

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Land Division  
Honolulu, Hawaii 96813

January 27, 2012

Board of Land and Natural Resources  
State of Hawaii  
Honolulu, Hawaii

PSF No.: 08od-068

OAHU

Resubmittal – Request to Cancel Grant of Term, Non-Exclusive Easement to TLM Partners Ltd. for Seawall, Lanai and Landscaping Purposes, and Request for Refund of Consideration Paid, situated at Niu, Honolulu, Oahu, Tax Map Key: (1) 3-7-002:seaward of 009.

BACKGROUND:

The request was withdrawn from the agenda of November 10, 2011 upon the request of the applicant. Staff brings the request to today's agenda after consulted with the attorney of the applicant.

The subject request was heard by the Board on June 9, 2011, under agenda item D-8. The matter was deferred due to a lack of having the minimum four (4) votes in order to take official action. A copy of the June 9, 2011 submittal is attached as Exhibit I-A for the Board's reference.

At the last meeting in June, a question arose as to one of the comparable easement transactions in the Niu area (item 2 on Exhibit 10 attached to the June Submittal), showing an easement area of 2,197 square feet and a value of \$34,140. However, immediately following the June 9, 2011 Board meeting staff went back into its files and reviewed that transaction and learned that the easement in question was actually only 297 square feet, and not 2,197 square feet (or about \$115 per square foot). The value of the easement of that comparable was actually much higher than TLM's value of \$61.54 per square foot (2195 square feet and a value of \$135,080). Staff immediately informed TLM's counsel of this error.<sup>1</sup>

After the June 9 meeting, staff and TLM's counsel discussed various aspects of this case and exchanged confidential settlement proposals or ideas issued pursuant to Rule 408 of the Hawaii Rules of Evidence. At the end of the day, the parties could not come to terms and it was decided to bring this matter back to the Land Board for a decision.

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<sup>1</sup> The land value assessed for real property tax purpose for the abutting TLM lands is \$1,899,000 for 16,317 square feet of land (\$116.38 per square foot), and the land value in the appraisal for the subject easement request is \$1,870,000 or \$114.61 per square foot). As such, the compensation sought for TLM's filled land and seawall easement seems very reasonable at \$61.54 per square foot.

It is still the staff's position that TLM is required to resolve the subject encroachment by way of a filled land and seawall easement, and that the compensation of \$135,080 is fair and just under these facts and circumstances.<sup>2</sup>

At the last meeting in June, the concept of the State being granted a real property lien in lieu of the cash equivalent for the filled land and seawall easement was discussed. After much discussion internally and with counsel, and in an attempt to reach an amicable resolution of this matter, staff is amenable to either: (1) the execution of an appropriate easement document full cash value of the easement of \$135,080, or (2) the execution of an appropriate easement document and a real property lien that runs with the land encumbering TLM's private lands in favor of the State for the full easement value (\$135,080).

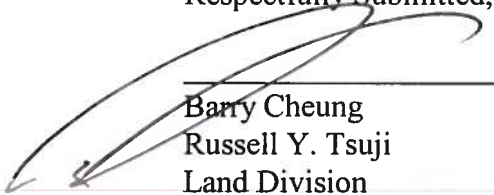
RECOMMENDATION: That the Board:

- A. Deny the request by TLM to cancel the easement request and for a refund of the cash paid for the easement in the amount of \$135, 080<sup>3</sup>;

OR

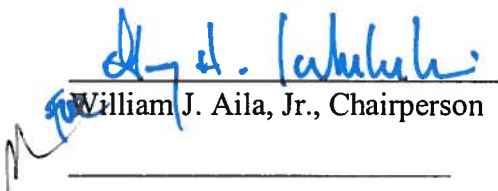
- B. Approve and authorize the Chairperson to execute an appropriate easement document provided that TLM grants to the State a real property lien (and provide to the State a current title report showing all encumbrances on the land and as may be approved as to form by the Department of the Attorney General) that runs with the land encumbering the abutting TLM's private lands for the full easement value of \$135,080, and the return of the cash equivalent of \$135,080 to TLM.

Respectfully Submitted,



Barry Cheung  
Russell Y. Tsuji  
Land Division

APPROVED FOR SUBMITTAL:



William J. Aila, Jr., Chairperson

<sup>2</sup> After reviewing the prior easement document sent to TLM, staff believes that some of the terms and conditions related to the conservation district may not have been entirely applicable in this case. If requested by TLM, staff is willing to work with TLM and the Department of the Attorney General on attempting to work out terms and conditions that may be more appropriate or acceptable to all parties.

<sup>3</sup> TLM previously paid \$135,080 for the easement and \$55 for the fee for the easement document and map.

# **EXHIBIT**

**I - A**

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WITHDRAWN

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Land Division  
Honolulu, Hawaii 96813

November 10, 2011

Board of Land and Natural Resources  
State of Hawaii  
Honolulu, Hawaii

PSF No.: 08od-068

OAHU

Resubmittal – Request to Cancel Grant of Term, Non-Exclusive Easement to TLM Partners Ltd. for Seawall, Lanai and Landscaping Purposes, and Request for Refund of Consideration Paid, situated at Niu, Honolulu, Oahu, Tax Map Key: (1) 3-7-002:seaward of 009.

BACKGROUND:

The subject request was heard by the Board on June 9, 2011, under agenda item D-8. The matter was deferred due to a lack of having the minimum four (4) votes in order to take official action. A copy of the June 9, 2011 submittal is attached as Exhibit A for the Board's reference.

At the last meeting in June, a question arose as to one of the comparable easement transactions in the Niu area (item 2 on Exhibit 10 attached to the June Submittal), showing an easement area of 2,197 square feet and a value of \$34,140. However, immediately following the June 9, 2011 Board meeting staff went back into its files and reviewed that transaction and learned that the easement in question was actually only 297 square feet, and not 2,197 square feet (or about \$115 per square foot). The value of the easement of that comparable was actually much higher than TLM's value of \$61.54 per square foot (2195 square feet and a value of \$135,080). Staff immediately informed TLM's counsel of this error.<sup>1</sup>

After the June 9 meeting, staff and TLM's counsel discussed various aspects of this case and exchanged confidential settlement proposals or ideas issued pursuant to Rule 408 of the Hawaii Rules of Evidence. At the end of the day, the parties could not come to terms and it was decided to bring this matter back to the Land Board for a decision.

<sup>1</sup> The land value assessed for real property tax purpose for the abutting TLM lands is \$1,899,000 for 16,317 square feet of land (\$116.38 per square foot), and the land value in the appraisal for the subject easement request is \$1,870,000 or \$114.61 per square foot). As such, the compensation sought for TLM's filled land and seawall easement seems very reasonable at \$61.54 per square foot.

Withdrawn  
APPROVED BY THE BOARD OF  
LAND AND NATURAL RESOURCES  
AT ITS MEETING HELD ON  
November 10, 2011

EXHIBIT "I-A"

It is still the staff's position that TLM is required to resolve the subject encroachment by way of a filled land and seawall easement, and that the compensation of \$135,080 is fair and just under these facts and circumstances.<sup>2</sup>

At the last meeting in June, the concept of the State being granted a real property lien in lieu of the cash equivalent for the filled land and seawall easement was discussed. After much discussion internally and with counsel, and in an attempt to reach an amicable resolution of this matter, staff is amenable to either: (1) the execution of an appropriate easement document full cash value of the easement of \$135,080, or (2) the execution of an appropriate easement document and a real property lien that runs with the land encumbering TLM's private lands in favor of the State for the full easement value (\$135,080).

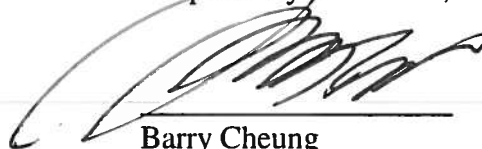
**RECOMMENDATION:** That the Board:

- A. Deny the request by TLM to cancel the easement request and for a refund of the cash paid for the easement in the amount of \$135,080<sup>3</sup>;

OR

- B. Approve and authorize the Chairperson to execute an appropriate easement document and a real property lien that runs with the land encumbering the abutting TLM's private lands in favor of the State of Hawaii for the full easement value of \$135,080, and the return of the cash equivalent of \$135,080 to TLM.

Respectfully Submitted,

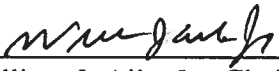


Barry Cheung  
Russell Y. Tsuji  
Land Division

**APPROVED FOR SUBMITTAL:**

<sup>2</sup> After reviewing the prior easement document sent to TLM, staff believes that some of the terms and conditions related to the conservation district may not have been entirely applicable in this case. If requested by TLM, staff is willing to work with TLM and the Department of the Attorney General on attempting to work out terms and conditions that may be more appropriate or acceptable to all parties.

<sup>3</sup> TLM previously paid \$135,080 for the easement and \$55 for the fee for the easement document and map.

  
\_\_\_\_\_  
William J. Aila, Jr., Chairperson

*WJ*

Land Board Meeting: November 10, 2011; D-13:

Withdrawn again at the Request of TLM. TLM asked that this matter be put off until either January meeting.

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# **EXHIBIT**

**A**

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Land Division  
Honolulu, Hawaii 96813

June 9, 2011

Board of Land and Natural Resources  
State of Hawaii  
Honolulu, Hawaii

PSF No: 08od-068

OAHU

Request to Cancel Grant of Term, Non-Exclusive Easement to TLM Partners Ltd. for Seawall, Lanai and Landscaping Purposes, and Request for Refund of Consideration and Fees Paid, situated at Niu, Honolulu, Oahu, Tax Map Key (1) 3-7-002:seaward of 009

BACKGROUND:

On May 8, 2008 and June 6, 2008, the Department received correspondence from Mr. Donald Clegg, the consultant for TLM Partners Ltd ("TLM" which hereafter shall also includes its attorneys, consultants and agents) seeking to acquire an easement for a seawall encroachment and use of State lands. Mr. Clegg's correspondence also included survey maps, photographs, and a "shoreline encroachment information sheet" describing the area it sought to acquire. See Exhibits "1" and "2" attached hereto.

