

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

**DATE:** Friday, October 28, 1994  
**TIME:** 9:00 a.m.  
**PLACE:** Kalanimoku Building  
1151 Punchbowl Street, Room 132  
Honolulu, Hawaii

**ROLL  
CALL**

Chairperson Keith W. Ahue called the meeting of the Board of Land and Natural Resources to order at 9:12 a.m. The following were in attendance:

The Honorable John Waihee, Governor

**MEMBERS:**

Mr. Herbert K. Apaka  
Mr. Christopher Yuen  
Mr. William Kennison  
Mr. Michael H. Nekoba  
Mr. Libert K. Landgraf  
Mr. Keith W. Ahue

**STAFF:**

Mr. Linford Chang  
Mr. Ralston Nagata  
Mr. Mason Young  
Mr. Dean Uchida  
Mr. Roger Evans  
Mr. Dan Quinn  
Mr. David Parsons  
Ms. Geraldine M. Besse

**OTHERS:**

Mr. Johnson H. Wong, Dept. of the Atty. General  
Mr. Randall Young, Dept. of the Atty. General  
Mr. William Tam, Dept. of the Atty. General  
Mr. Peter Garcia, Dept. of Transportation  
Mr. Hank Nawahine, Ms. Lea Albert, Ms. Lena Gardina, Mr. Ben Schaefer, and  
Rep. Ululani Bierne (Item No. E-1)  
Ms. Midge Oler (Item No. F-1)  
Ms. Carol Hendricks (Item No. F-2)  
Mr. Isaac Hall, Ms. Dana Hall, Mr. Leslie Kuloloio, Ms. Patricia Tummons, Mr. Ben Bland, Mr. Ben Bland, Jr., and Mr. Paul Achitoff  
(Item No. F-3)

Mr. Jarvis Shiroma (Item No. F-6)  
Mr. Chester Koga (Item No. F-7)  
M. Chong (Item No. F-9)  
Mr. Richard Wada, Bernie Lam Ho (Item No. F-12)  
Mr. Bernie Lam Ho (Item No. F-14)  
Ms. Nani Lee (Item No. H-2)  
Mr. Isaac Hall (Item No. H-3)  
Governor John Waihee, Ms. Hoaliku Drake, and Ms. Ululani Bierne (Item No. H-6)

All written testimony submitted at the meeting are filed in the Chairperson's Office and are available for review. Certain items on the agenda were taken out of sequence to accommodate applicants or interested parties present.

**ADDED ITEM** The following item was added to the agenda (Apaka/Kennison):

J-1--ISSUANCE OF SUBLEASE, MAALAEA BOAT HARBOR, ISLAND OF MAUI (FRESH ISLAND FISH CO., INC.)

**MINUTES** Unanimously approved the minutes of September 9, 1994, as submitted (Apaka/Landgraf).

**ITEM C-1 APPROVAL OF AN INVITATION FOR BID PROCESS FOR THE HAMAKUA SUSTAINABLE FOREST PLANTATION PROJECT**

**ACTION** Item withdrawn (Apaka/Kennison).

**ITEM F-15 CONVEYANCE OF STATE-OWNED LANDS TO OFFICE OF HAWAIIAN AFFAIRS PURSUANT TO ACT 304, SESSION LAWS OF HAWAII OF 1990 AT MOANALUA, ILINUI AND KALIWA (KALIHI-KAD), HONOLULU, OAHU; TAX MAP KEYS (1) 1-1-03:3, 204, 205, 206 AND 207 AND 1-2-21-35, 36, 37, 39, 40, 41, 42, 43 AND 44; AND AT KALIA, WAIKIKI, HONOLULU, OAHU; TAX MAP KEY (1)2-3-37:6**

and

**ITEM F-8 GRANT OF NON-EXCLUSIVE TERM FOR FIBER OPTIC TELECOMMUNICATIONS EASEMENT TO AMERICAN TELEPHONE AND TELEGRAPH (AT&T), KEAWAULA, WAIANAE, KUAOKALA, KAENA, MOKULEIA, OAHU, TAX MAP KEY 8-1-01:14 (PORTION OF), TAX MAP KEY 6-9-03:02, 05 (PORTION OF), TAX MAP KEY 6-9-01:04 (PORTION OF), TAX MAP KEY 6-9-04:09 (PORTION OF) AND TAX MAP KEY 6-9-05:-7 (PORTION OF)**

**ACTION** Mr. Young asked to withdraw and defer the above items to the next meeting. He said the elements of the F-15 proposal had not been completed, and the title of F-8 on the agenda may cause a problem with the Sunshine Law.

**ITEM F-1 CANCELLATION OF GRANT OF EASEMENT NO. S-4098 AND DIRECT AWARD OF AN ACCESS EASEMENT IN CONFIRMATION OF KULEANA ACCESS RIGHT AT WAIOHINU GOVERNMENT REMNANT, PARCEL B, WAIOHINU, KAU, HAWAII, TAX MAP KEY 9-5-02:40**

**ACTION** Unanimously approved as submitted (Yuen/Landgraf).

**ITEM F-12 STAFF REQUESTS ADOPTION OF FIRST CIRCUIT FINDINGS, ZELLER V. STATE (ACCRETION CLAIM) AND REMEDIES TO CORRECT ENCROACHMENT, KANEOHE BAY, KAALAEA, KANEOHE, KOOLAUPOKO, OAHU, TAX MAP KEY 4-7-41:SEAWARD OF 11**

Mr. Young stated: the applicant submitted to the court a request to claim title by way of accretion of submerged lands. When the claim was filed with the court, the subject matter was referred to the Survey Office and the Division of Land Management for review and comment. It was found that there were continuous violations of encroachment, illegal construction, etc., so the State filed a complaint testing the claim. Mr. William Tam, deputy attorney general, explained the legal proceeding and distributed a copy of the court's July decision. He stated that the action involves a small parcel in Kaalaea, on the shoreline.

He explained that an accretion claim is a claim by an adjacent landowner that the land along the shoreline has grown and is natural and permanent. The presiding judge found that it could not have been "natural" if the Zellers were planting mangroves, placing cinder blocks and construction material, collapsing house trailers and attempting to induce the accretion. He circulated photographs, including an aerial photograph, showing the trailer on State property. Mr. Tam stated he was asking the Board to adopt the findings of the court, which found encroachment on the property. He stated that the court, in fact, indicated that the court itself would not order the eviction but asked the State to return to the Land Board to seek the encroachment ruling and asked that the Board order the Zellers to clean up all material makai of the shoreline and remove that portion of the building, the two-story steel structure, which runs into the State property approximately four to five feet. Mr. Tam indicated that about two-thirds of the trailer is on State land. At trial, the Zellers did concede that they placed the trailer on State land and collapsed it. Mr. Tam added that Mr. Kazu Saiki, the former State surveyor, and Paul Nuha, former State surveyor, have extensive documentation in their files. He further stated that the Army Corps of Engineers, the State and County have cited the Zellers.

Mr. Young distributed an amendment to the submittal because Mr. Zeller passed away and the submittal should reflect "Zeller, et al."

Mr. Richard Wada, attorney for Mr. Zeller, addressed the Board stating that the trial was held in July and the court Decision, Findings of Facts and Order on the accretion claim was made in August. He claimed that the point today was the request by the division to adopt the findings on an accretion matter to apply to a matter of encroachment. It was not appropriate: the submittal to the Board indicates that this matter has been going on for a number of years but at no time did the State file a complaint, citation or charge against the landowner regarding encroachment. There was a lot of correspondence relating to the encroachment advising his client to clear it up and in most cases Mr. Zeller did comply. He conceded that on some he may not have but at no time was there a formal charge or citation or complaint or notice of hearing to allow his client to come before the Board or some body to present his side on the encroachment issue. This sudden request to adopt Findings in an accretion matter for an encroachment matter is simply a way to bypass his client's right to some sort of process, due process of law, administrative hearing or procedure. He claimed the submittals were a one-sided presentation. He said he had not planned to attend the meeting to present the matter on encroachment when they had not been given the opportunity to research the matter for that purpose--he looked at it from the accretion perspective, which, he claimed, was an entirely different issue, and noted that the court essentially told the State--don't come to us with an encroachment matter; finish it up administratively; complete your administrative remedies before going to court on it. He pointed out the decision states--the State did not prove or show any evidence that this matter--on the encroachment issue--was ever brought before or completed or concluded in an administrative proceeding. Mr. Wada further stated that now the State is coming to the Board and saying, "disregard the administrative proceedings, disregard the court's order and just adopt what the court's findings on the accretion claim," and his client's position is that it violates his rights to some sort of process embodied in the laws, administrative procedure law. He asked that the Board deny the request, send it back to the Land Management Division.

Mr. Ahue commented that it appeared that the staff is recommending remedy resulting from the court ruling on accretion and calling it "encroachment." He asked whether if they were dealing with "accretion" would it be any different? Mr. Wada stated that that portion of the property from the shoreline to the developed area has always been to him a question of whose property is it. "Is it the State's land? Or is it some land that's there that's used by the landowner and which the landowner has rights? Until a period of 20 years passes, that landowner cannot be actually taken over, the property cannot be actually taken over, to the landowner, but there's a question as to whose property that is." Mr. Ahue asked whether the court had ruled on that. Mr. Wada answered "no." However, Mr. Tam explained that the court did rule it is State property until the accretion claim is proven. "The issue is closed. The Board has no choice. The due process was allowed at trial. They put on their case. We put on our case. That matter is foreclosed. This is State property. The plaintiffs admitted at trial they encroached on State property by putting the the drain there, by planting mangroves, by putting cylinder tiles on it. There's no issue before the commission or board on that point. That matter's decided. We're simply coming before you, and this is the process by which this is decided for the remedy of requiring removal. That's the only question here. The question of title was resolved. The question of encroachment, by definition, was resolved. The only issue before this Board is what remedy is this Board going to take--if it is to require that the Zellers remove this encroachment on State land. We've asked for a series of remedies . . . and that is what this issue is about."

Mr. Yuen asked Mr. Wada whether he had appealed the decision. Mr. Wada answered, "No, for financial reasons." Mr. Yuen noted that the court's Findings of Fact say that the Zellers placed the trailer so that it encroached on State land by approximately four and one-half feet and assumed it was an issue with the court and that there was an opportunity to address the issue. Mr. Wada stated when they proceeded it was strictly on the point of accretion; they were attempting to show that this land accreted naturally and is permanent. He considered the other matters outside of the accretion issue because the State did not file a counterclaim or any kind of complaint on encroachment, and it was his understanding that the court did make those findings but those findings were appropriate only in recusing to grant accretion rather than making a finding that was not an issue. The State did try to make it an issue, and the court took it under advisement, but in the decision portion of the findings and decision by the court the court did make a statement saying: as far as the encroachment matter, it had to be handled administratively first and not in the courts unless the plaintiff was given notice that the State would counterclaim with encroachment.

Mr. Nekoba commented that the court had determined it is State property; there was encroachment on State land.

Mr. Wada further explained that a complaint has never been brought as to whether it is an encroachment. His point was that the issue has not been decided; that the court is stating it but that was not a necessary issue to be decided by the court. Mr. Wada stated that the landowner has a right to argue the issue on encroachment. The encroachment issue, he said, had to be proven by the party bringing the complaint. On the accretion issue, he said, he had the burden of proving accretion. He stated that to say that the court has the authority to determine what is or is not State land is appropriate if the issue is in fact before the court; however, it was not the issue before the court.

