because of ones ability as a business person. If somehow the goodwill factor could be accepted or exempt from the premium calculation, we have no problems with the 90/10. But given the current state of allowance

which does not allow for that, we feel it unfair and basically penalizes someone who has through his or her own hard work able to build up that goodwill factor.

Mr. Hamasu: The important thing to understand is that the master lease would be the first step towards our development. After the master lease is issued, the final subdivision from the City and it's going to be all City standard infrastructure including underground utilities and at this point we don't have the total cost of the construction of the infrastructure. ... Our engineers are now getting the construction plans approved by the City and the State agencies. Once the plans are approved we can get up-to-date estimate of the construction costs. We feel it's a minimum of \$15 million dollars at this point. Once the subdivision is approved then we can begin issuing the subleases to the tenants and at that time we need to work very closely with DLNR. We can only issue the sublease, as the law requires, to those people that have legitimate revocable permits, so we will need to check the revocable permits from DLNR and issue the subleases. At the same time we need to get the infrastructure financing loan from the bank since we'll be paying for all the infrastructure, the construction and the environmental mediation would be done for the infrastructure. Once the roadways, etc. is completed, we'll dedicate it to the City. Then the master lease also calls for property management by SIBA. A point was raised about the cost. The tenants are paying 11.5¢ for open area and double that for covered area, 24¢. Once the lease, sublease, master lease is self-paying as indicated, lease rent will be 4¢. We would be assessing, at this point we don't know for sure as we don't know the exact cost of the infrastructure. We would be assessing our tenants for the infrastructure construction loan, plus the management fee and we feel that would exceed the 11.5¢ being paid by the revocable permittees.

Right now the tenants are paying 15.5¢ total, they're paying 4¢ to SIBA for the development cost, the engineering, etc. After the lease is issued 4¢ to SIBA and 11.5¢ to DLNR, so 15.5¢. Once the lease is issued, we're asking the minimum of 16¢, that would be an increase of .5¢.

Mr. Yim: I feel that the State will be losing about \$8.4 million dollars in the next 5 years and a good part of the \$8.4 million will be going to subsidize a good hunk of that project because they are not paying the State.

Mr. Hamasu: We are putting in the City standard infrastructure and feel it's going to be an improvement on the under-utilized land that is there right now. Together in partnership with the State, we'd like to make this Sand Island land a productive land as the legislature indicated in the intent and purpose.

Mr. Yim: The point I'm raising is that on the lease itself, it seems to me the State is being very generous. The idea of the State helping small business, I am in full accord, as we help the farmers, as we help people play ball, provide parks, build gyms and swimming pools. I'm in favor of all that but it's just a matter of degree of help. So it's my own personal view, I'm in favor of helping small business but in this formula I'm saying we're over generous. since it's already cut and dry and I'm fighting on the premium which is being asking too much for the 50/50. So that to me is the breaking point. What is given already without counting the premium where some of the business people will be gaining, it's being extra generous and in the staff proposal of the 90/10, they're

still getting the \$72,000.00 as demonstrated. That \$72,000 I consider too much, it should be zero.

Mr. Walter Arakaki: I just want to conclude by saying that it's been three years since I've been here continuously. I want to thank the Board and staff for working along with us. We're the first industrial park with a long term lease and fortunate because the legislature has set the mechanism passing the law on the master lease concept. So I want to assure Mr. Yim and the rest of the Board that we will try our best. We know we're not perfect, we know we have to work hard to correct some errors because we're the first and everyone will be watching us. Be assured we will make this master lease concept with the State of Hawaii a win, win situation.

Mr. Ebisui: I just want to comment on a couple things. The infrastructure development is not without risk to SIBA and tenants. It's very difficult to conduct business on a month to month tenancy or revocable permit. You can't put in the kind of structures or improvements on property with that set up. At the end of the 55 year lease, the infrastructure, the structures on this land will revert back to the State. The State will own it. At the end of year 2025, rents get bumped to fair market value so that our balance is in there. It's not a situation of theft or one group taking unfair advantage of another group. There are balances all throughout this whole project.

Chairman Paty asked what was the situation relative to cleanup now?