In 1999 the Board of Land and Natural Resource (Land Board) established a policy to allow the disposition of shoreline encroachments by either removal or issuance of an easement. In carrying-out this policy, the Department established criteria to guide decision-making over specific cases. The criteria are as follows:

1. Protect/preserve/enhance public shoreline access;
2. Protect/preserve/enhance public beach areas;
3. Protect adjacent properties;
4. Protect property and important facilities/structures from erosion damages; and
5. Apply "no tolerance" policy for recent or new unauthorized shoreline structures

In this instance, staff concurred with TLM's consultant that the legitimization through an easement would be appropriate. Thereafter, on September 26, 2008, under agenda item D-9, the Land Board approved TLM's request and staff's recommendation for the issuance of a 55-year term, non-exclusive easement to TLM for seawall, lanai and landscaping purposes. A copy of the September 26, 2008 submittal is attached as Exhibit "3". Parts of the Land Board requirements were as follows:

**EXHIBIT "A"**



CONSIDERATION:

One-time payment to be determined by independent or staff appraisal establishing fair market rent, subject to review and approval by the Chairperson.

APPLICANT REQUIREMENTS:

Applicant shall be required to

- 1) Pay for an appraisal to determine one-time payment; and
- 2) Provide survey map and description according to State DAGS standards and at Applicant's own cost (previously submitted).

TLM paid for the appraisal and agreed to the appraisal amount. By letter dated September 8, 2009 (Exhibit 4), TLM paid the appraised value of \$135,080.00 for the term easement and submitted survey maps of the subject encroachment area of 2,195 square feet.<sup>1</sup> The Department of Attorney General drafted the easement document. Staff sent the document to TLM in January 2010.

TLM still holds the legal easement document and has not returned the executed document to the Department. Nevertheless starting in May 2010, TLM, through its attorneys has been asking staff to cancel the easement and return the money it paid.<sup>2</sup> For various correspondence between TLM's attorneys and the Department, see Exhibits "5a through 5d" through "6a through 6c," respectively.

At TLM's insistence, staff agreed to present this matter to the Land Board.

SUBJECT PROPERTY AND THE ENCROACHMENT:

The subject property is located in the Niu Beach Lots subdivision. This area was subdivided in 1927. See attached subdivision map, Exhibit 7. TLM's property includes Lot 28 as shown on this map. The shoreline at the time is shown on the map. The approximate azimuths and distances of the shoreline are stated on the map.

The easement covers 2195 square feet of land makai of the 1927 shoreline and a seawall on the makai end of this new land. The seawall is about 35 to 40 feet makai of the record boundary. Staff believes the area between the record boundary and the seawall is filled.

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<sup>1</sup> TLM's private survey maps are part of Exhibit "1" and "2" attached hereto, and for the Land Board's information, attached as Exhibit "9" are additional photographs of the encroachment area from the appraisal report.

<sup>2</sup> The money for these shoreline encroachments, especially for a seawall and use of State lands, typically is initially split 20% to OHA, and 80% to the Beach Fund administered by the Office of Conservation and Coastal Lands. Here, since the money was received by the Beach Fund in or around January of 2010, it is very likely the money has already been set aside by OCCL to help pay for its beach nourishment project at Waikiki Beach.

Such filled land and the seawall is an encroachment.

There are several bases for staff's position. A 1949 aerial photograph shows that the seawall had been constructed by that time and was located makai of an existing sandy beach – that is makai of the then shoreline. Exhibit 8. Some time after the seawall was built on territorial / state land, the area behind it was backfilled. This is apparent from staff's site visit when it was noted that the height of the seawall is about 6 feet higher than the submerged lands (which consists of a rocky shoreline). The land mauka and inside the seawall sits at least 5 feet above the submerged lands that is situated outside and seaward of the seawall.<sup>3</sup> This is clear indicia and evidence that the area was filled in the past. Moreover, other property owners within this particular neighborhood have sought to legitimize various encroachments in the form of easements as well. See Exhibits "10" and "11" which includes a spreadsheet showing various lot owners in the surrounding area and a map of those who obtained or are seeking an easement to legitimize encroachments and unauthorized uses of State lands.

TLM itself indicated that the area behind the seawall was "fill." See specifically para. 6 of Clegg's letter dated June 6, 2008 (Exhibit "2") and enclosures, and see generally, Clegg's letter dated May 8, 2008 (Exhibit "1").

#### REMARKS:

The Land Division staff has been consulting with the Department of the Attorney General, as well as the shoreline certification crew consisting of members from the Land Division, Office of Conservation and Coastal Lands and the State Surveyor's Office. Staff and the Department of the Attorney General do not believe TLM is entitled to cancel its easement which was issued to legitimize the seawall encroachment and unauthorized fill on State lands.

Here, we have TLM or its agent requesting to legitimize the encroachment through an easement for the seawall and filled land area. We have TLM's offer, Land Board's acceptance, and performance by TLM of providing the necessary survey maps, payment of the appraisal fee, and the payment of the appraised value of the easement. Staff and the Department of Attorney General consider the easement is a completed transaction. TLM's request to cancel the easement is and should be treated exactly as would any such request. In such a case, the easement can only be canceled if alternative arrangements are made to resolve the encroachment.

Staff therefore recommends that the Land Board deny TLM's request to cancel the easement unless and until TLM works with staff to make satisfactory alternative

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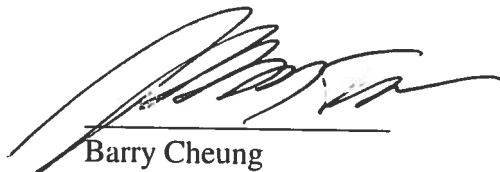
<sup>3</sup> See photographs of the area attached to Don Clegg's letter dated June 6, 2008 (Exhibit "2") and the photographs from the Appraisal Report attached hereto as Exhibit "9".

arrangements to resolve the encroachment.<sup>4</sup>

If and when such arrangements are made, then a portion of the payment for the easement may be retained to account for unauthorized use of state land.<sup>5</sup>

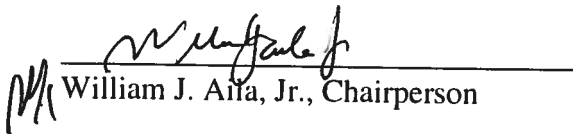
**RECOMMENDATION:** That the Land Board deny the request by TLM to cancel the easement and request for a refund of the consideration and fees for a total amount of \$135,135.00 regarding the grant of term, non-exclusive easement unless and until alternative arrangements to resolve the encroachment are presented to and approved by the Land Board.

Respectfully Submitted,



Barry Cheung  
Russell Y. Tsuji  
Land Division

APPROVED FOR SUBMITTAL:



William J. Aifa, Jr., Chairperson

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<sup>4</sup> This scenario often arises when processing shoreline certification applications. Applicants with shoreline encroachment problems must "resolve the encroachment" before the Department will certify the shoreline. Resolving the encroachment will either involve seeking the approval from the Department and Land Board to legitimize the encroachment through an easement as was done in the instant TLM case, or removal. HAR 13-222-19 [Encroachment upon State land and unauthorized shoreline improvements]. In this case, removal will likely lead to substantial erosion on the subject property and possibly neighboring properties.

<sup>5</sup> Easement commencement date upon Land Board's approval (September 26, 2008) through June 9, 2011 which is about 32-33 months or so, over a 55-year term easement. The encroachments have clearly been in existence for at least as long as and perhaps longer than the Land Board approval of September 26, 2008.

**EXHIBIT**

**LIST**

## Exhibit List

### TLM—Seawall Encroachment and Filled Lands Case

<u>Exhibit No.</u>	<u>Description</u>
1	Don Clegg letter dated May 8, 2008
2	Don Clegg letter w/Enclosures dated June 6, 2008
3	Land Board Submittal dated September 26, 2008
4	TLM's letter dated September 8, 2009 paying \$135,080.00 for the term easement for the encroachment
5a	TLM's Counsel's letter to DLNR dated May 3, 2010
5b	TLM's Counsel's letter to DLNR dated July 30, 2010
5c	TLM's Counsel's letter to DLNR dated November 2, 2010
5d	TLM's Counsel's letter to DLNR dated December 9, 2010
6a	DLNR's letter to Counsel dated May 24, 2010
6b	DLNR's letter to Counsel dated October 18, 2010
6c	DLNR's letter to Counsel dated November 29, 2010
7	1927 Subdivision Map
8	1949 Aerial Photograph of the area
9	Photographs from Appraisal Report
10	Spreadsheet showing various lot owners in the surrounding area that have sought or obtained easements for various types of encroachments
11	Map of showing various lot owners in the surrounding area that have sought or obtained easements for various types of encroachments

# **EXHIBIT**

**1**

PHONE (BUS): (808) 536-5695  
FAX: (808) 599-1553



**ANALYTICAL PLANNING CONSULTANTS, INC.**

928 NUUANU AVENUE, SUITE 502 • HONOLULU, HI 96817

RECEIVED  
LAND DIVISION

2008 MAY 12 A 9:03

PLANNING DIVISION  
HAWAII

May 8, 2008

Mr. Morris Atta, Acting Director  
Land Division  
Department of Land and Natural Resources  
State of Hawaii  
P.O. Box 621  
Honolulu, HI 96809

Dear Mr. Atta

Mr. Tom McConnell is the owner of the property at 5677 Kalaniana'ole Hwy., TMK 3-7-002:009. It is our understanding that the State of Hawaii owns a strip of land, 2,195 sq. ft. in area, located between the makai boundary of Mr. McConnell's property and the ocean. Mr. McConnell wants to purchase/lease the strip of land from the State prior to doing some reconstruction of the existing house.

Enclosed is map prepared by a licensed Land Surveyor which shows the McConnell property and the purchase/lease area. Mr. McConnell is aware of the hold on the sale of ceded lands and if purchase is not possible at this time, would like to proceed with a lease.