Mr. Wada commented that the court stated that the accretion issue did not meet the issue of permanency and naturalness. Mr. Yuen stated that the remedy being requested is that his client clean all the debris from State land makai of the property line. Mr. Yuen explained that the court decided it was State land and now the State is asking that his client remove the building projecting four and one-half feet across the boundary line.

Mr. Wada explained that (1) the State owns land that existed and owns all the submerged lands. What happens when submerged lands become "unsubmerged" lands. Part of the property is no longer submerged. Mr. Yuen asked whether that wasn't the accretion claim. Mr. Wada stated accretion takes 20 years or longer but there's land that's been there for 19 years in the shore area. There's no law, Mr. Wada explained, that says it is State land. Mr. Tam commented that is the definition of State land. Mr. Wada explained he wanted to make a distinction between title to the land and the right to use the land. In accretion claims, the individual obtains title to the land. He claimed his client had the right to use the land. Mr. Yuen stated his client could walk across it, go fishing but only to that extent and not by putting a trailer on it. Mr. Wada stated that the questions needed to be looked at in the proper proceeding where a complaint for encroachment is filed and that it should be done before a

penalty is imposed. It was simple fairness, he said. Mr. Tam pointed out that this is what's before the Board; that Mr. Wada had the right to make his claims, and the State is asking for a remedy. He stated that the encroachment has been going on for 17 or 18 years.

Mr. Wada stated that the State granted shoreline certification and from his perspective if all of these things were unresolved problems the State should never have given the shoreline certification to his client and that "something was not quite right--with their coming in now and saying all these problems in the past, prior to 1990, the last shoreline certification given was in 1990, it seems to me that the State is saying, 'Well, we had all these problems going back to 1971, or whatever it was, but despite all these problems, we give you a shoreline certification.'" Mr. Tam explained that a shoreline certification does not determine title. "But all these problems that they're pointing out, going back beyond 1990, seems to me should have prevented the State from granting a shoreline certification. The reason is your rules state that if there is encroachment, there are problems on the property, no shoreline certification can be granted, but they did," Mr. Wada noted.

Mr. Bernie Lam Ho stated he lived in that area for 67 years, born and raised there. He said he told the State on two occasions that the high water mark is "right on the road, where the culvert is." He said when he walked to school and it was high tide they had to use the other side of the road because the water came over the road. The culvert is still there, he said. There is a lot of encroachment in that area, three-fourths of the lots. The State is not doing its job, he added. Mr. Tam noted it does present problems because a lot of seawalls have been built in the area.

**ACTION** Unanimously approved as amended (Nekoba/Landgraf).

**ITEM F-7 GRANT OF NON-EXCLUSIVE TERM FOR FIBER OPTIC TELECOMMUNICATIONS EASEMENT TO AMERICAN TELEPHONE AND TELEGRAPH SUBMARINE SYSTEMS, INC. (A T & T SSD), KEAWAULA BAY, WAIANAE, OAHU, TAX MAP KEY 8-1-01**

Mr. Young distributed copies of amendments should the Board grant the easement. Mr. Young stated the submittal contained a "consideration." However, he said it should be an annual rental instead, and the statutory requirements for disposition is spelled out in the amendments. He stated the amendments also included the method of payment and annual rental in the form of an automatic step-up each year of 4%. In addition, there would be reopening every ten years.

In answer to a question from Mr. Landgraf, Mr. Young stated he would check on the possible delinquency and suggested making the disposition subject to the delinquency.

Mr. Chester Koga, consultant, stated that considering it was a submarine cable, the 4% might not be appropriate in this case, unlike a cable on fast land or commercial land. The probability of the value of that submerged land increasing 4% per year is probably very unlikely. At the reopening, if the 4% is greater than the appraised value, would the lessee be

refunded that value from the period when it arrived at next value? Mr. Young replied that the law stipulates that at the time of reopening, should the reopened rent be less than the existing rent, then the rent for the 11th year should be the lower but there is no refund. Mr. Young added that in past cases the values of the easements have increased, and he has not seen any appraisals where the value has gone down or remained level. Mr. Young stated that as Mr. Nekoba had indicated values have been increasing at three to four percent per year.

Mr. Koga stated that having the 4% increase the Board is imposing would be an indirect tax to the consumer; the increase would be passed on to the consumer. He said his client would accept reopening at 10 years but without the 4% increase.

Mr. Landgraf stated that the department needs to look into innovative ways of disposition and leasing, in light of the sugar lands being returned to the State.

Mr. Koga stated that unlike other commercial ventures which are not regulated in the same way as utilities, they need to go to the PUC and FCC to ask for rate increases.

Mr. Nekoba commented on Mr. Koga's concerns regarding the 4% per year--that historically during the last 40 years, real estate prices have risen 3 to 4 % per year, that on a 65-year lease, he did not feel it would be out of line. Mr. Koga stated that traditionally submerged has risen one-half percent whereas fast land has varied approximately 3 to 12%. Mr. Yuen stated it was a difficult comparison because all of the evaluations for submerged land are based on appraisals or negotiations; that there is really no market to point to as to its worth.

**ACTION** Unanimously approved as amended (Nekoba/Landgraf).

**ITEM H-2 CONSERVATION DISTRICT USE APPLICATION, AFTER-THE-FACT, FOR A SINGLE FAMILY RESIDENCE AT KEEKEE, SOUTH KONA, HAWAII; TAX MAP KEY: 8-1-4:13; APPLICANTS: WILLIAM AND RITA COWELL; AGENT: NANI RAPOZA, CADES SCHUTTE FLEMING & WRIGHT**

Mr. Evans asked to defer. He stated that the expiration date, not shown on page 1, is November 25, 1994, and asked that the item be brought to the November 18th meeting. He stated that the staff did not foresee any changes to the present recommendation but from the process standpoint, the department has issued a preliminary negative declaration, which had been published, and the reviews completed. They are now in the process of publishing the final negative declaration and would like the declaration made before coming to the Board.

Ms. Nani Rapoza, representing the Cowells, stated she agrees with the deferral, has read the present submittal and has no objections.

Mr. Ahue commented that the recommendation rather than being for a single family residence may be for a nonconforming kuleana.

**ACTION** Unanimously approved to defer (Yuen/Landgraf).

**ITEM H-3 REQUEST TO AMEND CONSERVATION DISTRICT USE PERMIT MA-2663 FOR WATER TRANSMISSION LINE AT WEST MAUI FOREST RESERVE, KAHAKULOA, MAUI; TAX MAP KEYS: 3-1-16: 1 & 3; APPLICANTS: SUSAN AND JAMES BENDON**

Mr. Isaac Hall representing applicants stated he has reviewed the proposed change and agrees.

**ACTION** Unanimously approved as submitted (Kennison/Apaka).

**ITEM F-3 CHAPTER 91, ADMINISTRATIVE PROCEDURE FOR PETITION FOR A CONTESTED CASE HEARING TO APPEAL THE DIRECT AWARD OF FIVE, FIFTY-FIVE (55) YEAR TERM, NON-EXCLUSIVE EASEMENTS FOR LANDSCAPING AND MAINTENANCE PURPOSES COVERING PORTIONS OF GOVERNMENT BEACH RESERVES ON MAUI**

Mr. Young stated that the Attorney General's office concurred that the petitioners do not have standing. Mr. Young circulated a report by Maui staff, and Mr. Young indicated he instructed his staff to inspect and cure violations. Photos were also circulated to the Board.

Mr. Landgraf asked whether the public access areas couldn't be added to the recreation maps. He suggested an addendum to recently-published maps.

In reply to Mr. Yuen's concerns on the signage, Mr. Young indicated that the signage would be uniform. Mr. Young assured Mr. Kennison that there is a withdrawal provision in the leases.

Mr. Hall representing petitioners said who wins are the adjoining property owners, who loses are the public. He stated he did not agree with Mr. Young. There are government beach reserves "up and down the Maui coast, which in fact are preferred in their natural state by local people because there are kiawe trees--they're natural. They're used. What's happening here is that because of these easements these properties have been privatized by these adjoining property owners. There are no signs; we've been there before April 8, and people are now going to testify to you about the existing conditions now. They are private; they are occupied as private property. No one thinks they can go on these properties; there are no signs. In fact, the private users have made access to these parcels as difficult as they can make. I haven't seen these pictures but I imagine they tried to make it look as good as it can be. I think the best thing that could occur would be for you folks to take a site inspection and go look for yourselves because I think if you go to any of these places and look, it'll be absolutely clear to you that they are not public; that they are not available to the public; they're being used as if it were private land and public access is being restricted so there's a loss here and that's why we want a contested case. I want to discuss with you but I think it would be far more effective if you allow me to discuss the legal issues after two of the intervenors come and talk to you about what actually exists on these parcels and what is actually happening to people."



Ms. Dana Hall stated that the responses in the staff submittal deal primarily with the Hui's arguments for a contested case and concludes that because staff is not in agreement with the position taken and the arguments made by the Hui that the Hui has no standing in the request for contested case in this matter. "It's the Hui's firm belief that the 55-year easements for the landscaping and maintenance of portions of government beach reserve lands in Kihei are granted by the Board in their currently proposed form, such approval will result in continued restriction on public and native Hawaiian uses of these lands for recreational and traditional customary purposes. I should say that the Hui and the individually-named Hui members do not relish the prospect of engaging in a contested case or having to appeal the decision of the Board to circuit court should the Board choose to deny our petition to intervene.

We are compelled to take these actions only because of the harm that these inadequately conditioned 55-year easements would cause to the beneficial uses of the shoreline lands and coastal resources. We also feel that enforcement of any conditions attached to the easements would not be adequate based on our historical experience unless the Board considers the approval of these easements in a more comprehensive context. By this I mean that the Board at its March 12, 1993, meeting apparently instructed Land Management Division to negotiate the long-term leases or easements at issue here. If the Board before granting any more 55-year easements would further instruct Land Management Division to undertake a comprehensive signing of the government beach reserve lands, clearly indicating the public nature, it would be an important step in ensuring that these lands are actually open and available to the public. This is especially imperative in places like Kihei. Most of the shoreline where the beach reserves are located are not visible from the nearest road, whether it is South Kihei Road or smaller road or interior street. The long expanses of resort condominium, vacation rental, commercial development and expensive new single-family residences that lie on the streets are interrupted at irregular and lengthy distances by County shoreline access signs. The problem is that anyone using the narrow public shoreline corridors would not know that once they arrive at the shoreline that public lands in the form of government beach reserves exist above the high wash of the waves. Without signs notifying the public of its right to use these lands, I can assure you from my own experience and the experience of the Hui, that there will be little or no use by the public or native Hawaiians. I'm aware of the easements will be conditioned by the Board to require placement of signs indicating that the areas are State-owned and open to the public; however, this condition will only be of use, obviously, if the easement holder complies with the condition, and the condition is vigorously enforced. This same signage condition was attached to a number of revocable permits, which the Land Management and the Board are seeking to convert to long-term easements. Not one of the approximately 16 permittees has complied in substantial measure with this condition. I don't believe that these particular tiny signs are adequately indicative of what's public. This particular sign, for instance, says 'public property.' It's right along the rocky shore there. The land, the government-owned land, actually extends into the grassy area where it appears that the public would think they were restricted to this rocky area. In fact, as recently as yesterday, Les Kuloloio visited again the Kihei government beach reserve land, some of them, and in the case of government beach reserve land makai of

the Flood property, to which the Board granted the first 55-year lease of non-exclusive easement on March 11, 1994, we can tell you that those signs have been posted identifying the public area.