Mr. Hamasu: Ever since April 1, 1991, when the Board instructed SIBA to do the cleaning up and because of that, a penny was reduced to start undertaking the task. We had initially installed gates at all the four main entrances into the industrial park, lighting system plus we've provided for sticker system to the permittees and their employees and finally we've hired a security and guard company to guard around the clock from 6 pm to 6 am during week days, holidays and weekends. We cannot say that it's been 100% successful because we still have tenants. If a tenant or someone from the outside coming in and dumping these garulous junks, I think the City and the parks adjoining us has storage area. Before we begin infrastructure construction we are planning this year in September 1992, we're trying to coordinate the construction activities to get better security and guards.

Mr. Arisumi added that this matter has been coming before the Board many times. He asked if the 4 items of concern could be worked out among all with the Chairperson.

Mr. Ebisui responded that the two regarding the languages for the sublease and the language on the assignment, he felt they could work it out. As to the premium he felt that the Board would have to resolve it. They've already agreed to adjust the rental reopening periods and SIBA is going to redo that.

Mr. Pat Yamada: As far as the issues brought up by Mr. Uchida today, we're really in agreement with the issues and the last issue up for discussion, we really have to defer to SIBA. The basic underwriting, we're very much behind this project, we think it's a good project, something good for the community and good banking opportunity for us also. The key to our underwriting really is

the ground rent situation. That enables us to assure that we will get paid through the assessments.

Chairperson Paty: You're saying that the ground rent as established, permits the level of assessment in the management fees, could be such that the total could be something that they could live with within their management. If the rent were higher or much higher, they still would have to have the same assessment plus the management fee and that would put them at a point where you might not feel that comfortable with the marketability of these terms.

Mr. Yamada: That's correct. The marketability of the individual tenant leases could be jeopardized if the rent plus assessment, plus management fees rises above a certain level. It will then jeopardize the ability of the tenants or the interests of the tenants in leasing a space and therefore paying our assessments. That's the basis of our over-ride.

Mr. Yim: What is the loan amount for the construction?

Mr. Yamada: It is dependent upon the numbers that SIBA comes up with when they finalize their construction costs and that's also dependent upon the processing through the City and City requirements. So they haven't been able to give us a firm number yet. It's been in the range of \$12 to \$15 million dollars.

Mr. Arisumi: Mr. Uchida, the premium rate of 90/10, that's what's your're proposing to the board and that's what SIBA is in disagreement with?

Mr. Uchida: They want the 50/50 split.

Mr. Arisumi: After listening to Mr. Yim's concerns, I don't think we can go on a 50/50 basis. Personally I do want to see this thing go.

MOTION Mr. Arisumi entertained a motion to approve Item F-10 and amend the premium rate from 90/10 to 85/15 with the details to be worked out with the Bank, staff and the Chairman as to the language.

DISCUSSION: Ms. Himeno: I would just like to comment. Being relatively new to this, I haven't been sitting on the Board as long John Arisumi but, I share his sentiment that I would like to see this being brought to a resolution. My perspective in this is as a small business person and I know it's very difficult to make your business go and although I understand Mr. Yim's concerns and I think he raises some very valid points, I do think from the perspective that your neck is on the line when you're a small business person. It's your money, it's your house, you're signing the notes very often on a personal basis so I don't look at it in the sense that the State is subsidizing something. I look at it as a partnership between small business and the State. It's standard in most leases that when you take a space there is an improvement allowance. Almost always there's a reduction of rent for a period of time and the rationale being that the improvements that the tenant makes will revert back to the landowner at the termination of the lease. So I find that a very standard provision. I'm very satisfied with the review and the work that staff has done on this to insure that there is no unfair windfall to anybody, be it SIBA or whoever, but in this case

that there is no unfair benefit being given to SIBA in this situation. I do think that goodwill of a business is very important to that business. Unfortunately the statute does not allow the consideration in that, but I think some consideration should be given perhaps in the split. In a sense recognizing some aspect of goodwill and I would like to see some adjustment. I have no problem with Mr. Arisumi's figure of 85/15, I think that would be fair but I think that there should be some adjustment in there. That's my personal view.