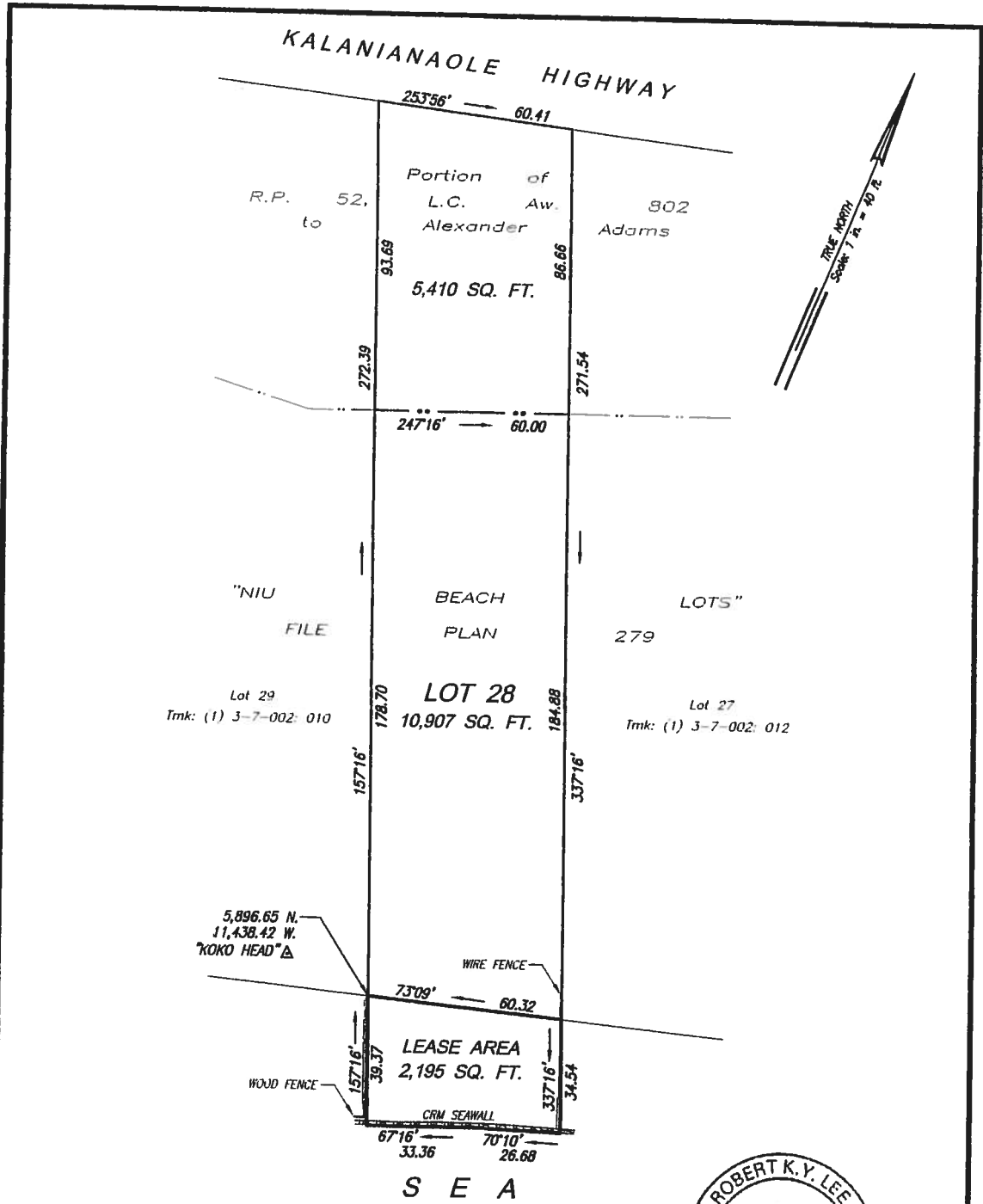
I have discussed this with Mr. Al Jodar of your staff who suggested that I submit this request to your office. If there are any questions please contact me at 536-5695.

Sincerely,

Donald Clegg  
President

EXHIBIT " 1 "

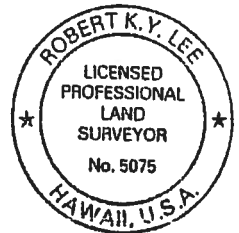
JH.C:\SURVEY CAD FILES\2008\4611\DWG\4611\_LOT28\_EASE.DWG



**PLAN SHOWING LEASE AREA  
FRONTING LOT 28 OF "NIU BEACH LOTS"  
AS SHOWN ON FILE PLAN 279**

AT NIU, HONOLULU, OAHU, HAWAII  
TAX MAP KEY: (1) 3-7-002: 009

OWNER: TLM PARTNERS LTD.  
ADDRESS: 5677 KALANIANA'OLE HIGHWAY  
Honolulu, Hawaii 96821



This work was prepared by me  
or under my direct supervision.

*Robert K. Y. Lee*  
Robert K.Y. Lee  
Licensed Professional Land Surveyor  
Certificate Number 5075

JOB NO.: 4611  
FB. NO.: 1789  
8.5" X 14" = 0.8 Sq. Ft.

**TOWILL SHIGEOKA & ASSOCIATES, INC.**  
LAND SURVEYORS

APRIL 30, 2008  
2153 N. KING STREET  
SUITE 308  
HONOLULU, HAWAII 96815



# **EXHIBIT**

**2**



PHONE (BUS): (808) 536-5695  
FAX: (808) 599-1553

**ANALYTICAL PLANNING CONSULTANTS, INC.**  
928 NUUANU AVENUE, SUITE 502 • HONOLULU, HI 96817

RECEIVED  
LAND DIVISION

2008 JUN -6 P 3:33

June 6, 2008

DEPARTMENT OF LAND & NATURAL RESOURCES  
STATE OF HAWAII

08ad-068

Mr. Morris Atta, Acting Director  
Land Division  
Department of Land and Natural Resources  
State of Hawaii  
P.O. Box 621  
Honolulu, HI 96809

Attn: Mr. Al Jodar

Dear Mr. Atta

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Enclosed are the following:

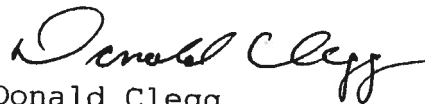
1. Completed "Shoreline Encroachment Information Sheet".
2. Aerial Photo of the property and surrounding area dated Nov. 17, 1954. The photo shows a seawall at the makei end of the property. There appears to be a second wall mauka of the seawall which would be at the current makai boundary of the parcel. The distance on the photo from this wall and the street matches this distance on the surveyors map, and the distance from this wall to the sea wall on the photo matches this distance on the surveyors map. This latter is the area that the owner is asking to purchase or lease.
3. Aerial photo of the property and surrounding area dated Jan. 20, 1961. Unfortunately the resolution on this photo is not as good as the 1954 photo, however there appears to be a seawall at the makai end of the property on the State land. The second wall mauka is obscured by the vegetation.

**EXHIBIT "2"**

4. Photo from the ocean of the sea wall encroachment in front of the existing house. Photo taken May 2008.
5. Photo from the ocean of the abutting seawall encroachments. Note that every property has a sea wall. In, fact there are sea walls makai of every parcel along Niuiki Circle. Photo taken May 2008
6. Photo taken from the house showing much of the "fill" area. Photo taken May 2008.
7. Google satellite photo of property and surrounding area. Photo taken 2007 or 2008.
8. Tax map
9. Map prepared by a licensed land surveyor of the McConnell property and the proposed purchase/lease area.
10. Topographic Survey of parcel 6 (Lot 28) and the encroachment.

If there are any questions please contact me at 536-5695.

Sincerely,



Donald Clegg  
President

SHORELINE ENCROACHMENT INFORMATION SHEET  
Department of Land and Natural Resources  
State of Hawaii

June 3, 2008

#1: Applicant:

TLM Partners Ltd.  
1568 Calzada Avenue  
Santa Ynez, CA 93460  
Thomas E. McConnell, Linda M. McConnell;  
General Partners  
Tel: (805) 686-1489 home, (805) 264-5510 mobile,  
(805) 922-2250 office, (808) 373-4544 home Hawaii

#2: Location:

5677 Kalaniana'ole Hwy  
Honolulu, HI 96821

TMK: (1) 3-7-002:009 Lot 28 File Plan 279

#3: Approximate Size of Encroachment: 2,195 sq. feet

#4: Approx. Date of Encroachment:

Unknown but prior to November 17, 1954 (see aerial photo showing seawall existing at site as of this date).

#5: Date of Previous Shoreline Survey:

Unknown

#6: Identification of Adjacent Development and Surrounding Land Use:

See aerial photo. Existing residential properties adjacent to both sides of site. All properties in area have existing seawalls.

#7: Identification of Surrounding Artificial Coastal Structures:  
Existing seawalls. See photos.

#8: Assessment of Beach Resources:

Poor. Area has no beach.

#9: Assessment of Public Access:

Poor. Area has no public access and no public parking.