"In addition, it appears that the Floods chose to landscape only a portion of the 18,000 square feet fronting their property. A band of relatively dense kiawe has been left untouched between the neatly grassed landscaped area and the shoreline. This band of thorny vegetation contributes to the private aspect of the portion of beach reserve lands landscaped by the Floods. For Board members who have not visited this area very recently, I can tell you that the landscaping of the Flood property, this portion only of the government beach reserve land, is seamless. It is all of the piece with no physical indication of the boundary between public and private lands. The Board is considering granting a similar 55-year easement for another private property owner in Kihei, Douglas Sherman. The landscaping of the Sherman property and adjacent beach reserve land is essentially the same as what I described in the Flood situation--seamless landscaping of public and private lands and no indication by way of required signage as to where the State-owned lands lie. There isn't time to discuss each permittee at this time; however, I would also note briefly that the Mana Kai is a large apartment-hotel complex whose property is greatly enhanced by its landscaping and use of adjacent beach reserve land. Mana Kai is clearly receiving a private benefit from government beach reserve lands while the public is effectively excluded from similar and equal use of these lands. The only signs visible at Mana Kai declare that the chairs and lounges which litter the State beach reserve lands are for the 'exclusive use of the registered guests' of Mana Kai. All parking is similarly restricted to guests and employees. It's not surprising that the only people enjoying the government land are guests of Mana Kai--not the general public and not the Hawaiians.

"Les Kuloloio will elaborate on shoreline uses in the Kihei area but let me say briefly using yesterday as one small example that the fishermen shoreline gatherers and general public recreational users we talked to and met up with have no idea that the government beach reserve land existed and were available for public use. Rather, all the members of the public we saw were carefully treading along and below the high water mark, unaware that they could also use mauka land as well. This is especially a problem along sections of rocky coastline. These portions receive even less public use because they are more difficult to traverse, especially for long distances. These rocky shorelines would be more accessible for various shoreline users if the government beach reserve lands immediately mauka clearly signed for public use. Two fishermen in the small boat ramp parking lot off Ilili Road in Kihei who had no boat were getting ready to swim their net out to a fishing spot yesterday. We informed them of the government beach reserve lands nearby available for their use; that they could walk all along the bluff overlooking the rocky shore getting a good view of the ocean and fishing spots before deciding where to enter the water to lay their net. They were reluctant to exercise the right to use these lands because there were no signs declaring the area open to the public. They had a long swim ahead of them.

"To return to my earlier point, the Hui would prefer not to engage in a contested case or appeal a decision of the Board to deny our request for intervention. We want what staff refers to in its report as a win-win situation. We just don't think we're there yet. We want to

make sure that the 55-year easements being contemplated by the Board don't result in the effective privatization of public lands and its restriction, if not virtual elimination of public recreational and traditional and customary uses. We prefer to work with Land Management and the Board to arrive at a reasonable agreement on the issues we have raised. I think Board Member Landgraf's suggestion should be part of this agreement that we come to. If, for instance, lease or easement rents are based on fair market value appraisal, keeping in mind that we are talking about some of the most valuable properties owned by the State, these monies may be used with other funding if necessary to properly sign all of Kihei government beach reserve lands. The individual lessees would still be required to sign property covered by their specific easements; otherwise, what we'll have is--will continue to have an unclear situation with respect to lands that are available for public use. Because if you look at the TMKs and the maps of these government beach reserve area, you will notice that all you have is just like an island that comes out. There'll be a couple of signs there but the beach reserves in most cases extends considerable distance to the north or south of where a particular easement may be granted so . . . it's kind of like of what's the sense of that--you have a tiny little inroad that's signed for public use but nothing else is signed that adjoins it so you're still, you have a kind of haphazard way of making this area available for public use so I guess our request is that--is there some way to work together? Is there some way to defer your decisionmaking on this? Or can we get some kind of agreement that will allow for meaningful public access and use and that will pretty much obviate enforcement problems. Nobody wants to be in the position of having to enforce conditions that private property owners are reluctant live by."

Ms. Hall in answer to a question from Mr. Yuen stated that correct signage would go a long way toward curing the problem, along with listing the areas on State maps. She further stated they could live with the landscaping so long as the area is properly signed.

Mr. Les Kuloloio stated he was a fisherman and was familiar with the south shore area of Maui. The 1980-82 storms eliminated Kamaole I and the shoreline lost from 0 to 30 feet of shoreline. There's no place to walk except in the water from St. Theresa's Church down. He said in one particular case the signage is "Crime Watch." There are no public access signs. He further stated that the southwest shoreline from Maalaea to Kihei is unique and should be developed but worked slowly, and that the Hui is willing to work hand-in-hand to educate the public.

Mr. Isaac Hall stated, "This matter first was put on your agenda on April 8, and it's now October 28, four and one-half months. I would have thought that somebody would have said, 'Hey, those guys filed the petition to intervene, let's get this situation straightened out before October 28.' You had four and one-half months to do something and so when Les and Dana went down there yesterday, and it's still exactly the same as it was April 8, you can see why we're a little bit, why we want a contested case because we don't feel, don't have any assurances that this ever is going to be any different, but if I put myself in your shoes I think somebody would have said, 'Go down, straighten this thing out,' but nobody did. We're still in the same place. I'll jump forward. You know, this business about there not being standing--I have to answer that to some extent. There's no way in the world, Johnson, that we don't have standing in this case. As people that use those areas that are being deprived of their use, there's

no way you could win on that, and I'll leave at that. I talked to Mason a while ago and suggested to him--why don't you folks defer this for one year. If we work something out and come up with a solution where those properties are actually used and are open to the public, then give it to them, but part of the problem is the lack of enforcement and part of the problem is the people using these easements because they have the wrong attitude, and I don't know how we're going to change that attitude. You're probably not going to be able to get them not to give Les 'stink eye.' I hope you can do that but there's no way that those people should think it's theirs. I went to the Mana Kai one. It's not just the no-signs; there's the obstacles. There's all kinds of ways they've made it look like it's not public. They put trash. They put trees, fallen trees where you can't get through to the public lands, and I think part of what Les is saying is that the signs they're using--they're sending the total contrary message in every subtle way they can. Those signs have got to come down. They say 'no swimming.' They know what that's meaning to somebody coming in the area--don't come here. When they put a sign out there saying, 'don't use these lawn chairs,' the message is 'don't come on this property.' Those signs got to go. All those contradictory signs, all the signs with contrary messages got to go. I do disagree with Dana a little bit about the seamless landscaping. I think when landscaping is used . . . you folks are well familiar with Carlsberg and . . . you have landscaping on your private property and then you add on on the government beach reserve. Anybody looking at that is going to think, 'that's your private property,' so I don't agree that landscaping--the landscaping got to be done in a way that does not convey a message that it's an extension of their property so there's got to be something in the landscaping. . . .

"I would ask that the Board defer action on these easements and there's no legal reason why you got to grant them now, I don't think. They're on revocable permits so they have authority to be there for a year, and defer action on our petition to intervene for a year and if we work something out along the lines we're all talking about here and I would add to that if in that one year people start actually going there because they now feel comfortable going there then give them the 55-year easement. . . . I think the signs are a good idea but what we're looking at is actual use be reinstated. I think if in that year's time actions have been taken to get rid of the trees, the thrash, the contrary signs, good signage goes up, people have begun to use it again, fine, they can have them but until that happens I don't think they ought to get it so I would formally ask that you defer this for a year and defer action on our petition for a year and as everybody said we are more willing to work with you folks to try to make sure that the public can use these areas and at that point I think they would be entitled to consideration for 55 years but not before that."

Mr. Nekoba suggested that it might be helpful for the Board to take a look at the area.

Ms. Pat Tummons testified that she wrote about the beach reserves earlier in the year. She made three tours of the area, with tax maps. She said if she had not had the maps it would have been "totally bewildering." She said there was not a single sign. She said another problem was that users of State lands on the makai side and in the case of Kihei Surfside and Mana Kai, both of those have beach reserve land on the mauka side of the property as well. She said they're using this even though it's not encumbered by an r.p. for overflow parking it's been

graded and dumping of garden waste and construction waste. She suggested enforcement action on that area.

Mr. Young explained there was no problem in deferring but wanted to take action on the contested case and let the staff work with the petitioners before disposition of the easements are given. He stated they are willing to work with the petitioners.

Mr. Yuen stated that if the Board rejects the contested case, the petitioners have 30 days to appeal. What if they withdrew their request, work with the division and if they're not happy later on they can file another contested case. Mr. Hall replied that if the Board denied their petition they would go to circuit court and hope to prevail. He stated that he didn't think it was worth putting themselves or the Board through that if the matter can be resolved in a year. He suggested deferral of action on the petition. Mr. Kennison suggested that the whole matter could be deferred. Mr. Young commented if the entire matter is deferred the cloud of the petition is still there.

**ACTION** Mr. Kennison moved for deferral of the item; seconded by Mr. Nekoba and unanimously approved.

**RECESS** The Chairperson called a recess from 11:07 to 11:33 a.m.

**EXECUTIVE SESSION** Mr. Kennison moved for an executive session to consult with legal counsel on Item No. H-5; seconded by Mr. Apaka and unanimously carried.

**ITEM H-5 CONSERVATION DISTRICT USE APPLICATION FOR THE SUBDIVISION OF SUBMERGED LANDS AND FOR HARBOR IMPROVEMENTS AT MAALAEA SMALL BOAT HARBOR, MAALAEA, WAILUKU, MAUI; TAX MAP KEY: 3-6-01 (SEAWARD); APPLICANT: DEPT. OF LAND AND NATURAL RESOURCES, DIVISION OF BOATING AND OCEAN RECREATION**

Mr. Evans recalled that this matter was deferred; the Board considered that at the Maui public hearing, the public testified on the entire project. When the proposal was circulated to agencies for comments, comments related to the entire project. The Board decided that the staff should evaluate the entire project, rather than only the question of subdivision and directed the staff to return to the Board with an analysis and recommendation on the entire project. The Department of the Attorney General expressed concern of that limitation. Mr. Evans pointed out page 8 of the submittal, that comments had been received from the Office of State Planning, the last paragraph pointed out that the U.S. Fish and Wildlife, for example, believed there were deficiencies in the draft EIS. OSP also pointed out secondary impacts to coral reefs. OSP states that these concerns are not addressed in the CDUA document. Mr. Evans stated that the project must comply with CZM and other enforceable policies; that on page 9, second paragraph, OSP states the CZM policies are to protect coastal resources uniquely suited for recreational activities. They also point out that while the harbor improvements may be qualifying as overriding public needs compensation for the unavoidable loss of recreational resources must be

provided. The final paragraph states that the project will require approval by the Army Corps of Engineers. A federal consistency certification from their office will be a prerequisite. They state that they have not received the application for approval and they may impose conditions on the project to assure compliance with the State CZM law.