Mr. Yim: If you allow the goodwill, the goodwill can be \$750,000 or it could be \$720,000, that's the problem to determine that. Secondly, of all the players, 100+ tenants there, how many of them have goodwill to begin with? Okay, let's say if for illustration purpose you have 100 tenants there, 90 are on the verge of bankrupt or having a hard time, have no goodwill and 10 just as an illustration, and even though whatever projection may take may hurt that 10. And to take care the 10, become a windfall to the 90 that don't have any goodwill, that's the part. If my illustration is closer to actuality, then it is cruel to help the 10 and the 90 have the big windfall. To being with, we are trying to have a special situation on the windfall only in this particular case because of the extreme low rent that I think it is. ... My prediction would be that had we gone the 50/50, the next five years you have 50% at least turnover for windfall sake and that maybe a wild speculation. But that's where I'm coming from, how I feel the way I do. If this was 90/10 and they come in favor of it then it will reduce my suspicion, but the fact they publicly come and ask for the 50/50 it just revives my suspicion and the key for many of the players is the windfall. So the fact is that when they go back to the windfall question, relative to the windfall percentage, we do not know for a fact of the 100 people there, how many of them really got goodwill. We don't have the information to make a better judgement as to how we will factor in the goodwill and even if we did, it will become for staff to say no, goodwill should be \$50,000 and SIBA say no, it should be \$20,000, you will have a problem.

MOTION Chairperson asked if there was a second to the motion. Ms. Himeno seconded Mr. Arisumi's motion.

DISCUSSION Chairperson Paty continued the discussion and commented that Mr. Yim's comments are well taken. He felt the motion would indicate that the Board is still maintaining a great conservative posture to it and the SIBA people will not feel that a 5% move offer from the 90/10 is exactly a substantial move towards a 50/50 arrangement. By any standards they would still feel that what they're looking at is a pretty tight show.

Chair Paty then asked for a clarification of the motion:

- Percentage participation for first assignment premium changed from 90%(State)/10%(sublessee) to 85%/15%.
- Authorize the Chairperson to approve the final wording developed for each of the areas described in the submittal, including effective date of Master Lease, based on agreement amongst the parties.

Mr. Uchida clarified to the Board that staff will be closing the waiting list after the Board's action today so that there's not an onslaught of people trying to get on

that waiting list.

ACTION The Chair called for the question, there were 4 ayes and 1 no by Mr. Yim, motion carried.

ITEM H-6 **CDUA FOR A TELEVISION TRANSLATOR FACILITY AT HUMUULA, NORTH HILO, HAWAII, TAX MAP KEY 3-8-01:01(POR.), APPLICANT: KFVE JOINT VENTURE DBA KFVE CHANNEL 5**

Mr. Evans made his presentation and concluded with staff's recommendation for approval subject to the conditions listed on pages 7, 8 and 9. He asked to bring to the Board's attention, two conditions. Condition 16, staff is asking the applicant to undertake and coordinate with the department meaning that they would need to coordinate with the Division of Land Management on a site master plan for telecommunications facilities for a specific determined planning area. He then explained the reasoning.

On Condition 17, that all the land use elements would be developed in a manner so that they would be removable and easily relocated subject to the direction of the department. In this regard KFVE has used 20 foot containers instead of putting up anything permanent.

Mr. Lee Holmes of KFVE said that they accept the conditions recommended by the staff and would only like to request that the costs incurred for helping with the coordination and undertaking of a site master plan be prorated and/or shared with other future users of the site. Most important of all, KFVE can hardly wait to service the people of Hilo and people of Hawaii.

MOTION Mr. Arisumi moved for approval; seconded by Mr. Apaka.

DISCUSSION Regarding the request for sharing of costs, Mr. Evans explained that it could be done through Condition 4 which is a standard condition. Applicant would need to contact the Division of Land Management to obtain some kind of land disposition and it could probably be further elaborated on the prorata aspect.

ACTION Chair Paty called for the question and motion carried unanimously.

ITEM F-2 **REQUEST AUTHORIZATION TO ACQUIRE LAND AND IMPROVEMENTS FOR STATE TELECOMMUNICATIONS FACILITY, KAUPULEHU CRATER KAUPULEHU, NO. KONA, HAWAII, TAX MAP KEY 7-2-01:POR.1**

Mr. Ernest Shima of the Department of Budget and Finance, Telecommunications Section said they were in support of this because this facility is needed to get the HITS Program to Kona. Right now Kona is only being served with one HITS channel through the courtesy of Sun Cablevision of Kona. They don't have anymore capacity to give the University of Hawaii or to HVBA for any education purposes. This facility will enable them to put a transmitter up there and beam the signal out to the Kona side. The University of Hawaii has rented a facility over at Captain Cook and they're having credit courses offered on a daily basis to the Kona residents and on their sight survey they were able to pick up the signal from this particular transmitter site so that they will be able to get the full HITS channels that are available at Hilo

Community College and it's also available at Wailuku and at Lihue's Kauai Community College. The sharing or buying out from Motorola will help to reduce the total cost if they were to construct it themselves.