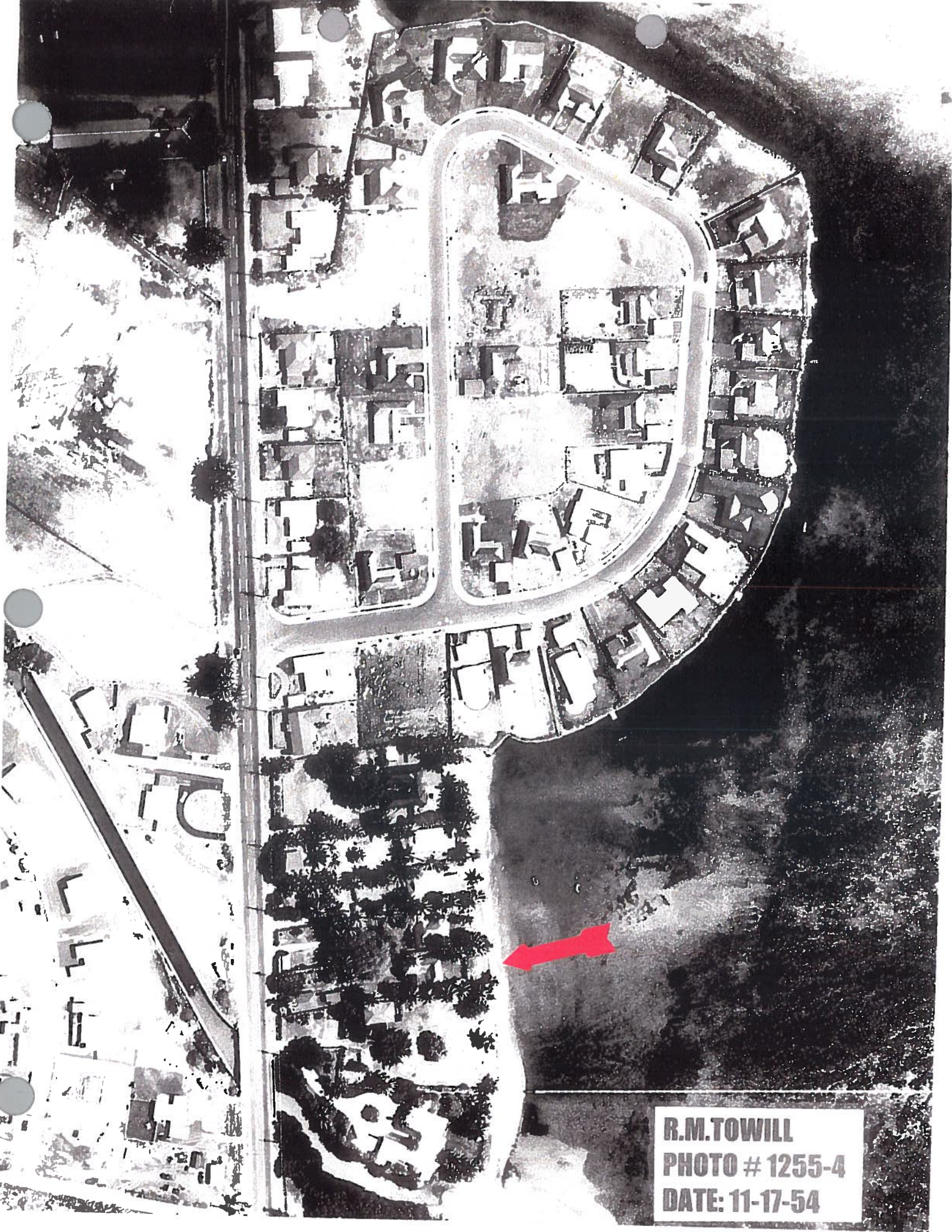
#10: Effect of Removing Encroachment on Upland Development and Surrounding Uses:

Removing existing seawall would result in rapid erosion of land areas behind existing seawalls on adjacent properties, loss of existing mature shoreline palm trees and other vegetation, and other unknown damage.

#11: Would Removal of Encroachment Improve Beach Processes and Public Access:

No. The area has no beach, no public access, and no public parking.





**R.M.TOWILL**  
**PHOTO # 1255-4**  
**DATE: 11-17-54**





**R.M.TOWILL**  
**PHOTO # 2238-2F**  
**DATE: 1-20-61**











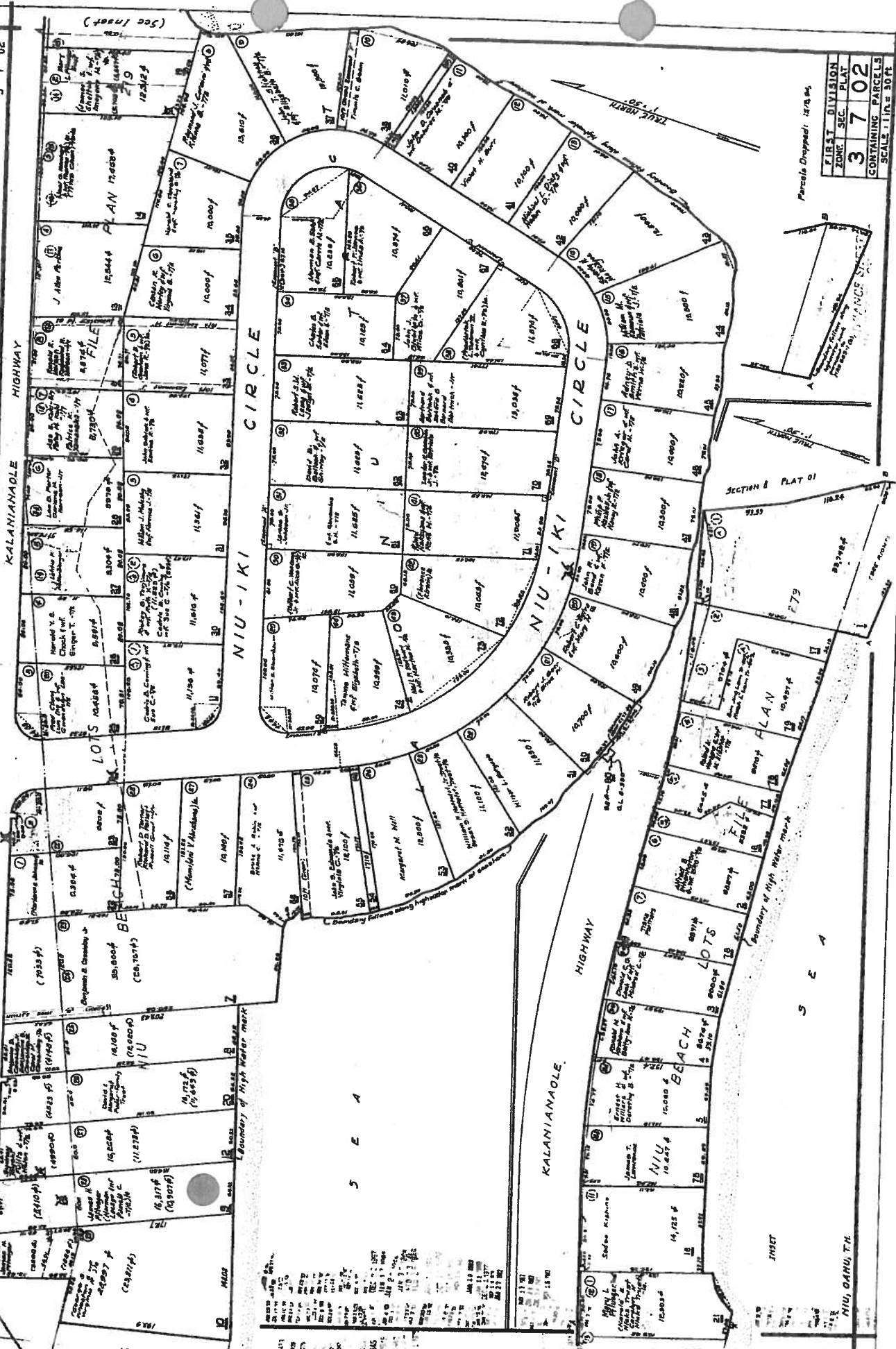




5677 Kalanianaʻole Hwy, Honolulu, HI 96821







FIRST DIVISION	3
ZONE	3702
SEC.	02
PLAT	
CONTAINING PARCELS	
SCALE: 1 INCH = 30 FT.	