Mr. Evans stated those comments were taken into consideration, as well as comments by Aquatic Resources, Land Management, and Historic Preservation. "The result of these comments, including those from Maui County Planning and those made at the public hearing relative to the entire project, we analyzed those. Based upon our analysis, we wrote a recommendation for you. The recommendation you see before you this morning on pages 28 and 29 is two-fold. The first part of our recommendation is relative to that request that the Board received on a contested case hearing. We reviewed that request and had consultations on that request. Based upon that request for a contested case hearing, the first part of our recommendation before you this morning relates to that request. We are recommending that the Board deny the request for contested case hearing on the basis of timeliness. By that we specifically mean--in our administrative rule relative to contested cases there are clear provisions for anyone to ask for a contested case. When a public hearing is held, that request for the contested case, according to the rules, must come by the close of the contested case hearing. If there is no public hearing held, then the request for the contested case must come at the time the Board makes its decision. If the Board will recall, the public hearing on Maui was rather extensive, many people talking about the project. All parties that asked to be heard by the Board were in fact heard by the Board. The public hearing was closed. There was no request from anyone by the close of the public hearing for a contested case. As a result, it is staff's opinion that a request coming to us subsequent to that specific requirement in the administrative rule is not timely.

"As a result, our recommendation this morning is in two parts: Part A on the request for contested case hearing, we recommend denial. Our specific reason for the recommendation of denial is timeliness. On Part B, we are recommending as you see on pages 28 and 29, we need to provide the Board with a caveat for the public record. Subsequent to the writing of this document, we received on . . . October 20 a document written on October 14, from the Office of State Planning. In that document, the Office of State Planning makes a statement to us. They deny the federal consistency requirement. They list the reasons for denial in the federal consistency requirement. They also state methods by which this denial may be overcome. We find ourselves at a minimum from an OCEA staff perspective, perplexed. The reason we're perplexed--if this Board will recall, OCEA does a rather rigorous analysis of all projects, including our department's own projects. In this case, the Division of Boating. We feel our analysis was rather rigorous. We, taking into consideration in that analysis drew upon the specific written statements made by the Office of State Planning relative to this specific federal consistency CZM issues. We relied on those public statements that were made as a part of our analysis that formulated our recommendation. As a result and considering from our perspective, which is somewhat biased, we do provide a rigorous analysis of all departmental projects, we feel to some degree that this last minute letter from OSP denying the CZM consistency is difficult to analyze. However, we can bring the Board some basics. We do not see the letter notwithstanding its content as one which would change our recommendation. If

the Board will take a look at our recommendation on page 28, Part B, where we recommend approval of this project, Condition No. 1 states in that approval that the applicant in this case, Boating people, shall comply with all applicable statutes, ordinances, rules and regulations of the federal, state and county governments. We feel that notwithstanding the comments from OSP they are relative to a different federal, state or county government rule or regulation. As such, we feel that based upon what is written that we can, we see no basis that requires us to change our recommendation or the conditions as they are currently written."

Mr. Hall said he represented the Protect Maalaea Coalition, which includes surfers, who are concerned about the project's destruction of surf sites and the loss in quality of those surf sites; environmentalists, who are concerned with the destruction of the reef and the adverse impacts to endangered species, the degradation of ocean water quality all caused by the project; and surrounding landowners, who are concerned about the loss of the sandy beach, the traffic impact, and decrease in the quality of their living environment. With or without the petition to intervene, Mr. Hall stated, "This CDUA cannot be granted in any event for a number of reasons. First, there has been no SMA clearance for a CDUA permit for the whole project. On 11/19/93, there was a memo written from Chairperson Ahue to Mr. Parsons that indicated to Mr. Parsons that he would have to obtain an SMA clearance letter from the County of Maui. On March 17, 1994, the Planning Department wrote a letter back to Mr. Ahue which stated that since the submerged lands were outside of the SMA that no SMA permit was required for the submerged land but it said the proposed harbor improvements may require an SMA. That letter which actually appears on page 12 of your staff submittal notes that DOBOR has applied for SMA permits for harbor improvements in the past. I took the time yesterday to go to the Planning Department to research those SMA applications and, indeed, I found three. DOBOR applied for two SMA permits for the Keawekapu Boat Launching Ramp in Kihei, Docket Nos. 93-SM1-20 and Docket No. 93-SM1-32. DOBOR is currently processing an SMA application for a comfort station at Mala Wharf in Lahaina, and that's Docket No. 94-SMA-18. It's evident that DOBOR regards itself as being required to comply with SMA permit requirements. There are also commitments that appear as a matter of record that indicates that DOBOR must get an SMA permit for the Maalaea Harbor improvements. These are found in the final EIS which I'll brief you right now. The Planning Department on, this is found in the comments in the final EIS, on January 14, 1993, the Planning the Department wrote a letter that was passed on which said: Since not all the proposed facilities are in submerged lands, portions of the project falls within the county jurisdiction under CZM regulations. Because of this, the State would have to apply for an SMA permit for portions mauka of the shoreline. There's a response to that letter written by Army Corps dated August 15, 1994. In response to those permit questions, the Army Corps writes, 'An SMA application is in progress by the State Department of Transportation as agent for DLNR Division of Boating, DOBOR. Here's a statement that an SMA application is being applied for the harbor improvements. As you know, you don't ever grant SMA permits unless . . . you don't ever grant CDUA permits unless the SMA permit has been granted first or you get a letter from the County which says, 'You're cleared from this requirement.' In this case, you have no clearance from the County of Maui for the harbor improvements in general. You had a clearance from the County of Maui for the submerged, subdivision of submerged lands, but you don't have any clearance from the County of Maui for the harbor improvements themselves. What you had instead are indications from the County of

Maui that an SMA permit is required. You have admissions by DOBOR that they do apply for SMA permits. You have a commitment from the Army Corps that they are actually applying for an SMA permit for the harbor improvements. Until and unless an SMA permit is either applied for and received or you get a letter from the County of Maui clearing them from this SMA requirement for the harbor project as a whole, you can't grant this permit.

"The second reason why you can't do that is because you cannot at this point in time find that this project is consistent with the objectives and policies of the Coastal Zone Management Act. HRS 205A-4(b) says that the objectives and policies of the Coastal Zone Management Act are binding on actions in the coastal management area by all agencies, and that was amended recently in 205A-5(b) to say all agencies shall enforce the objectives and policies of the CZMA. Now, Mr. Evans has just supplied you with the letter from OSP, but I don't think he explained to you the real import of that letter. I have it here. One of the statements in that letter says, 'The proposal, which includes the preferred the Alternative Plan 1, and three alternative plans, is not consistent with the objectives and policies of the Hawaii CZM program and the Hawaii CZM law.' That finding prevents you from issuing this particular CDUA permit." Mr. Ahue advised Mr. Hall that Mr. Evans did point that out. Mr. Hall commented that he believed Mr. Evans said it did not necessarily have to do with the CDUA permit. Mr. Hall continued, quoting from the OSP letter, "The reason why this project conflicts with the Coastal Zone Management Act recreation policies is because of the destruction of at least one popular surf site, the reduction in quality of waves at a second surf site, and the elimination of a sandy beach within the harbor. To the extent that this project does those three things is inconsistent with the recreational resource policies of the CZMA. Secondly, the letter indicates that CZM eco-system policies are violated by this particular proposal because and Mr. Parsons has accused me of making false and fallacious comments--not sure what that means but--it's not I that said some of these things. We're talking about the sober OSP people who have said the harbor improvements will destroy up to 13 acres of aquatic habitat and associated biological community. This isn't me; this is OSP--that's going to destroy 13 acres of an important aquatic habitat.

"Also, OSP notes concern of the adverse impact on the endangered humpback whale nursery area. And, again, it's not me, it's the U.S. National Marine Fisheries Service that raised that question.

"Finally, OSP says that this will cause water quality degradation in the area. That makes that inconsistent with the same policy. Now, it isn't as if you approve this in a way that's consistent with what OSP has said is necessary to do because OSP in its consistency objections has basically said, 'You've got to go find some other alternative.' They're here asking you to approve an alternative--that OSP in its letter says you can't do. And that is in paragraph one of page three of their letter. It says, 'Select an alternative design which will not destroy or affect any surf sites or sandy beaches and will have negligible impacts on marine resources.' It points out other alternatives that would accomplish those results. Basically, not doing the harbor improvements outside the harbor but improving the inside of the harbor. They say, 'That's OK because you're not going to destroy all these resources.' Provide equal surf sites of equal quality--there's been no talk about doing that. It also says, 'Replace the sand



beach.' There's no talk of doing that. 'Mitigate all impacts to marine resources so that the net effect of the project is negligible.' I'm a little disappointed because the staff submittal, I might have been able to live with this if there were some mitigation program you folks were asking for, but the only mitigation program you have in here is paragraph 9--all representations relative to mitigation set forth in the accepted application and the final Supplemental EIS are hereby incorporated as conditions. This is not a mitigation program. For your CDUA permits, you folks normally detail exactly what you want done. That's what's necessary in this case--detail it. How are you going to protect those surf sites? How are you going to protect the sandy beach? How are you going to protect the whales, etc.? There's nothing in here You can't, I don't think you folks should approve any CDUA for harbor improvements with something like this. You don't even know what it means. I don't know what it means. It says you're just accepting whatever's in the final EIS as a mitigation program? But, I don't think any of us know what that is. In any event, because of the OSP letter, because of your obligation, I disagree with Roger that this action you take doesn't have to be consistent with the Coastal Zone Management Act. It does, but you don't have any evidence this is consistent with the Coastal Zone Management Act, and you haven't adopted any mitigation measures that are going to protect coastal resources so for that reason no permit can be granted.

"The third reason is that the EIS process has not actually been completed yet. What we have--there are admissions throughout all the documents that the Army Corps and DOBOR are partners in this, and that's true. We have a federal agency that's a partner with a State agency. What's happened is that the State part of the EIS is completed; they did a joint EIS. I should back up--as partners they prepared a joint EIS. The State part ended with Governor Waihee's acceptance letter on August 31, but Bill Lennan is the source of this information here. The Army Corps, the federal part of this EIS has not been completed. What happens to complete the federal part is that it ends up with a record of decision. That's the end of the federal part of the EIS. No record of decision has been issued by the Army Corps of Engineers in this case. And in that record of decision, the Army Corps, they decide on what alternative to select. The Army Corps has not yet even got to the point of selecting a particular alternative in this case. They cannot under federal law. They have to finish their EIS, yet they're coming in and asking you to approve a particular alternative, and they, by law, cannot even select an alternative. Under NEFA and our State law, you can't approve a permit when the federal-state joint EIS process hasn't even been completed yet. I have a good example--Willie may remember--but this was with the Kahului Airport, where the State portion of the EIS was completed and then the DOT asked the Land Use Commission to grant a boundary amendment but the federal EIS wasn't done and wasn't completed, and I represented people in that case and, finally, we got the boundary amendment proceedings halted until the federal EIS was completed, and I put to you we're in the exact same situation here. You're being asked to approve a part of this project when the joint federal EIS isn't even completed yet and that would violate NEFA, I believe.