ACTION Unanimously approved as submitted. (Arisumi/Himeno)

REQUEST FOR TIME EXTENSION FOR CONSERVATION DISTRICT USE PERMIT KA-2155, UPPER WAILUA RIVER HYDROELECTRIC POWER PROJECT, WAILUA RIVER, KAUAI, TAX MAP KEYS 3-9-1:1-3, 3-9-2:1 AND 4-2-1:2; APPLICANT: ISLAND POWER COMPANY, INC.

ITEM H-4

Mr. Evans said that staff had taken a look at the reasons for the request of the extension. Staff is recommending approval subject to the two conditions in the submittal.

He notified the Board that he is in receipt today of a letter from the Native Hawaiian Advisory Council. They list 5 specific concerns. First, a petition to amend the interim instream flow standards were recently denied where we agree, we stand corrected in what we say on that. Second, they suggest that these projects are otherwise completely separable projects and they indicate the applicant has stated that they are not separable relative to economic feasibility. We point out that the projects are otherwise completely separable projects. Third, they point out that the water license on land easement on the project that were authorized by the Board in 1986 and our submittal should reflect the additional unmet water licensing requirements. We feel that's irrelevant relative to the request for time extension. Fourth, they point out that the proposed two year extension was requested prior to the unexpected denial by the Commission on Water Resource Management. When they ask when was this extension requested, it was requested on February 10th of this year. Lastly they point out that there's concern relative to this Board being required to report its intent with regard to this water license by the end of the year. To what extent might the pre-existence of the CDUA for the proposed projects affect the Board's water licensing intent? Our position is that the CDUA is a separate instrument from the water licensing agreement. The CDUA does not guarantee any other approvals by any other commission. (A copy of the Testimony from the Native Hawaiian Advisory Council, dated April 22, 1992 has been placed in file.)

Mr. Evans commented that they were confining themselves to land use, conservation district.

Mr. Merv Kimura representing Island Power Company of Kauai said that they would like to ask for the extension because they have many applications they have to seek after, so many permits to go for and they have problems with them lapsing while they seek other permits. The critical issue here is the water. The time extension is less critical compared to the water right now. They would like to ask for an extension at this present time.

Mr. Apaka asked Mr. Kimura how many approved permits had he gotten so far.

Mr. Kimura said that they had gotten all the required permits approved once so far but they've had permits lapse and they've had to go back and repeat public

hearings in several cases. They were involved in five months of hearings in the County of Kauai and thus their water license lapsed and they had to go through the whole hearing process again.

Ms. Marjorie Ziegler, Resource Analyst with the Sierra Club Legal Defense Fund said they were the attorneys of record for the petitioners and on March 4th they submitted a petition to the Water Commission to establish permanent instream flow standards for the Hanalei River. She wanted to comment on that. She asked to give the Board a brief background before making a decision. She said the project would need permits that involve water from many streams. Hanalei River water is needed for the Wailua Hydro Project. Of the five streams involved in the project, only two have petitions to amend the instream flow standard and so that leaves three streams that are going to have water taken out but have not gotten a petition approved by the Water Commission and one of them is the Hanalei River. This is why the people on Kauai and the rest of the State are concerned because the Hanalei water is needed by the taro farmers and other people for their livelihood. That's just one of the problems. On March 4th the Water Commission denied two permits. One was a new permit to alter the stream on the upper project. Second permit was to extend time on a permit previously approved for the lower project, both to amend the streams and still we don't see any petitions for amending the interim instreams program. They recommend that the Board not allow the time extension but rather let the developer work within the time he has on the lower project. They also agree with the Native Hawaiian Advisory Council that it was not a petition to amend an instream flow standard that was recently denied but rather the two stream alteration permits that were denied by the Water Commission in March.

Ms. Ziegler also wanted to mention that the Wailua Projects are dependent upon the Hanalei water which is under a water lease right now.

Mr. Arisumi informed Ms. Ziegler that the Board had previously approved this permit and that they would still need to obtain all other required permits.