Parcels Dropped: 12/18/84

PRINTED

KALANIANA'OLE HIGHWAY

NIU-IKI CIRCLE

NIU-IKI CIRCLE

KALANIANA'OLE HIGHWAY

BEACH LOTS

NIU

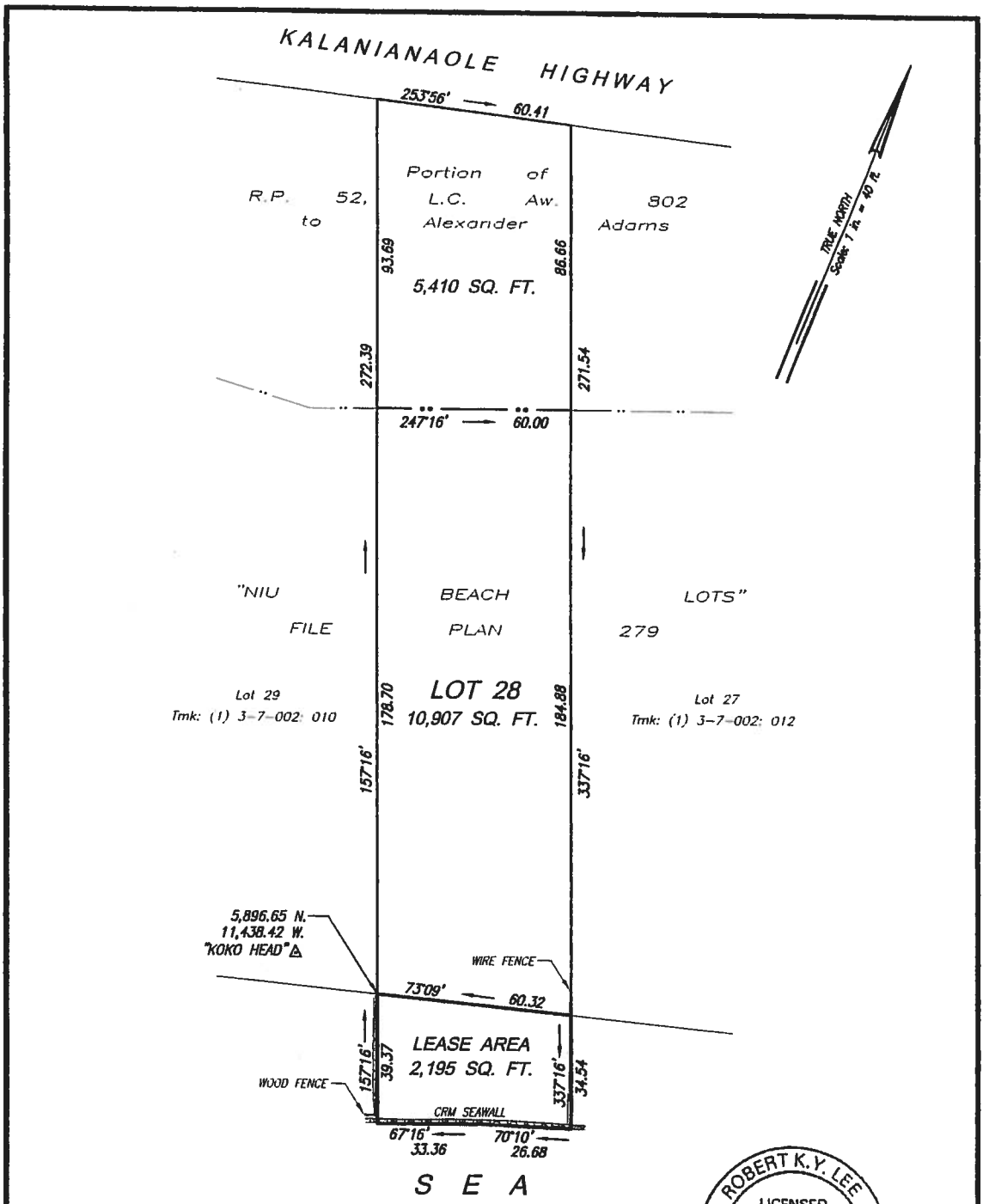
SECTION 8 PLAT 01

PLAT 01

NIU, OAHU, T.H.

Dry Hole, 1983  
Source: R.T. Fry & Tholice

J:\L.C.\SURVEY CAD FILES\2008\4611\DWG\4611\_LOT28\_EASE.DWG



**PLAN SHOWING LEASE AREA  
FRONTING LOT 28 OF "NIU BEACH LOTS"  
AS SHOWN ON FILE PLAN 279**

AT NIU, HONOLULU, OAHU, HAWAII  
TAX MAP KEY: (1) 3-7-002: 009

OWNER: TLM PARTNERS LTD.  
ADDRESS: 5677 KALANIANA'OLE HIGHWAY  
Honolulu, Hawaii 96821



This work was prepared by me  
or under my direct supervision.

*Robert K.Y. Lee*

Robert K.Y. Lee  
Licensed Professional Land Surveyor  
Certificate Number 5075

APRIL 30, 2008

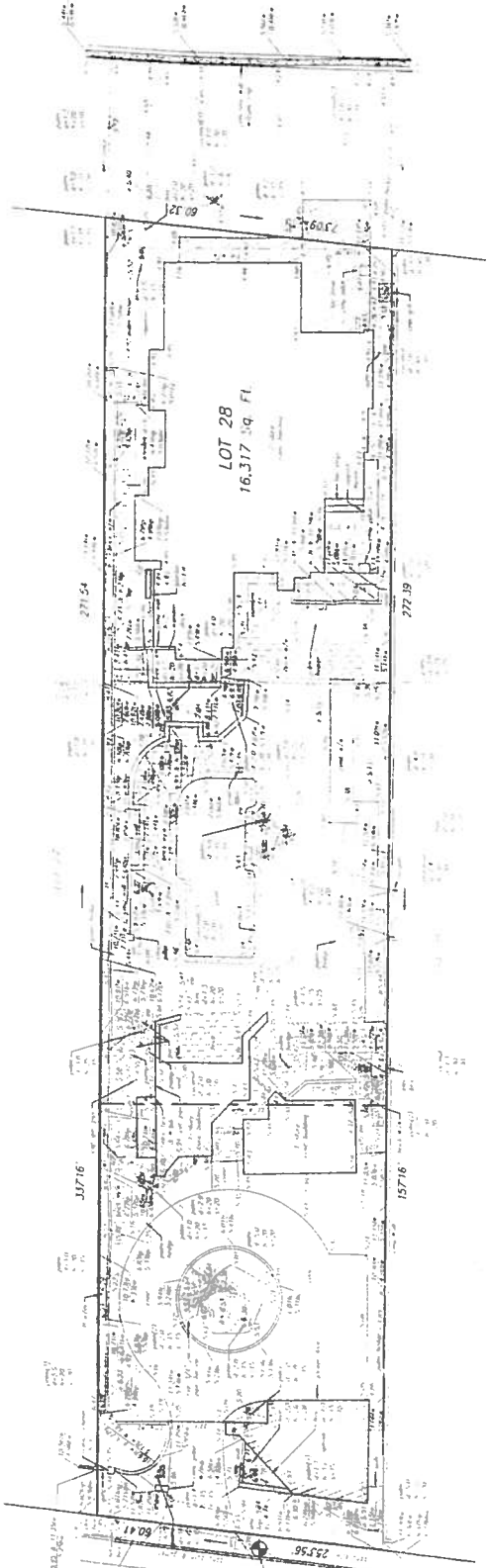
JOB NO.: 4611  
FB. NO.: 1789  
8.5" X 14" = 0.8 Sq. Ft.

**TOWILL SHIGEOKA & ASSOCIATES, INC.**  
LAND SURVEYORS

2153 N. KING STREET  
SUITE 308  
HONOLULU, HAWAII 96819

TOWELL, SHIGEKAWA & ASSOCIATES, INC.

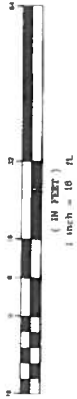
*Robert Kyrielle*  
Licensed Professional Land Surveyor  
Certificate Number 50725



### Topographic Survey of Lot 28

At Nui, Honolulu, Oahu, Hawaii  
TMK: (1) 3-7-002: 009  
Address: 5627 Kakanui Road, Honolulu, Hawaii 96821

GRAPHIC SCALE



TOWELL, SHIGEKAWA & ASSOCIATES, INC.  
LAND SURVEYORS

- bc = bottom curb
- bs = bottom planter
- bsm = bottom masonry
- cmu = concrete masonry unit
- cc = concrete
- ccm = concrete curb masonry
- d = diameter
- elc = electric
- el = electric outlet
- esp = exposed
- fl = flood light
- flr = floor
- l = lead
- mc = masonry
- mcu = concrete masonry unit
- mc = masonry concrete
- s = spread
- sw = sewer clean out
- tc = top curb
- tr = ramping
- tp = top planter
- tl = top left
- tr = top right
- ur = upper
- w/c = water catch
- w/s = water stop
- w = wooden fence
- wh = water head valve
- wm = water meter

Notes  
1 Elevations are referred to Street Monument located at the intersection of the 4th Circle in front of lots 26 & 27. Elevation = 4.05 feet

2 Subject Lot is located within Flood Zones A and AE of the FEMA Flood Insurance Rate Map No. 500C03390 C, dated August 1983, of the City and County of Honolulu, Hawaii, dated November 20, 2008.

3 Subject Lot is Zone A-10 Hazardous District

4 Subject Lot is designated a Special Management Area (SMA)

# **EXHIBIT**

**3**

080D-068

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Land Division  
Honolulu, Hawaii 96813

September 26, 2008

Board of Land and Natural Resources  
State of Hawaii  
Honolulu, Hawaii

Ref:08od-068

Oahu

Grant of Term, Non-Exclusive Easement to TLM Partners LTD  
for Seawall, Lanai and Landscaping Purposes, Niu, Honolulu,  
Oahu, Tax Map Key: 3-7-02: 09 seaward.

APPLICANT:

TLM Partners LTD, whose mailing address is 1568 Calzada Avenue,  
Santa Ynez, California 93460.

LEGAL REFERENCE:

Section 171-13, Hawaii Revised Statutes, as amended.

LOCATION:

Portion of Government lands of Honolulu located seaward of Tax  
Map Key: 3-7-02: 09, Niu, Honolulu, Oahu, as shown on the  
attached map labeled Exhibit A.

AREA:

2,195 square feet, more or less, to be determined by DAGS Survey  
Division.

ZONING:

State Land Use District: Conservation

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act

DHHL 30% entitlement lands pursuant to the Hawaii State  
Constitution: YES \_\_\_\_\_ NO x

CURRENT USE STATUS:

Unencumbered with encroachments.

APPROVED BY THE BOARD OF  
LAND AND NATURAL RESOURCES  
AT ITS MEETING HELD ON  
September 26, 2008

**EXHIBIT "3"**



CHARACTER OF USE:

Right, privilege and authority to use and occupy the subject area for the purpose of using, maintaining, repairing, replacing and removing existing seawall, lanai and landscaping area purposes, under and across State-owned land.

COMMENCEMENT DATE:

To be determined by the Chairperson.

CONSIDERATION:

One-time payment to be determined by independent or staff appraisal establishing fair market rent, subject to review and approval by the Chairperson.

EASEMENT TERM:

Fifty-five (55) years.

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

Office of Conservation and Coastal Lands (OCCL) staff cited evidence that the subject seawall is contiguous with the neighbors' walls on either side, which were in existence before 1964, and is considered a pre-existing use prior to the enactment of Chapter 343. Inasmuch as this action contemplates the use and maintenance of pre-existing structures or features on State lands, this action is exempt from the provisions of chapter 343, HRS, as amended, pursuant to Exemption class #1 of the Approved EIS Exemption List for the Division dated April 28, 1986.

DCCA VERIFICATION:

Not applicable. The Applicant as a landowner is not required to register with DCCA.

APPLICANT REQUIREMENTS:

Applicant shall be required to

- 1) Pay for an appraisal to determine one-time payment; and
- 2) Provide survey map and description according to State DAGS standards and at Applicant's own cost (previously submitted).

REMARKS:

The applicant is planning to do some reconstruction on the property. Part of the building permit process triggers a shoreline certification process. The survey map reveals an encroachment of the seawall, portion of the dwelling's tile lanai and a landscaped

area with a total area of about 2,195 square feet (see Exhibit B-1 & B-2).