"Finally, I think that to transmute this application into one for harbor improvements for the harbor as a whole is really not 'kosher,' as somebody said at one time. The CDUA application that's been processed before you has been processed as one for submerged, subdivision of submerged lands only, and I reviewed the record on this. There's

a letter dated October 4, 1993, from Mr. Parsons to Mr. Evans making it clear that it's limited to submerged lands only. There's an 11/19/93 memo from Mr. Ahue to Mr. Parsons, where he accepts the application, the subdivision of submerged lands. On 11/19/93, Mr. Ahue sends to agencies request for comments on an application for the subdivision of submerged lands. There is a notice of the public hearing that was on February 14, 1994, which says the subject is the subdivision of submerged lands. There's a newspaper notice that appeared in the newspaper February 17, '94, which indicates the subject is 'subdivision of submerged lands.' There's a sign-up sheet for the public hearing dated March 10, 1994, which says the subject of the hearing is the subdivision of submerged lands. There's a 9/23/94 staff submittal which says, 'This project is limited to the subdivision of submerged lands.' There's a 9/23/94 agenda saying what's being discussed is the subdivision of submerged lands. There's an agenda for October 14, 1994, which says the subject is the subdivision of submerged lands. There's a 10/28/94 agenda. That is the agenda for this meeting, which says this is for the subdivision of submerged lands, and, for the first time ever, and 'harbor improvements.' This is the first time this CDUA has been transmuted into something's that for the approval, CDUA approval, of the harbor improvements. You can't do this without having a new public hearing, new agency review and doing this in a way that's been clear all along that this is an application for all the harbor improvements and not just subdivision of submerged lands, and there's been a lot said about the timeliness of the petition to intervene that I filed but since this is the first day that the application is for the harbor improvements themselves since this is the first day it appeared on your agenda I hereby request contested case on the issue of the harbor improvements as a whole. That could not possibly be an untimely request since this is the first time that you've ever put this matter on your agenda. For all those reasons, I think you could not grant the CDUA for the harbor project as a whole.

"Going back to the--I do want to answer one thing and that is . . . the staff submittal--for some reason people chose to put in there that DOBOR had said I had made false and otherwise fallacious statements about, in the petition to intervene. I want to go through those because I think that none of them are false or fallacious. In fact, the replies in there have misled you more than anything that I've ever said.

"The first one is that FEIS does not consider the impact of the project on the hawksbill turtle. This, again, goes back to a letter that's dated February 25, 1993. I wasn't referring to a letter, I'm not for lying on that, what happened after February 25, 1993, and your own Maui aquatic biologist was the person who reported it. After that, during the summer, two hawksbill turtles were found nesting at Maalaea, and one I guess hatched, there's one hawksbill turtle that was hatched in captivity, and one was hatched there on the beach, and there would be information tending to indicate that is a habitat for the hawksbill turtle, and that wasn't addressed. Mr. Parsons takes issue with my saying that the surf sites would be destroyed. That's one of the reasons why we asked for a contested case. As far as the surfers are concerned, those surf sites are going to be destroyed. Mr. Parsons takes issue with my statement that the project will eradicate a significant coastal reef. Again, if we go back to the more sober analysis of OSP--that's exactly what OSP is saying--it's going to destroy that resource. And the lack of the availability of the SEIS, I think I've addressed that earlier, but this matter seems to come up a lot but I'd like to quote from the guidebook for the Hawaii State

Environmental Process on page 9. OEQC implements the Hawaii environmental program and what they had to say about it I think is very important. Page 9 says: acceptance of an EIS is required before the proposed action or project can proceed to the permitting stage, which would make you believe that you couldn't even file an application until you had completed the EIS process, but even if you don't take it that way, this EIS process, which is a joint federal-state one, has certainly not been completed. I don't think it's sufficient that as it implies here that the draft EIS was available at the public hearing. That's not what this regulation talks about. The final EIS has to be available at least to the public and the decisionmakers, yourselves, prior to action on a permit like this. Going on to our petition, just with respect to submerged lands and the untimeliness. What your rules say is that if it's not filed on, not requested at the public hearing, it's untimely. It also says that for good cause, after that, as long as it is before you take final action, you can grant it so it's not an absolute situation where you're precluded from granting the intervention. This is a case which deserves a contested case. Too many important resources are going to get destroyed by this project. To just go 'willy-nilly' through it now and approve the harbor improvement--it's just too much at stake, too much at stake for surfers, too much at stake for environmentalists, too much at stake for the people living around the harbor. There's too many contested facts. There's no mitigation program. I would like--this Board usually addresses projects very carefully and carefully adopts mitigation program if it's going to adopt something. You guys don't even have a mitigation program yet. It's not your fault, but I mean, this takes some time. I think given the resources that are involved, this should happen. Documents continue to pour in, important documents, like OSP's document, and I think that justifies a late request for contested case. I don't want to belabor this but I think if you actually read the documents, important agencies--U.S. Fish and Wildlife Service, U.S. Marine and Mammal Protection Program, OSP--are all saying, 'hey, this is not your normal case. You're destroying important habitats, you're adversely affecting endangered species, you're going to adversely affect the community around you. This takes a more serious look and so I think that the petition, although on the submerged lands, although untimely filed, there's still good cause for granting it at this point and, again, to the extent that you are seeking to approve the harbor improvements themselves, then I just make a timely request for intervention."

**ACTION** Mr. Kennison moved for executive session based on information presented; seconded by Mr. Apaka and unanimously approved to consult with counsel. The Board was in executive session from 12:30 to 1:00 p.m.

Mr. Kennison moved to temporarily defer the item until further on in the meeting to take up Item No. H-6 as the Governor was present and requested to make a statement. Seconded by Mr. Apaka and unanimously approved.

**ITEM H-6 CONVEYANCE OF LAND FROM THE DEPARTMENT OF LAND AND NATURAL RESOURCES TO THE DEPARTMENT OF HAWAIIAN HOMELANDS STATEWIDE**

Mr. Uchida stated that the item was a "request to convey lands from the Department of Land and Natural Resources to the Department of Hawaiian Homelands. The Governor formed a task force back in 1990 to address title claims that Hawaiian Homelands

has had ongoing since the inception of the Act, back in 1921. Through the efforts of the task force--originally in 1921 Congress conveyed, designated, 203,500 acres of land to Hawaiian Homes. Currently, they have about 187,000 in their inventory. In the 1994 State of the State, the Governor expressed his intent to transfer approximately 16,000 acres of State lands to Hawaiian Homes to make their trust whole. Our involvement in the task force--the task force's main objective was to, first of all, determine what was Hawaiian Homes and what was or is Hawaiian Homelands, correct any unauthorized use of Hawaiian Homelands, and compensate Hawaiian Homelands for its unauthorized use. Through the efforts of the task force, we were able to resolve some of the unauthorized Governor's Executive Orders and Proclamations that were issued. We entered into continued use agreements or returned lands to Hawaiian Homes and also got funding from the Legislature paying Hawaiian Homelands back rent to the tune of \$12 million. The task force also resolved two nominal lease rent issues with Hawaiian Homelands regarding the U.S. Government's use of Hawaiian Homelands at Kekaha and Pohakuloa. The Board approved the land exchange, and currently those land exchanges are in progress between the two departments. Currently, DLNR and Hawaiian Homes have some major differences on the remaining, on certain of the remaining land claims that the task force is looking at right now. Despite our different interpretations and in recognition of the necessity to resolve the remaining claims in a manner that's responsible to both trusts, we support the Governor's intent in making the trust whole. Hawaiian Homes has been able to confirm through the efforts of the task force 186,982 acres of land that they currently own, and this less from the 203,500 acres that are supposed to be Hawaiian Homelands gives us a total of 16,518 acres that they're short of. The 16,500 acres are what we're talking about transferring or conveying to Hawaiian Homes in an effort to make the trust whole. Furthermore, in certain instances the transfer of these lands are part of long-standing title claims made by Hawaiian Homelands and will essentially render these claims moot; however, this action does not preclude Hawaiian Homelands from continuing their claims on the ahupuaa theory with the courts should they choose to at a later date. In addition to the 16,500 acres transfer, we're also are looking at two . . . smaller agreements that we've been able to reach with Hawaiian Homes. One involves approximately 400 acres at Waimanalo that we're asking the Board to quitclaim or convey to Hawaiian Homes as a part of a regional settlement in Waimanalo. The second part is 1150 acres of land at Anahola, Kealia, Kamamalu and Molowaa that we're asking the Board to convey as a result of claims within that area also. Part of the criteria we applied in compiling the list of the 16,518 acres, we excluded from the overall inventory of State lands all lands that were currently being used by government uses to prevent the situation we addressed in the task force about compensating Hawaiian Homes for government uses of Hawaiian Homelands. We also ask that the conveyance be subject to any existing encumbrances on the land. The Board and the Department are currently going through a permit-to-lease conversion pursuant to Act 237, which would convert month-to-month revocable permits into long-term leases. We've asked Hawaiian Homes, and they've agreed to take the lands, subject to any long-term lease issued on these properties. We've also informed all of the tenants of lands that were identified for the conveyance that their properties would possibly be given to Hawaiian Homes. The net effect of that would simply be a change in landlord--rather than DLNR being the landlord, Hawaiian Homes would be the landlord. Hawaiian Homes is in agreement. Once the list is finalized, they'll be notifying all of our existing tenants that they, in fact, should be paying Hawaiian Homes. Finally, we looked at revenue-generating lands, and you'll notice from the list that we

compiled there's not a large amount of currently commercial, industrial, resort properties that are currently generating revenue. We felt that to convey those lands with the existing encumbrances, existing tenants may be a disservice to our public trust responsibility and that we did convey lands that have income-producing potential, meaning lands that may be zoned or in close proximity to a currently zoned lands for commercial, industrial, resort uses.

"With that, I have a couple of . . . first, is an addendum to Exhibit A, page 6, of Exhibit A. In the list that's attached to the submittal, we had listed lands that we had acquired from QLT, Queen Liliuokalani Trust on the Big Island, and identified 450 acres of those lands to be included. We've subsequently been informed that HFDC has plans for approximately 300 of the 450 acres so we're reducing that amount of QLT lands to be conveyed to Hawaiian Homes to 150 acres, and we've added . . . 300 acres from a 2300 acre parcel north of Keahole Airport that we're going to be conveying in lieu of the 300 from the QLT lands." Mr. Uchida identified the 150 acres on the map.

"I have an amended recommendation here, too, and I think we're going to be amending it further so--the submittal currently doesn't list the conveyance of, the authorization to convey the lands at Anahola, Kealia, and Kamamalu, or the lands in Waimanalo in the original submittal so the amendment I passed out now includes those conveyances. In addition to the 16,000 we're adding, we're asking the Board to authorize the conveyance of lands at Waimanalo and lands at Anahola, Kealia and Kamamalu. The recommendation, the conditions 1 through 7 are the same as listed in the submittal that was passed out. I think we'd also like to, at this time, amend or add another condition, Condition 8, which would be specific to the Puunene parcel that's being considered for conveyance on Maui, and that condition would be that Hawaiian Homes agree to issue a long-term lease to A & B for sugar cultivation as long as sugar is economically viable."