She would not be against the extension of the permit, she just wanted the Board to be aware of the larger picture.

Mr. Kimura said that they have no intentions at all of hurting the farmers. They are only interested in surplus and excess water. Farmers have first rights. They are in the second position and their plants will shut down if the water flow drops down. If the water permit is denied, the project will be dead.

ACTION Unanimously approved as submitted. (Apaka/Himeno)

ITEM B-1 REQUEST FOR APPROVAL TO ENTER INTO AN AGREEMENT FOR CONSULTANT SERVICES WITH THE RESEARCH CORPORATION OF THE UNIVERSITY OF HAWAII FOR ADMINISTRATIVE SERVICES TO UNDERTAKE SHORELINE FISHING SURVEYS DURING FY 1992-93

ACTION Unanimously approved as submitted. (Himeno/Apaka)

ITEM B-2 REQUEST FOR APPROVAL TO PRODUCE AND SELL FRESHWATER SEED TO HAWAII'S PRAWN FARMERS IN 1992

ACTION Unanimously approved as submitted. (Himeno/Yim)

ITEM C-1 REQUEST FOR RENEWAL OF CONTRACT WITH MS. JUDY PANGELINAN-SUBAITIS OF AVICULTURAL ASSISTANT CONSULTANT SERVICES AT THE ENDANGERED SPECIES FACILITY AT OLINDA, MAUI

ACTION Unanimously approved as submitted. (Himeno/Yim)

ITEM C-2 REQUEST FOR BOARD APPROVAL TO A SECOND AMENDMENT TO THE EXISTING CONTRACT WITH THE RESEARCH CORPORATION OF THE UNIVERSITY OF HAWAII (RCUH) TO PROVIDE RESEARCH ASSISTANCE AND TECHNICAL SUPPORT IN THE IMPLEMENTATION OF THE STATEWIDE TRAIL AND ACCESS SYSTEM

ACTION Unanimously approved as submitted. (Himeno/Yim)

ITEM F-1 DOCUMENTS FOR BOARD CONSIDERATION

Item F-1-a **Assignment of General Lease of Easement No. S-5089, Lot 69, Puu Ka Pele Park Lots, Waimea (Kona), Kauai, Tax Map Key 1-4-02:66**

Item F-1-b **Issuance of Revocable Permit to Sunny Honda, Former Railroad Right-of-Way at Anahola, Kauai, Tax Map Key 4-8-09-10**

Item F-1-c **Issuance of Revocable Permit to BHP Petroleum, Government Land at Kekaha, Waimea (Kona), Kauai, Tax Map Key 1-2-01:1**

ACTION Mr. Apaka moved for the approval of Items F-1-a, F-1-b and F-1-c; seconded by Mr. Yim, motion carried.

ITEM F-2 See Page 25 for Action.

ITEM F-3 R.M. TOWILL CORPORATION REQUESTS RIGHT-OF-ENTRY TO STATE LAND AT HOOLEHUA-PALAAU HOMESTEADS, HOOLEHUA, MOLOKAI, TAX MAP KEY 5-2-04:VARIOUS

ACTION Unanimously approved as submitted. (Arisumi/Apaka)

ITEM F-4 See Page 3 for Action.

ITEM F-5 RESUBMITTAL-ISSUANCE OF DIRECT LEASE TO UNIVERSITY OF HAWAII FOR HOUSING, EMPLOYMENT TRAINING AND PUBLIC PARK PURPOSES AT HONOLULU, OAHU, TAX MAP KEY 2-3-09:POR. 1

WITHDRAWN Mr. Young requested to withdraw this item at the permission of the Board.

ITEM F-6 GRANT OF NON-EXCLUSIVE EASEMENT FOR SEAWALL AT KANEOHE, KOOLAUPOKO, OAHU, TAX MAP KEY 4-7-16:60

Mr. Young requested to make an amendment. Under Purpose revised to "landscape and seawall purposes."

ACTION Unanimously approved as amended. (Himeno/Yim)

ITEM F-7 RESUBMITTAL-CITY AND COUNTY OF HONOLULU REQUESTS SET ASIDE OF STATE LANDS AT HALEIWA, OAHU FOR ADDITION TO HALEIWA BEACH PARK, TAX MAP KEY 6-2-03:10 AND 39

WITHDRAWN Item was withdrawn to allow Neighborhood Board 27 to meet and act on the proposed disposition.