The Office of Conservation and Coastal Lands (OCCL) staff has determined that the issuance of an easement for the encroachments would have no adverse impacts on natural resources, including beach resources and therefore has no objections to the issuance of an easement (see OCCL letter, Exhibit C).

Applicant has not had a lease, permit, easement or other disposition of State lands terminated within the last five years due to non-compliance with such terms and conditions.

Staff also recommends imposing a \$500 fine, pursuant to Section 171-6(12)HRS, for the encroachment constructed without prior authorization by the State.

A request for comments was made to various agencies. The Department of Hawaiian Home Lands, Department of Land and Natural Resources, Water Resource Management Division and the Board of Water Supply had no objections or no comments. The Office of Hawaiian Affairs provided comments regarding the \$500 fine and the 55-year term easement (see Exhibit D). Staff notes that the 55-year term easement is a standard condition that has been approved for earlier seawall easements with similar issues while the \$500 fine is what the Board had consistently imposed in these cases.

RECOMMENDATION: That the Board:

1. Impose a \$500 fine for illegal encroachment, under Section 171-6(12).
2. Authorize the subject requests to be applicable in the event of a change in the ownership of the abutting parcel described as Tax Map Key: (1) 3-7-02:09, provided the succeeding owner has not had a lease, permit, easement or other disposition of State lands terminated within the last five (5) years due to non-compliance with such terms and conditions.
3. Subject to the Applicant fulfilling all of the Applicant requirements listed above, authorize the issuance of a term non-exclusive easement to TLM Partners LTD, covering the subject area for seawall, lanai and landscaping area purposes under the terms and conditions cited above, which are by this reference incorporated herein and further subject to the following:
  - A. The standard terms and conditions of the most current term shoreline encroachment easement document form, as may be amended from time to time;

- B. Review and approval by the Department of the Attorney General;
- C. The easement shall run with the land and shall inure to the benefit of the real property described as Tax Map Key: 3-7-02:09, provided that when the easement is sold, assigned, conveyed, or otherwise transferred, the Grantee shall notify the Grantee's successors or assigns of the insurance requirement in writing, separate and apart from this easement document;
- D. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State; and
- E. Any shoreline hardening policy that may be adopted by the Board prior to execution of the grant of easement

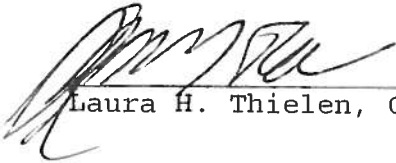
Respectfully Submitted,



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Al Jodar  
Land agent

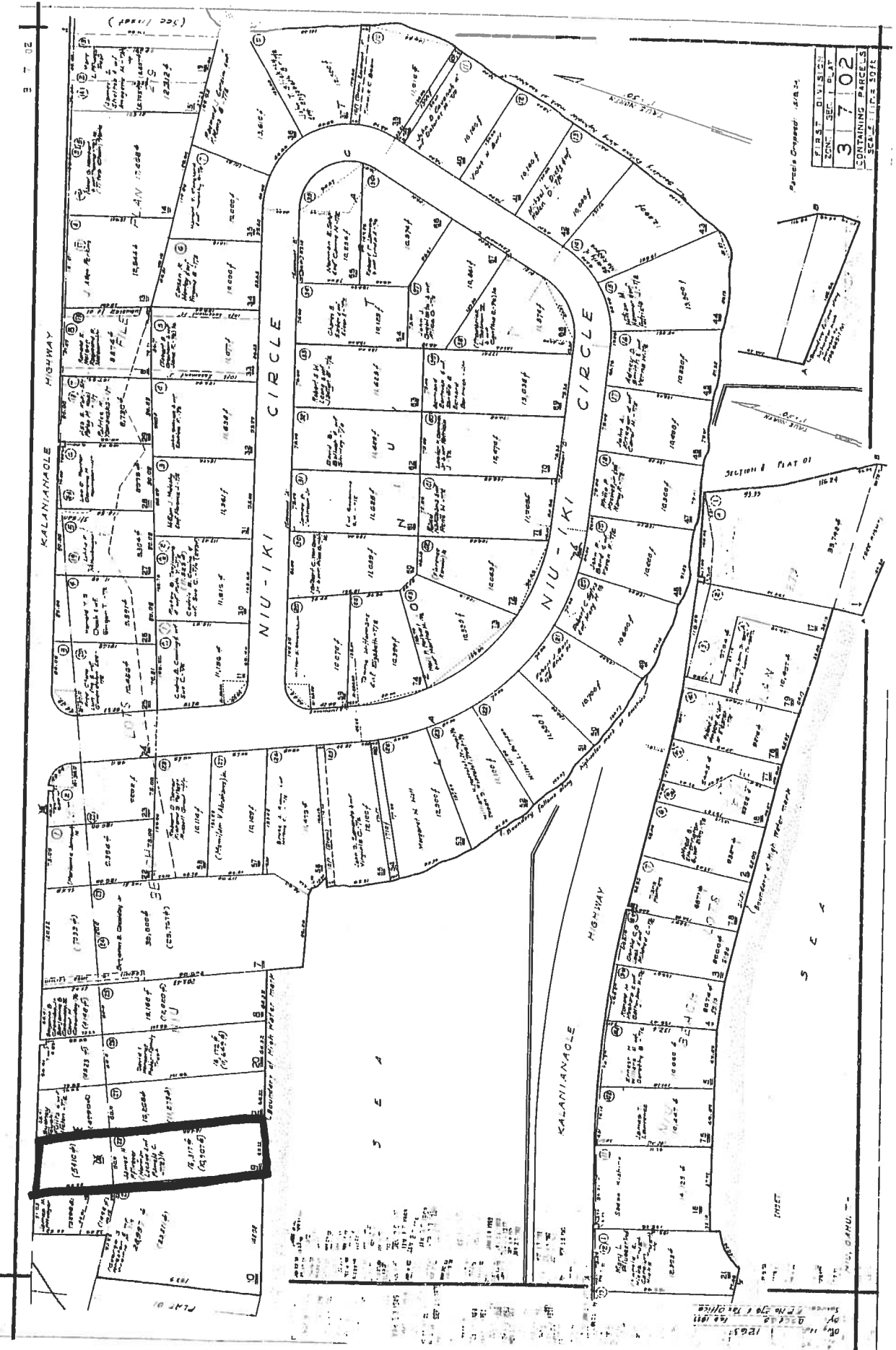
APPROVED FOR SUBMITTAL:



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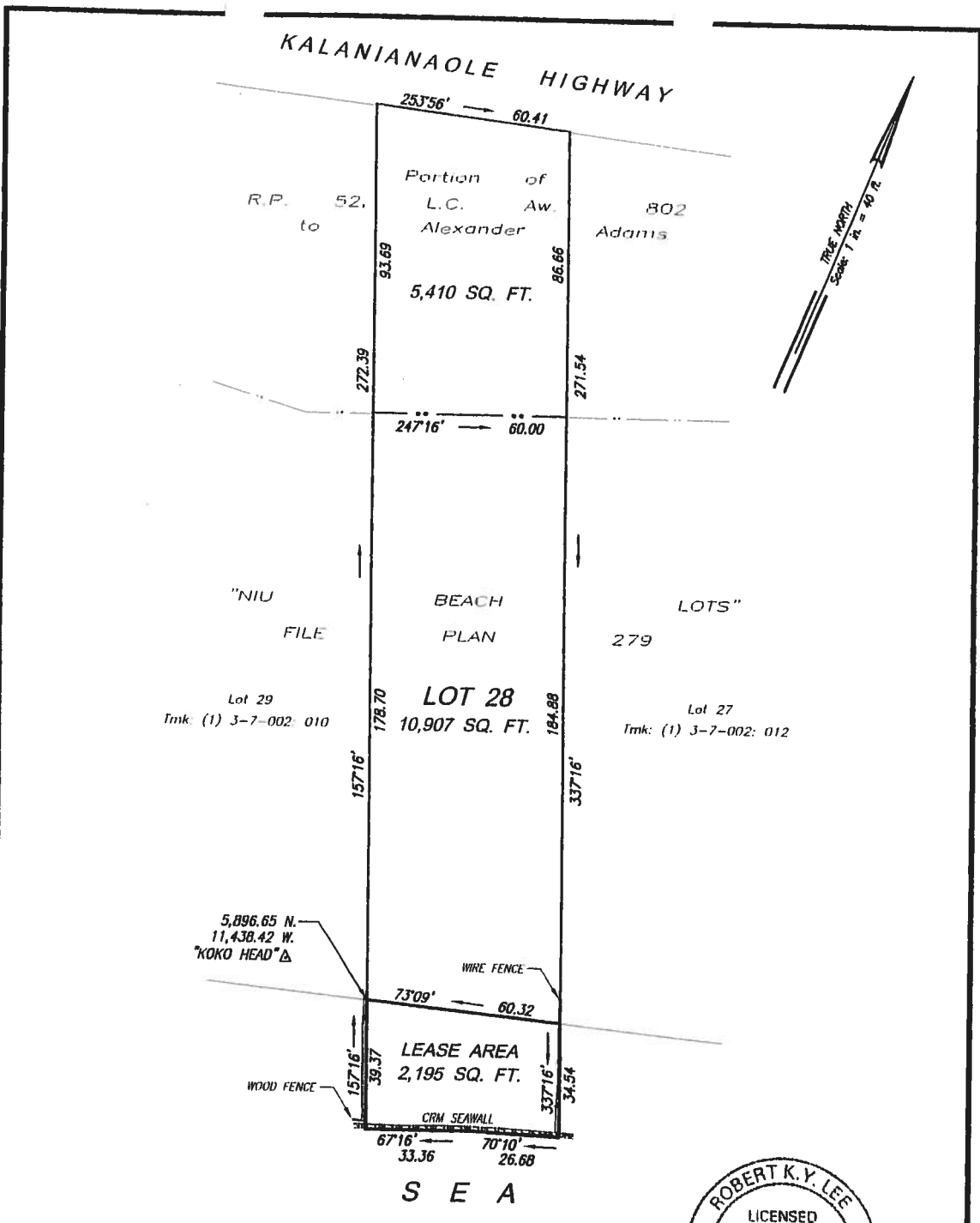
Laura H. Thielen, Chairperson





**EXHIBIT "A"**

J:\L.C.\SURVEY CAD FILES\2008\4611\DWG\4611\_LOT28\_EASE.DWG



**PLAN SHOWING LEASE AREA  
FRONTING LOT 28 OF "NIU BEACH LOTS"  
AS SHOWN ON FILE PLAN 279**

AT NIU, HONOLULU, OAHU, HAWAII  
TAX MAP KEY: (1) 3-7-002: 009

OWNER: TLM PARTNERS LTD.  
ADDRESS: 5677 KALANIANA'OLE HIGHWAY  
Honolulu, Hawaii 96821



This work was prepared by me  
or under my direct supervision.