Governor Waihee stated he appreciated all of the work being done. "I think the - what is especially satisfying for me is in a sense to be in on the beginning of the process and at the end and know that the people that have, were involved throughout it all, gave so much of their time and effort to meet a real need in the State of Hawaii. As was indicated earlier, the Congressional Act that established the Hawaiian Homes program talked about the conveyance of 200,003 acres more or less and for years that phrase 'more or less' has been plaguing the State and the Hawaiian Homes Program because in most instances, it meant 'less.' And in any attempt to resolve this over the past 80 years, or 70 years, has not resulted in any kind of resolution. In fact, in more cases than not, resulted in lands being lost to the Hawaiian Homes Program so this year we made an attempt to shift that to establish, to finally bring the acreage up to what the legislation called for and to see if anyone else wanted to challenge the 'more' or the 'less' would have the burden, rather than the Hawaiian Homes Program. So this is a very historic moment in the establishment of this trust. I think it is a historic moment in Hawaiian history when we bring these trusts back into satisfaction. That is what we set out as a goal in January in my State-of-the State. We would not be where we are today were it not for the people involved. There were countless numbers of individuals working hours, countless public hearings held, your staff has been incredible, and I want to thank them for bringing us this far. Obviously, I would urge that you complete this conveyance and transfer these lands to the

Hawaiian Homes Program. I need to assure you that, first of all, on a personal level, as a Native Hawaiian I think that this is a very satisfying day for me, personally, to see the Hawaiian Homes Trust made whole again and to see the trust have lands that could actually be used for homesteading rather than lands that are marginal to begin with. But, I think further, as Governor of the State of Hawaii, I know it's personally satisfying to me as I am in my own tenure that we are able to meet one of the major objectives of our State, which is the obligation to Native Hawaiians. I should also let you know that as Governor it is our intention to meet--there are a number of objectives that the State has--one objective and it is reflected in the very measured way that this was done to make sure that our pristine and forest lands be preserved as well so this is an exchange, setting up priorities, having DLNR take care of those things that are really pristine and important and transferring to Hawaiian Homes lands that people can settle on. Also, as Governor, I think, one of our priorities was to make sure that agriculture remains economically viable, and this exchange should in no way lessen agriculture activities in the State of Hawaii, and I don't think that's not the intention of Hawaiian Homes programs for those people who may be afraid that this would jeopardize their enterprises. And finally, we are very aware of the tenants on the land, and this is a long-term measure. What we have done is switch the ownership so that on the long-term we can unravel what in 70 years we have not been able to do so, again, I urge you to pass this conveyance today."

Rep. Ululani Bierne commented that during the work of the task force there was dialogue with the Governor, Mrs. Drake, and Mr. Ahue regarding lands in the 46th District and requested that the task force consider Waiahole-Waikane Valley, possibly Kahana Valley State Park, and lands on the Hauula Homestead Road. She said the Native Hawaiians not only live in Nanakuli, Waianae, and Waimanalo, and other areas on Kauai, like Anahola and Puunene, they do come from areas in the 46th District, as well.

Mrs. Hoaliku Drake said the lands were residential, agriculture and income-generating. She stated, "I know it is a historical day for the people of Hawaii, not only for the Hawaiians, but I believe for the people of Hawaii in the decision which I hope will be rendered by this Board in allowing us to receive this 16,518 acres of land and that my Commission would be in on Tuesday will be in receivership of your motion and these particular parcels of land but, you know, I have never seen a group of men and women that have wholeheartedly during the last month work so closely with Hawaiian Homelands. I have been on helicopters, I have been down in taro patches, I have climbed mountains, I have been in valleys, and I assure you that I've inspected most of the lands we talk about today, and it has been a great joy for me to work with this young man here, who has given much of his time and efforts and to much of your staff on the outside islands and the island of Oahu but especially, Keith, for you and your leadership, for Dona, who has worked very diligently with Hawaiian Homelands and for you men who sit on this Board, I would like to convey my heartfelt appreciation and the appreciation of all our beneficiaries, and all of the Hawaiian people."

Mr. Ahue thanked Norma Wong for her work on the project.

**ACTION** Mr. Nekoba moved to approve as amended; seconded by Mr. Landgraf.

Mr. Yuen asked to add amendments with the consent of Mr. Nekoba and Mr. Landgraf relating to the Island of Hawaii.

"(1) We've identified several parcels, TMKS 1,9,2,6,7,8,9, totalling 144 acres at Volcano, which are native forest land, and in the process of doing this proposal that this issue has come up as probably not really suitable for the Hawaiian Homes Program and my amendment would be replace that with at least equivalent acreage in the Lalamilo Ahupuaa. The original list that went out had up to 2400 acres in Lalamilo. I think it was plus or minus, and apparently it's 2105 so that shortage can be made up in that ahupuaa.

"The second amendment would be a technical one that relates to this 300 acres in Kalua that it's clear that the 300 acres is to be selected out of that larger parcel at a later date, and the reason for this amendment will be that the University, the future West Hawaii University site, is to be located in that area, as well as possible other governmental facilities. This is roughly a 2,000 acre parcel so that the planning for things like the selection of the University site should be finalized before the 300 acres is taken out.

"The third is a very technical point--that the highway corridor in Lalamilo for the future Waimea to Puako Highway is identified in the submittal as the 'mud lane,' and I don't think that that's really, that's not the 'mud lane,' and we need to, DLNR needs to retain the highway. I think everybody agrees that DLNR needs to retain that highway corridor in the Lalamilo Ahupuaa.

"The fourth point would be that there be reasonable access by the DLNR across these transferred lands to other lands that are retained by the DLNR. This is a technical thing that I'm sure will be worked out in the process of the conveyance but because we're dealing with so much land in a relatively compressed time frame, I'm not sure that all of the access issues have had a chance to be worked out. For example, there may be a road through a parcel that's going to Hawaiian Homes that leads to another parcel that's being retained by the DLNR. I think it only be reasonable that, that sorts of issues need to be dealt with."

Mr. Landgraf asked Mr. Yuen if he would consider a further amendment concerning the 130 acres in Volcano--rather than making that up in Lalamilo that there be some flexibility of somewhere else. Mr. Yuen said he was open to it to the extent that it was desired to get a certain acreage today Lalamilo was an area he suggested. If Hawaiian Homes, the people negotiating can identify somewhere else where the acreage could be made up, that would be fine.

**ACTION** Unanimously approved with staff's amendments; amendments by Mr. Yuen and the additional amendment by Mr. Landgraf.

## ITEM H-5 CONTINUED

Additional testimony was presented by Mr. Ben Bland from the Maalaea Coalition. He said he was a firefighter for the County of Maui and a member of the surfing community. He said he got involved in the project when the Army Corps brought out their old EIS and indicated that this project would cause no adverse effect to surfing. At that time he and his young sons surfed at those sites. He stated he was confused by the statement and as it evolved another EIS was requested. He wrote to the Army Corp suggesting a way to resolve the problem internally in the harbor through wave baffling, etc., to solve the boaters's problems and still protect the surfing sites and the environment. They attended public hearings, asked for additional mitigation. These are surf sites used by the young people of Maui, he said, and the submerged lands affect those surf sites directly because the waves break as a result of the configuration. If the surf sites are lost, he claimed they would never recover.

Mr. Ben Bland, Jr., asked that none of the surfing sites be destroyed and it was important part in his growing up and gave him something constructive to do.

Mr. Paul Achitoff, staff attorney with the Sierra Club Legal Defense Fund, testified regarding the environmental impacts of the project on behalf of the Maalaea Coalition and Life of the Land. "I want you to know that the environmental impacts that are projected to result from this project are serious and they are not being mitigated. I am very familiar with the environmental impact statement that had been prepared on this project and the various mitigation measures that have been proposed and a close reading of those provisions shows that there are serious environmental impacts that either--there's no mitigation proposed whatsoever or whatever mitigation has been proposed is, there's really no commitment to those mitigation measures, such that we can have any confidence that they will be implemented and, in fact, it is apparent that the project proponents do not want to implement those mitigation measures. It is my view that the project as proposed would clearly conflict with federal law, Clean Water Act, Endangered Species Act, and procedurally with NEFA. I won't go into the details of the federal laws except to the extent that those laws show that the sorts of impacts that are going to result from this project have been deemed acceptable because they conflict with policy. As far as the--one of these impacts is water quality impacts. The project area includes two special aquatic sites, two types of special aquatic sites. Now, the Environmental Protection Agency in its guidelines for issuance of dredge and fill permits has said that degradation of special aquatic sites considered to be the most severe environmental impact covered by the EPA's guidelines and the guiding principle should be that degradation or destruction of special aquatic sites may represent irreversible loss of valuable aquatic resources. The two types of special aquatic sites that will be affected by this project are coral reef habitat outside the harbor which would be destroyed forever, acres of it, as well as vegetative shallows within the harbor. Under the Clean Water Act, legally to proceed as planned, the project proponents would have to show that no design that doesn't destroy these resources is practicable and the project proponents haven't even tried to make such a showing. They have made no serious effort to show that there is no other practical design. Also as far as water quality is concerned, the water quality at Maalaea has in recent years been routinely below State standards. DOH monitoring has shown that and this is taken from EIS: In three years of sampling criteria have consistently been exceeded for turbidity



in over one-third of all measurements. The project proponents admit that turbidity will increase not only temporarily as a result of the dredging and filling but permanently as a result of increased vessel travel. They have expressly refused to control, to even try to control increased turbidity as a result of their dredging and filling activities, and even if they did control it they admit that in the long-term the project will result in increases in turbidity and siltation as a result of increased vessel activity. There is no mitigation program whatsoever for water quality degradation so environmentally it is simply unacceptable and it isn't just unacceptable to me or to my clients but Fish and Wildlife Services pointed this out, Office of State Planning has pointed this out, and still nothing's being done about it. Fish and Wildlife Services on record as saying as follows: Maalaea Bay is a productive system that may be limited by the effects of siltation. The biota of Maalaea Bay has been described as unusual in that the abundance and diversity of marine species which are uncommon elsewhere in the Hawaiian Islands are common in the bay. The reasons for the special character of the biological resources of the bay are largely unknown and extreme caution in undertaking any action which would alter any aspect or condition of the bay has been urged. The maintenance of good water quality in Maalaea Harbor is of great importance since cumulative impacts to water quality could contribute to the degradation of the biological resources and ecological features of Maalaea. Therefore, the Service recommends the Corps develop measures to protect the quality of water in Maalaea Harbor, project related impacts and incorporate these measures as part of the proposed project. In spite the urgings of Fish and Wildlife Service no such action has been taken and the Service remains opposed to the project as planned. There's another water quality issue--Water Act issue that proponents of this project have completely ignored. The Clean Water Act prohibits dredging and filling where sediments may contain toxic substances. It's not unlikely that the sediments in Maalaea Harbor contain toxics since sediments in other harbors of the State have been found to contain them. The EPA in its comments on the draft EIS called upon the proponents of the project to provide data on this issue. They have refused. In fact, they have--the proponents of the project have admitted that the accumulation of contaminants in the harbor waters and bottom sediments presents the potential for bioaccumulation in the marine life inhabiting the site. In addition, the presence of contaminants in the bottom sediments raises problems for disposal of maintenance dredged material through the life of the project so they admit that there's a problem but they have provided no analysis, no data, and no mitigation.