ITEM F-8 AMENDMENT TO PRIOR BOARD ACTION OF NOVEMBER 17, 1989 (AGENDA ITEM F-1-b), CONSENT TO ASSIGNMENT OF LEASE, LOT 84, KOKEE CAMPSITE LOTS, WAIMEA (KONA), KAUAI, TAX MAP KEY 1-4-04:55

ACTION Unanimously approved as submitted. (Apaka/Arisumi)

ITEM F-9 REQUEST FOR DIRECT LEASE FOR MARITIME PUPOSES, WAILUA RIVER, WAILUA, KAUAI, TAX MAP KEY 3-9-02

WITHDRAWN Mr. Young requested that this item be withdrawn. The applicant, Waialeale Boat Tours, Inc., is delinquent in lease rental payments. Staff is to serve notice of default.

ITEM F-10 See Pages 23-24 for Action.

ITEM H-1 Deferred, see Page 9.

ITEM H-2 REQUEST FOR TIME EXTENSION FOR CDUA OA-2441 FOR PROPERTY CONSOLIDATION, RESUBDIVISION, AND SINGLE FAMILY RESIDENCE AT TANTALUS, OAHU, TAX MAP KEY 2-9-55:04, APPLICANT: DR. AND MRS. J. GROBE; AGENT: DON S. KITAOKA, ESQ.

ACTION Unanimously approved as submitted. (Himeno/Apaka)

ITEM H-3 See Page 12 for Action.

ITEM H-4 See Page 26 for Action.

ITEM H-5 CDUA FOR A SMALL COMMERCIAL AGRICULTURAL OPERATION AT LAUPAHOEHOE, HAWAII, TAX MAP KEY 3-6-2:12; APPLICANT: JOHN GRACE

DEFERRED Mr. Evans requested the item to be deferred. There were no objections from the Board.

ITEM H-6 See Page 24 for Action.

ITEM I-1 APPOINTMENT OF HUNTER EDUCATION INSTRUCTORS, ISLANDS OF OAHU, MAUI AND HAWAII

ACTION Unanimously approved as submitted. (Arisumi/Apaka)

ITEM J-1 AGREEMENT - VENDING MACHINES (STORAGE LOCKERS), MAIN TERMINAL BUILDING, LIHUE AIRPORT, KAUAI (BRYAN MIYAKE)

ACTION Unanimously approved as submitted. (Apaka/Himeno)

ITEM J-2 CONSENT TO ASSIGNMENT DOT-A-75-6, KAHULUI AIRPORT, MAUI (NEIGHBOR ISLAND TERMINALS, INC. -DHL AIRWAYS)

ACTION Unanimously approved as submitted. (Arisumi/Apaka)

ITEM J-3 APPLICATION FOR ISSUANCE OF REVOCABLE PERMITS 4855, ETC., AIRPORTS DIVISION, HILO, HONOLULU, LIHUE, WAIMEA-KOHALA

ACTION Unanimously approved as submitted. (Himeno/Arisumi)

ITEM J-4 ISSUANCE OF LEASE BY DIRECT NEGOTIATION, FORT ARMSTRONG, HONOLULU HARBOR, OAHU (FORT ARMSTRONG CONTAINER TERMINAL, LTD. A HAWAII CORPORATION)

ACTION Unanimously approved as submitted. (Himeno/Arisumi)

ITEM J-5 ISSUANCE OF REVOCABLE PERMIT, HARBORS DIVISION, PIER 40 SHED, HONOLULU HARBOR OAHU (GRACE FISHERIES, INC.)

ACTION Unanimously approved as submitted. (Himeno/Arisumi)

ITEM J-6 ISSUANCE OF REVOCABLE PERMIT NO. HY-92-062, HIGHWAYS DIVISION, LUNALILO FREEWAY, FAP NO. I-HI-1(93), NUUANU AVENUE TO HOUGHTAILING STREET, HONOLULU, OAHU (RKL CONCRETE SPECIALIST, INC.)

ACTION Unanimously approved as submitted. (Himeno/Arisumi)

ADJOURNMENT There being no further business the meeting was adjourned at 2:10 p.m.

Respectfully submitted,

Dorothy Chun
Dorothy Chun
Secretary

APPROVED:



WILLIAM W. PATY, Chairperson

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