*Robert K.Y. Lee*  
Robert K.Y. Lee  
Licensed Professional Land Surveyor  
Certificate Number 5075

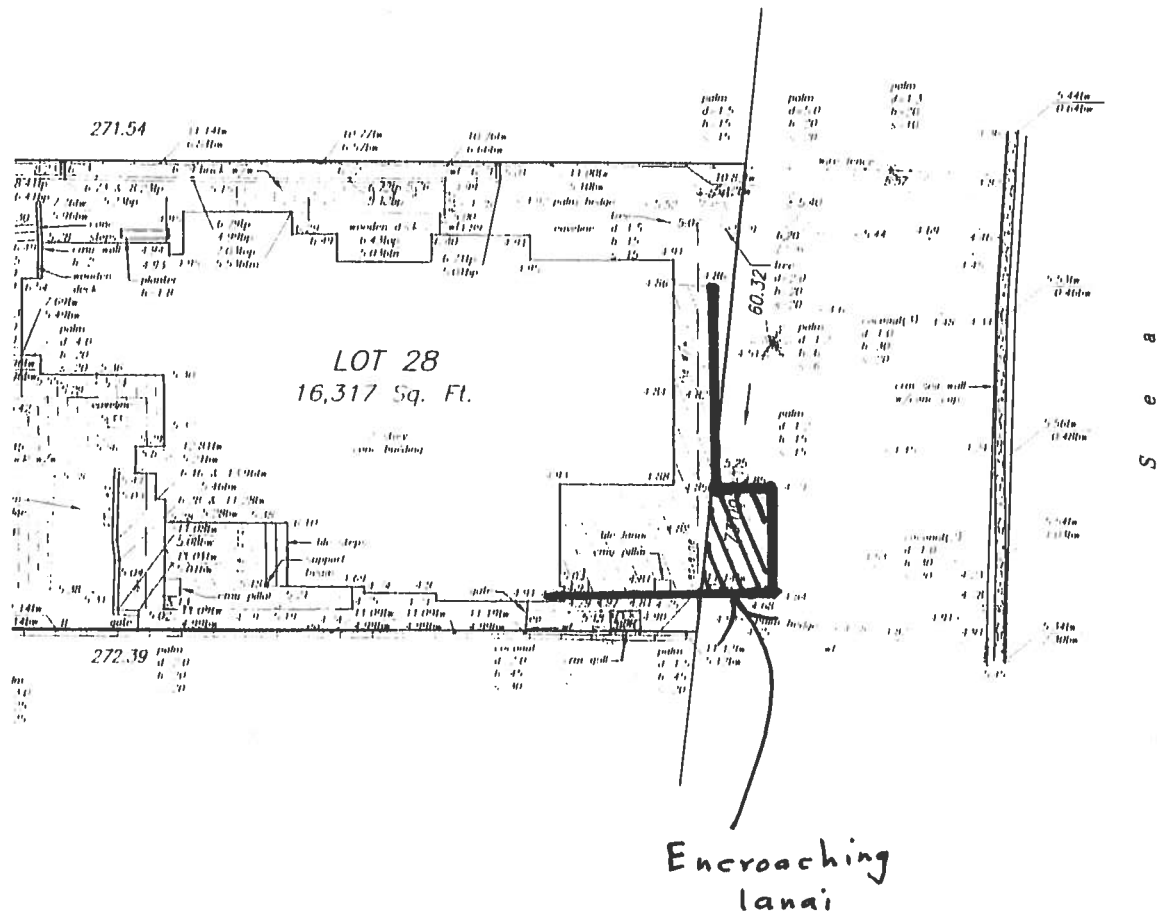
APRIL 30, 2008

JOB NO.: 4611  
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**TOWILL SHIGEOKA & ASSOCIATES, INC.**  
LAND SURVEYORS

2153 N. KING STREET  
SUITE 308  
HONOLULU, HAWAII 96819

**EXHIBIT "D" - 1**



TOWILL, SHIGEOKA & ASSOCIATES, INC.

*Robert Ky Lee*  
 Licensed Professional Land Surveyor  
 Certificate Number 5075

NOVEMBER 20, 2007

EXHIBIT "B" - 2

LINDA LINGLE  
GOVERNOR OF HAWAII



STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Office of Conservation and Coastal Lands

POST OFFICE BOX 621  
HONOLULU, HAWAII 96809

LAURA H. THELEN  
CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE MANAGEMENT  
  
RUSSELL Y. TSUJI  
FIRST DEPUTY  
  
KEN C. KAWAHARA  
DEPUTY DIRECTOR - WATER  
  
AQUATIC RESOURCES  
BOATING AND OCEAN RECREATION  
BUREAU OF CONVEYANCES  
COMMISSION ON WATER RESOURCE MANAGEMENT  
CONSERVATION AND COASTAL LANDS  
CONSERVATION AND RESOURCES ENFORCEMENT  
ENGINEERING  
FORESTRY AND WILDLIFE  
HISTORIC PRESERVATION  
KAHOOLAWE ISLAND RESERVE COMMISSION  
LAND  
STATE PARKS

REF:CC

File Number Encroachment: DA-08-018

08-08-068

MEMORANDUM:

TO: Al Jodar, Land Agent, Oahu  
Land Division

FROM: Samuel J. Lemmo, Administrator  
Office of Conservation and Coastal Lands

SUBJECT: Shoreline Encroachments at 5677 Kalaniana'ole Hwy, Waialae, Oahu  
Tax Map Key: (1) 3-7-002:009

AUG 2 2008  
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LAND DIVISION  
2008 AUG 12 4:10:32  
OFFICE OF LAND & NATURAL RESOURCES  
STATE OF HAWAII

The Office of Conservation and Coastal Lands (OCCL) has reviewed the June 06, 2008 memo from Land Division, including the Shoreline Encroachment Information Sheet provided by the applicant, Mr. Donald Clegg.

According to information, photographs, and maps, it appears as though the encroachments are nonconforming. The encroachments include 2195 square feet of state land with a tile lanai on the mauka side and a seawall on the makai side.

The Board of Land and Natural Resource (BLNR) established a policy to allow the disposition of shoreline encroachments by either removal or issuance of an easement. In carrying-out this policy, the Department established criteria to guide decision-making over specific cases. The criteria are as follows:

1. Protect/preserve/enhance public shoreline access;
2. Protect/preserve/enhance public beach areas;
3. Protect adjacent properties;
4. Protect property and important facilities/structures from erosion damages; and
5. Apply "no tolerance" policy for recent or new unauthorized shoreline structures

In addition, the Department developed a "Shoreline Encroachment Information Sheet" that is intended to provide the State with additional information to guide the Department's decisions on the disposition of shoreline encroachments.

Surrounding Land Uses:

The surrounding uses are residential in nature.

Beach Resources:

**EXHIBIT "C"**

There is no existing beach resource makai of the shoreline structure. Though the 1954 aerial photograph shows a small beach fronting the shoreline structure, it had disappeared by the 1961 aerial photograph.

Public Access:

This section of coastline has limited public access. There are no local shoreline accesses and no local public parking.

Effect of Removing the Encroachment on:

*Beach Resources: It is unknown if removal of the seawall would positively impact the beach resource, as the substrate mauka of the seawall is unknown. Though seawalls on either side will limit the potential formation of beach, a small pocket beach has the potential to form with input from the eroded coastal plain and the adjacent stream mouth clearing activities.*

*Public Access: OCCL staff has determined that public access will not be enhanced by removal of the seawall and tile lanai.*

*Affect on Adjacent Properties: Removal of the seawall may have a negative effect on neighboring shoreline armoring structures and might lead to their consequent destabilization. Consideration should be given to these potential impacts if the seawall is removed.*

*Affect on Upland Development: Removal of the seawall will cause erosion of the coastal plain. As the residence is more than 30 feet mauka of the seawall, it is uncertain whether removal of the seawall will create an emergency situation from the erosion.*

It has been a general policy and practice of the OCCL to support easement requests that have no discernable effect on beach and recreational resources, and do not act as a detriment to public access. In cases where the encroachment serves as primary erosion control for potentially threatened structures, impacts to the adjacent and upland developments must also be considered.

Upon review and careful consideration of the information gathered on this case, staff has determined that the requirements stated in HRS § 205A, HRS § 183C, and in the OCCL's evaluation criteria would support a disposition request being processed for both of the encroachments and the 2195 square feet of State land. The OCCL suggests that proper signage be placed identifying that the seawall, State land, and portion of the tile lanai on State land are open to the public.

Please feel free to contact Chris Conger, Sea Grant Extension Agent at the Office of Conservation and Coastal Lands at 587-0049.

CC: Office of Hawaiian Affairs, Grant Arnold



PHONE (808) 594-1888



**STATE OF HAWAII**  
**OFFICE OF HAWAIIAN AFFAIRS**  
711 KAPI'OLANI BOULEVARD, SUITE 500  
HONOLULU, HAWAII 96813

RECEIVED  
LAND  
FAX (808) 594-1865

2008 SEP -3 A 10:51

GIFT OF LAND  
NATURAL RESOURCES  
STATE OF HAWAII

HRD08/3791

August 29, 2008

Al Jodar  
Department of Land and Natural Resources  
Post Office Box 621  
Honolulu, Hawai'i 96809

**Re: Request for comments on the proposed 55-year term easement for seawall and landscaping on state lands, Niu, O'ahu, TMK: 3-7-02:09 seaward.**

Aloha e Al Jodar,

The Office of Hawaiian Affairs (OHA) is in receipt of the above-mentioned letter dated August 14, 2008. OHA has reviewed the project and offers the following comments.