"Turning to another important impact of this project--Maalaea Bay is universally acknowledged as one of the most critical habitats of the endangered humpback whale in the entire world. No one questions this. Humpback whales come to Maalaea from all over the Pacific every winter, November through May, to calve and nurse. The National Marine Fisheries Service has gone on record as saying that increased vessel activity as a result of proposed harbor expansion may adversely affect humpback whales in Hawaiian waters. This determination was based on the likelihood of displacing humpback whales . . . and subsequently impeding recovery of the whale population. National Marine Fisheries Service has also said, and this is from their biological opinion, which is part of the EIS: Future development of new harbors and programs along the West Maui coast may likely exceed the jeopardy threshold for humpback whales. In other words, they're saying that if you continue to develop West Maui in this way you are likely to jeopardize the continued existence of humpback whales--as a species--forever, gone. Maalaea Bay is not only home to humpback whales but hawksbill,

endangered hawksbill turtles have been sited within the past year nesting here, as well as green sea turtles, which are threatened species. The threats to these endangered species are not only from the increases in vessel traffic resulting indirectly from the project, much of which, ironically, is going to be the result of vessels that are coming to Maalaea to make money from whale watching but also from the blasting, the dredging and filling of the project itself and although National Marine Fisheries Service has specifically asked that there be no blasting and filling during the winter months when the humpbacks are in Maalaea to calve there has been no commitment to do that. So in light of these environmental impacts, which are acknowledged by Fish and Wildlife Service, by National Marine Fisheries Service, by Office of State Planning, and even proponents of the project themselves to plunge ahead and grant this application seems remarkably ill advised at this point. Particularly when, as Mr. Hall pointed out, the environmental impact statement has, the final environmental impact statement process under NEFA has not been finalized. There's no record of decision. There's no official determination that the project's proponents are committed to going forward with the project and as has been pointed out, OSP has already found that this project, as planned, is not consistent with the CZM program. Unless and until that objection is successfully appealed by the Corps no federal permits can be issued for this project. And I want to point out that you're not faced with having to choose between the goal of this project, which is protecting vessels in the harbor from wave conditions or sacrificing vessel safety in favor of the environmental concerns and surf sites. It's just, that is a false conflict. It is entirely possible that a harbor improvement plan can be designed that can safeguard the vessels without destroying any of the surf sites or adversely affecting endangered species or tearing out acres of rich corral community. This is not just speculation. Fish and Wildlife Service has been urging that the Corps examine such an alternative and the Corps itself has generated scientific data showing that an internal modification of the harbor, which would not have these environmental impacts, would be safe for vessels, and it wouldn't destroy the environment and yet there has been stubborn refusal to fully analyze the possibility of doing that kind of internal harbor improvement plan so I urge you to deny the application and I also feel that Mr. Hall has done an excellent job of pointing out the legal hurdles procedurally under State law to going ahead with this permit at this time."

Mr. Evans clarified that there may have been some confusion relative to the law in the conservation district. "Specifically, several things were brought up that need clearance . . . and show why we took the position we took, vis-a-vis Maui County, the Maui County Planning Department's position is relatively consistent with us. We have a project, basically, the area here being mauka, the area here being sea. Now, on the question of the SMA, the Conservation District Use Application before you this morning, gentlemen, limits itself only to those areas makai--that's the area of interest for your staff. We're limited to the CDUA. That's not to say that Mr. Parsons' project is limited to this area, too. Mr. Parsons' may well have things that he may desire to do mauka; he may want to put in buildings, or whatever, but these buildings are not in the conservation district. This area here is all urban or some other zone. Our function in processing the conservation application was to limit our requirements to that area so when we go to the County and we ask the County for some kind of clearance, the County can come back and say, 'The project has a lot of things in it.' And some things and Mr. Parsons

may have to on other occasions apply to the County for SMA clearances because the SMA clearly involves this area here if the County tells us, but the County tells us that this area in conservation district is outside the SMA. That's clearance from County relative to the SMA. We limit our actions, or at least your staff, limit our actions to the area under concern by us, which was that of the conservation district. Mr. Hall's concerns about the environmental and EIS questions--when we do this conservation application because we are in the conservation district that triggers, that's what they call a category action under State law, and that category of action triggered an environmental requirement of some kind on the part of the applicant. In this particular case, State law requires a Supplemental EIS. The applicant then went through that process of complying with State law. In contrary to what the guidebook says, the statute, as we understand it, does say that: if you require an EIS, then the EIS must be accepted before you can approve the project--before you approve the project. In this particular case, a Supplemental EIS was required under Chapter 343. A Supplemental EIS was done. A Supplemental EIS was accepted by the Governor so our action which limits itself to the conservation district also limits itself environmentally to State law, and the State law here was Chapter 343. Now, if you gentlemen will look at Condition No. 1, we do not and did not intend to obviate the need for any other federal NEFA law or Clean Water Act, for example, which was brought up here this morning. There clearly may be requirements under those laws. We felt comfortable that by placing Condition No. 1, in our recommendation for approval, if you approve the submittal with that condition in it, that still requires the applicant to go out and get any other, any other statutes, to meet, federal or whatever, to comply with those statutes before, if that's what the statutes say, before they proceed. Relative to the request for another contested case hearing that Mr. Hall made before you this morning, Mr. Hall says to you that: this is the first time I've heard this before the Board that incorporates the whole project; therefore, I am now asking you for a contested case this morning. But if we take a look at Paragraph 11 on page 8 of Mr. Hall's request for a contested case, we will see on page 8, in paragraph 11, no. 1 that he himself refers the submerged lands outside the current Maalaea Small Boat Harbor are the part proposed to be blasted to construct a new channel entrance and a new 640 foot breakwater. And Mr. Hall, who previously has come in, and asked you gentlemen for a contested case, based that request on the entire project, which this morning he now is saying is the first opportunity he really has to address that. Relative to the concerns on cause, it is very difficult. 'Cause' is a subjective thing, and Mr. Hall does say in his request, notwithstanding all of this: I still feel that I've demonstrated good cause for the Board to hold a contested case. That really is an opportunity for him, from our perspective, to try to establish equity, if you will, from his perspective, and we really would not have one comment at this point for or opposed to that kind of a statement."

In answer to a question from Mr. Landgraf, Mr. Evans replied that as far as the breakwaters in the harbor the SMA would not be applicable based on comments of the Planning Department. Mr. Evans added that the SMA line delineated by the shoreline, would be consistent with the existing Executive Order.

Mr. Hall pointed out that DOT had filed for an SMA application for the Sea Flight Terminal so he did not agree with Mr. Evans that it was outside of the SMA area and that the County should be asked for a clearance. Mr. Ahue pointed out a letter from the County

stating that they reviewed the project and it didn't require an SMA. Mr. Hall claimed that the letter was in reference to the subdivision of submerged lands. Mr. Evans stated that the County did indicate that the area is not within the SMA. Mr. Hall pointed out a letter dated January 14, 1993, in the EIS where the County commented on the EIS saying that: Since not all of the proposed facilities are in submerged lands portions of the project falls within the County's jurisdiction under CZM regulations. Because of this the State would have to apply for an SMA permit for the portions mauka of the shoreline. Mr. Evans agreed that portions mauka of the shoreline and those would require an SMA. "The only issue before the Board today are those portions of the project that lie within the conservation district," Mr. Evans said. Mr. Hall commented that in every other case the Board has asked for a clearance letter from the County of Maui before proceeding and was not sure who was correct--that the Board has never granted a CDUA permit without a clearance from the County of Maui and until and unless is received did not believe the Board could grant the permit. He said the application was expanded to harbor improvements and there is no County approval for those improvements; he further stated that the County was probably unaware of the proposed improvements.

**EXECUTIVE SESSION** Mr. Kennison moved for executive session to consult with legal counsel.

The Chairperson allowed Mr. Hall further comment. "The EIS here was not just mandated as a matter of State law. Again, you are partners with the feds; it was a joint federal-state EIS. Just because there's compliance with State law, it doesn't mean you're off the hook and the whole process is complete--that's not true. The contested case, to the extent that you folks are expanding the application to include all the harbor improvements, I am now asking for a contested case on that so and, again, for the portions that had to do with the submerged lands, I still believe there's good cause for a contested case because I don't think the Board's prepared to act on this; there's no mitigation program you guys are ready to adopt and I think a contested case is the best way for you to exercise your responsibility to preserve what we can preserve and see if there is an alternative as has been mentioned that would allow the harbor to expand without destroying all these important sites."

Mr. Kennison's motion was seconded by Mr. Apaka and unanimously carried.  
The Board was in executive session from 2:09 to 2:18 p.m.

Mr. Evans clarified:

(1) Questions have been raised concerning the title in the CDUA. He said staff is clarifying what the project encompasses; the title today currently reflects what has been under discussion throughout the entire process;

(2) Regarding the question of the SMA boundary, Maui County advised that lands makai of the shoreline are outside the SMA; lands mauka of the shoreline are in the SMA and applicant would be subject to any County requirements.

(3) Concerning Condition No. 9, should the Board sustain the staff recommendation, states: the representations made in the environmental document itself relative to mitigation, they're all incorporated as conditions to this particular project. Mitigation measures were proposed as indicated on page 24 by the Army Corps of Engineers, U.S. Fish and Wildlife Service, the contractors, the Environmental Protection Plan, the biological opinion of the National Marine Fisheries Service, as well as the Coastal Zone Management Program. Other representations regarding mitigation that were made that were not named are through Condition No. 9 incorporated as conditions of the approval.

Mr. Evans further stated in response to a question from Mr. Yuen that there would appear that there was a good faith effort on the part of the parties as in the case of the statement that they may or might create a new surf site.

Mr. Nekoba commented that the OSP notes the replacement sites as an option and the mitigating items would be incorporated into the CDDA. Mr. Parsons elaborated that the specific mitigation items in the final Supplemental EIS goes into more detail on each of those sites. For instance, he said, with respect to constructing a new surfing site, that was discussed and was considered "probably too expensive and maybe environmentally unacceptable because of the area that would have to be covered by the construction; however, it further states in the mitigation efforts that the east side of the new channel would be sculpted to provide a left break as an effort to replace 'Off the Walls' which must necessarily be destroyed in this action. The mitigation efforts within the final Supplemental EIS itself is in more detail. With respect to the Office of State Planning, we hope to have a meeting with them to discuss possible revision of some specific language in their recommendations that would allow us to proceed with some of the recommended mitigation efforts. We would especially like them to acknowledge in their letter that this project is fully in compliance with the Coastal Zone Management policy and objectives as relating to economic use, which was not mentioned in their letter."

**ACTION** Mr. Kennison moved to approve staff recommendation on A & B. Seconded by Mr. Apaka.

Mr. Evans, "Part A is understandable; now, before Part B, the question in my mind, there's been another request this morning for contested case hearing. Should the Board act on Part B before it adjudicates the second request for the contested case hearing, in fairness to the requestor of the contested case hearing, . . . I'm just trying to be fair. "

The Chairperson suggested taking one motion at a time; therefore, Mr. Kennison withdrew his motion.

Mr. Kennison moved to approve Part A; seconded by Mr. Apaka and unanimously approved.

Mr. Evans, "Now, we got a verbal request made today for contested case hearing."

Mr. Kennison moved to deny the verbal request for contested case hearing; seconded by Mr. Apaka; Mr. Landgraf abstaining; motion carried.

Mr. Kennison moved to approve Part B; seconded by Mr. Apaka; Mr. Landgraf abstaining; and no by Mr. Yuen; motion carried.

Mr. Hall asked for a certified copy of the decision.

**ITEM F-9 REQUEST LAND BOARD APPROVAL FOR THE TERMINATION OF LEASE AGREEMENT BETWEEN DOLE FOOD COMPANY, INC., WAIALUA SUGAR COMPANY, INC. AND THE STATE OF HAWAII, HALEIWA WEINBERG VILLAGE, HALEIWA, OAHU, TAX MAP KEY 6-2-06:6(POR. OF), TAX MAP KEY 6-2-07(POR. OF)**

and

**ITEM F-10 REQUEST LAND BOARD APPROVAL FOR THE TERMINATION OF LEASE AGREEMENT BETWEEN THE CONSUELO ZOBEL ALGER FOUNDATION AND THE STATE OF HAWAII, CONSUELO ZOBEL, ALGER HOMELESS VILLAGE, WAIANAE, OAHU, TAX MAP KEY 8-5-35:24(POR. OF)**

**ACTION** Unanimously approved as submitted (Nekoba/Landgraf).

**ITEM F-2 WAIMEA OUTDOOR CIRCLE REQUESTS DIRECT LEASE OF PARCELS 1 & 2, BEING PORTION OF THE GOVERNMENT LANDS AT WAIMEA, SO. KOHALA, HAWAII, TAX MAP KEYS 6-6-03:7 AND 6-6-08:ROAD RESERVE**

**ACTION** Unanimously approved as submitted (Yuen/Nekoba).

**ITEM F-6 RESUBMITTAL--REQUEST FOR EXTENSION OF LEASE TERM AND CONSENT TO MORTGAGE ON GENERAL LEASE NO. S-4095, OLOMANA GOLF LINKS, INC., WAIMANALO, KOOLAUPOKO, OAHU, TAX MAP KEY 4-1-13:10**

**ACTION** Unanimously approved as submitted (Nekoba/Landgraf).

**ITEM F-13 AMENDMENT TO PRIOR BOARD ACTION OF FEBRUARY 12, 1988 (AGENDA ITEM F-24) RELATING TO AN AGREEMENT TO PARTITION LAND AT NIU VALLEY, HONOLULU, OAHU; ACCEPT QUITCLAIM TO A PORTION OF PROPERTY, ISSUE QUITCLAIMS TO THE REMAINDER OF PROPERTY; AND SET ASIDE TO DIVISION OF FORESTRY AND WILDLIFE, TAX MAP KEY 3-7-04:1, 2 AND 20**

**ACTION** Unanimously approved as submitted (Nekoba/Landgraf).

**ITEM F-14 AMENDMENT TO PRIOR BOARD ACTION OF MARCH 12, 1993 (AGENDA ITEM F-11) SETTING REVOCABLE PERMIT RENT INCREASES, WAIAHOLE, KOOLAUPOKO, OAHU, TAX MAP KEY 4-8-01 AND 07**

Mr. Bernie Lam Ho stated he represented the eight permittees and commented on the rental increases originally proposed and the actual land areas under the permits.

Mr. Young explained that the rate increases wouldn't be implemented and would be rolled back; whatever has been paid since January 1, 1994, will be refunded and this was the purpose of the action today.

**ACTION** Unanimously approved as submitted (Nekoba/Landgraf).

**ITEM H-1 PURSUANT TO A CONTESTED CASE HEARING UNDER CHAPTER 91, HRS, DECISION AND ORDER OF THE BOARD OF LAND AND NATURAL RESOURCES IN THE MATTER OF THE REQUEST FOR A ONE-YEAR EXTENSION FOR THREE SPECIAL USE PERMITS TO MAKE COMMERCIAL TOUR BOAT LANDINGS AT THE NA PALI COAST STATE PARK AND/OR HAENA POINT, KAUAI**

**ACTION** Unanimously approved as submitted (Apaka/Kennison).

**ITEM E-1 REQUEST OF KAHUKU HIGH AND INTERMEDIATE SCHOOL TO ESTABLISH AN ALTERNATE EDUCATION CENTER AT KAHANA VALLEY STATE PARK, OAHU**

Mr. Hank Nawahine and Lea Albert, principal of Kahuku High School urged the Board to establish the center. Rep. Ululani Beirne spoke in support of the program; however, expressed her concern about the center being located in front of Lydia Dela Cerna's property. Mrs. Cerna was worried about the intrusion on her privacy but was informed that if any problems arose the students would be removed. Rep. Beirne suggested that maybe further review was necessary. Another concern was that the students would not have adequate time for cultural study because they needed to focus on core subjects in order to graduate. She also said that almost \$7,500 has been spent for the flooring and tent. She suggested that after the residents relocate to the new subdivision such a program at that time would be more favorable. She also recommended that the program be kept on one site.

Ms. Leona Gardina spoke in favor of the program.

Mr. Ben Schaefer pointed out that at a recent meeting of 13 residents, the majority support the program. Besides Mrs. Dela Cerna's concerns, concern was expressed about proper supervision of the students. The question he said was whether they should have the program in Kahana Valley at this particular time.

**ACTION** Unanimously approved as submitted (Nekoba/Landgraf).

**ITEM F-4** **REQUEST TO ACQUIRE EASEMENT FOR WATERLINE TO KING KEKAULIKE HIGH SCHOOL, MAKAWAO, MAUI, TAX MAP KEY 2-3-07:PORS. 1 AND 10**

**ACTION** Item deferred to the next meeting of the Board (Kennison/Apaka).

**ITEM F-5** **DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT AND TOURISM REQUEST ONE-YEAR EXTENSION OF RIGHT-OF-ENTRY COVERING INSTALLATION AND PERIODIC MAINTENANCE OF WIND AND STRATEGY PROJECT ON STATE LANDS AT KUAOKALA (KAENA POINT AREA), WAIALUA, OAHU; PULUHUNUI (OLD PUUNENE AIRPORT AREA) AND UKUMEHAME, WAILUKU, MAUI; AND LALAMILO, SO. KOHALA, HAWAII**

**ACTION** Unanimously approved as submitted (Nekoba/Landgraf).

**ITEM F-11** **DEPARTMENT OF ATTORNEY GENERAL REQUESTS APPROVAL OF AMENDMENT NO. 3 OF LAND OFFICE DEED LOPP-OA-141, DOWNTOWN, HONOLULU, OAHU, TAX MAP KEY 2-1-03:1**

**ACTION** Unanimously approved as submitted (Nekoba/Landgraf).

**ITEM F-16** **DIRECT AWARD OF PERPETUAL, NON-EXCLUSIVE EASEMENT FOR WATER METER PURPOSES, LOT 23, HANAPEPE TOWN LOTS, 1ST SERIES, HANAPEPE, WAIMEA (KONA), KAUAI, TAX MAP KEY 1-9-05:07**

**ACTION** Unanimously approved as submitted (Yuen/Landgraf).

**ITEM F-17** **WAIVER OF IMPROVEMENT BOND REQUIREMENT CONTAINED IN EXTENSION OF GENERAL LEASE NO. S-4654, NORTHRUP KING CO., KEKAHA, WAIMEA (KONA), KAUAI, TAX MAP KEY 1-2-02:35**

**ACTION** Unanimously approved as submitted (Yuen/Nekoba).

**ITEM F-18** **AMENDMENT TO PRIOR BOARD ACTION OF JUNE 9, 1994 (AGENDA ITEM F-1-J), LAND LICENSE NO. S-328, KEKAHA, WAIMEA (KONA), KAUAI, TAX MAP KEY 1-2-02:1**



**ACTION** Unanimously approved as submitted (Nekoba/Yuen).

**ITEM D-1 PERMISSION TO ENTER INTO OPERATION AND MAINTENANCE AGREEMENT, DRAINAGE IMPROVEMENTS, ALONG KAMEHAMEHA HIGHWAY, KAAAWA, OAHU**

**ACTION** Unanimously approved as submitted (Nekoba/Landgraf).

**ITEM H-4 AMENDMENT REQUEST FOR CONSERVATION DISTRICT USE PERMIT HA-811, SINGLE FAMILY RESIDENCE AT SOUTH KONA, HAWAII; TAX MAP KEY: 8-3-5:16; APPLICANT: BILL RUSH; AGENT: BILL WEIGANG, WEIGANG MARVICK & ASSOCIATES**

Mr. Yuen stated the location and design hints of a bed and breakfast. The Chairperson noted a single-family agreement with the County, and Mr. Yuen questioned why that would be necessary when a home is modified.

**ACTION** Mr. Yuen asked to add that recorded permit approval be submitted to the Board, as well as a copy of the single-family dwelling agreement; no bed and breakfast, or rental (Condition No. 4A) with a copy of the CDUP to Virginia Goldstein, the Hawaii County Planning Director, and to the community association; seconded by Mr. Nekoba and unanimously approved as amended.

**ITEM K-1 LEASES FOR LEI VENDING CONCESSION, HILO INTERNATIONAL AIRPORT, HAWAII (AH LAN HIRO, AH LIN LOO, ANNA KAMAHELE)**

**ACTION** Unanimously approved as submitted (Yuen/Nekoba).

**ITEM K-3 GIFT, PACKAGED FOODS, FLORIST, JEWELRY AND SUNDRIES CONCESSION, KAHULUI AIRPORT**

**ACTION** Unanimously approved as submitted (Landgraf/Nekoba).

**ITEM K-4 APPLICATION FOR ISSUANCE OF REVOCABLE PERMIT 5230, KAPALUA-WEST AIRPORT, MAUI (MAUI LAND & PINEAPPLE CO., INC.)**

**ACTION** Unanimously approved as submitted Landgraf/Nekoba).

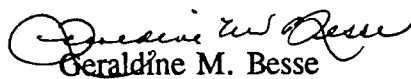
**RESOLUTIONS**

The following resolutions were adopted by the Board congratulating employees on their retirement:

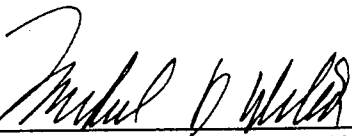
- (1) Paul Kawamoto, Aquatic Biology Program Manager, 29 years of service;
- (2) Henry Y. Okamoto, Aquatic Biologist, 36 years of service;
- (3) Henry M. Sakuda, Aquatic Resources Administrator; 31 years of service;
- (4) Nobuko Nishimura, Aquatic Resources Clerk-Typist, 31 years of service;
- (5) Gary Allen Provencal, DOCARE Officer, 10 years of service; and
- (6) Kathy S. Laoron, Division of Forestry and Wildlife Secretary, 26 years of service.

**ADJOURNMENT** - There being no further business, the meeting was adjourned at 3:55 p.m.

Respectfully submitted,

  
Geraldine M. Besse

**APPROVED FOR SUBMITTAL:**

  
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MICHAEL D. WILSON, Chairperson  
Board of Land and Natural Resources