OHA understands that a shoreline certification process revealed an encroachment on the subject property due to a seawall, landscaping area and a portion of the dwelling itself. OHA sees that staff recommendation to the board is to authorize the issuance of a term non-exclusive easement for the encroachment in addition to imposing a \$500 fine.

OHA notes that page two of the August 12, 2008 memorandum from Samuel Lemmo to Al Jodar states that a 1954 aerial photograph shows a small beach fronting the property, which is no longer there. OHA asks if the 1954 or 1961 photographs show the seawall or encroaching structures. We understand that not only did a beach used to be exist, but from the Office of Conservation and Coastal Lands memorandum we see that "a small pocket beach has the potential to form" if the seawall were removed.

While OHA is not suggesting that the seawall be removed in this case, we are inquiring if the loss of this beach can be attributed to what the Board of Land and Natural Resources may authorize in this action. If such a link can be made, perhaps a \$500 fine is too lenient.

**EXHIBIT "D"**

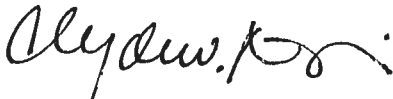
Al Jodar  
August 29, 2008  
Page 2

We also suggest that the 55-year lease now proposed may be too long. OHA notes that federal and state agencies are preparing for the advent of sea level rise. For example, the Coastal Zone Management Act at 16 USC §1451 (l) states, "Because global warming may result in a substantial sea level rise with serious adverse effects in the coastal zone, coastal states must anticipate and plan for such an occurrence." Therefore, a shorter lease term may allow future boards and decision-makers more flexibility in dealing with the unfortunates that this issue will present for us in the near future.

Further, OHA notes that the subject land is designated as Section 5(b) Ceded Lands, which hold a considerable amount of sentimental, historical and legal significance for Native Hawaiians and OHA. These lands were illegally taken from the Hawaiian Kingdom after the 1893 overthrow and later transferred ("ceded") by the United States government to the State of Hawai'i upon statehood. Today, the state holds the Ceded Lands corpus in trust for Native Hawaiians and the general public. OHA is supposed to receive a portion of all revenues generated on these lands.

Thank you for the opportunity to comment. If you have further questions, please contact Grant Arnold at (808) 594-0263 or e-mail him at [granta@oha.org](mailto:granta@oha.org).

'O wau iho nō me ka 'oia'i'o,



Clyde W. Nāmu'o  
Administrator

# **EXHIBIT**

**4**

September 8, 2009

Mr. Timothy Chee  
Land Agent, Land Division  
Dept. of Land and Natural Resources  
P.O. Box 621  
Honolulu, HI 96809  
Via: Express Mail

Re: Ref. No.: 08OD-068

Subject: Non-Exclusive Easement to TLM Partners Ltd. for Seawall, Lanai, and  
Landscaping Purposes Niu, Honolulu, Oahu, Tax Map Key: (1)-3-7-002:009 seaward.

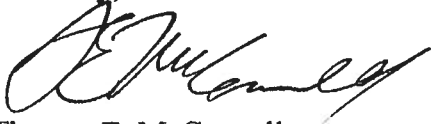
Dear Mr. Chee:

Please find enclosed TLM Partners Ltd.'s check #2476 in the amount of \$135,135.00 that you requested in your letter of January 29, 2009 in anticipation of the granting for the easement described above plus document fee and maps and description fee. I am also enclosing the State and City/County Tax Clearances requested.

I will look forward to receiving the legal document from the Department of the Attorney General that you mention for my approval and signature so that the easement will be final and be able to be recorded.

Please contact me at the below address or by telephone if you have any questions.

Sincerely,



Thomas E. McConnell  
General Partner  
TLM Partners Ltd.  
1568 Calzada Avenue  
Santa Ynez, CA 93460  
Tel: (805) 264-5510 cell; (805) 686-1489

TEM/ck  
Encl.

DEPARTMENT OF LAND AND NATURAL RESOURCES  
STATE OF HAWAII

2009 SEP 10 A 10: 21

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LAND DIVISION

EXHIBIT "4"

# **EXHIBIT**

**5a**

RECEIVED

10 MAY -5 110:21

# DAMON KEY LEONG KUPCHAK HASTER

A LAW CORPORATION  
DEPT. OF LAND & NATURAL RESOURCES  
STATE OF HAWAII

Attorneys at Law

May 3, 2010

1003 Bishop Street, Suite 1600  
Honolulu, Hawaii 96813-6152

Telephone (808) 531-8011  
Facsimile (808) 531-2242  
E-Mail: info@hawaiilawyer.com  
Website: www.hawaiilawyer.com

Chairperson Laura H. Thielen  
State of Hawaii, Department of Land and Natural Resources  
1151 Punchbowl Street, Room 130  
Honolulu, Hawaii 96813

**Re: TAX MAP KEY (1) 3-7-002: SEAWARD OF 009**

Dear Chair Thielen:

We represent TLM Partners Ltd. ("TLM"), which is the owner of 5677 Kalaniana'ole Hwy, Honolulu, HI 96821, Tax Map Key: (1) 3-7-002:009 ("Property"). We and our client have been in contact with Messrs. Barry Cheung and Timothy Chee of your Department ("DLNR"), who asked that we write to you to request the return of the ONE HUNDRED THIRTY-FIVE THOUSAND ONE HUNDRED THIRTY-FIVE DOLLARS (\$135,135.00) submitted in connection with a proposed easement that does not appear to be necessary.

When it was suggested that TLM may need an easement, DLNR was contacted to discuss that possibility. The Board of Land and Natural Resources ("BLNR") voted to approve the grant of an easement to TLM in or around September 2008. After a year of discussions, however, the parties were not able to agree upon the need for, or the possible terms of, an easement. Because it is unclear that an easement is necessary, or even that the State has the right to grant an easement, we request that DLNR refund the \$135,135.00.

Further, Mr. Cheung asked that we provide you with any other questions or concerns. One concern we have relates to recent correspondence from DLNR to Mr. Thomas McConnell, the general partner of TLM, dated February 10, 2010, suggesting the existing seawall, lanai and landscaping constitute encroachments.

- Cherise K. Boyce
- Elizabeth L. Burroughs
- Hoelle B. Catalan
- Matthew T. Evans
- Trod R. Eyerly
- Diane D. Foster
- Joseph W. Foster
- Caron H. Horka
- Courtney S. Kajiawa
- Christine A. Kubota
- Christi Anne H. Luchs Choe
- Gregory W. Luge
- Kenneth E. Kupchak
- Dennis H. Leong
- David P. McAuley
- James C. McWhinnie
- Mark M. Muralant
- Anna H. Oshiro
- Michelle M. Shin
- Douglas C. Smith
- Robert H. Thomas
- Michael A. Yoshida

Of Counsel  
R. Charles Bachlen  
C.J. Damon, Jr.  
Gerhard Frohlich  
Hany A. Inman

Charles W. Key  
(1999-2008)

<sup>1</sup>Admitted in Hawaii and California

<sup>2</sup>Admitted in New York and District of Columbia



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DAMON KEY LEONG KUPCHAK HASTERT

Chairperson Laura H. Thielen

May 3, 2010

Page 2

Previously, the DLNR suggested there was a single encroachment – the lanai of the house, despite the fact that the house and lanai were built by prior owners in or around 1934. We respectfully disagree that any encroachments exist, and seek further information concerning this.

It is unclear on what basis the State can claim either the right to grant an easement or to declare anything an encroachment under the circumstances. We have been unable to locate any evidence that this was not accreted land, and we have found nothing in DLNR's files to the contrary. It is well settled in Hawaii that accreted land belongs to the littoral owner, *see Maunalua Bay Beach Ohana 28 v. State*, 122 Haw. 34, 52, 222 P.3d 441, 459 (Ct. App. 2009), which in this case is TLM. We are interested in understanding from you what evidence, if any, exists to the contrary.

With respect to the suggestion that existing vegetation is an encroachment, we disagree. Not only does the photographic evidence suggest that palm trees have been in existence on the land for over fifty years, vegetation cannot constitute an encroachment since it is a naturally occurring phenomenon. *See, generally, Griefield v. Gibraltar Fire & Marine Ins. Co.*, 24 So.2d 356, 357-58 (Miss. 1946) (no landowner liability for natural growing vegetation).

As for the seawall, it is a lawful, non-conforming structure that continues along the makai boundary of several parcels. *See generally* Revised Ordinances of Honolulu, ch. 23 (providing for the continued use of nonconforming structures in the shoreline setback area); Haw. Admin. R. § 13-5-37 (stating similarly in the conservation district). *See also Waikiki Marketplace Inv. Co. v. Chair of Zoning Bd. of Appeals*, 86 Haw. 343, 356, 949 P.2d 183, 196 (Ct. App. 1997) (construing non-conforming structures and uses as lawful). The seawall has been in existence since 1961, or possibly earlier. *See* August 12, 2008, DLNR Letter from Mr. A. Jodar to Mr. S. Lemmo (File No. 0A-08-018). Further, DLNR already determined that "removal of the seawall will cause erosion of the coastal plain," and that, because "the residence is more than 30 feet mauka of the seawall, it is uncertain whether removal of the seawall will create an emergency situation from the erosion." More specifically, DLNR found that "impacts to the adjacent and upland developments must be considered" and that removal of the seawall fronting TLM's Property "may have a negative effect on neighboring shoreline armoring structures and might lead to their consequent destabilization." Furthermore, even assuming the seawall is located on State land, it was not constructed by TLM. Accordingly, we are unclear what right or duty exists to allow or require TLM to remove it.

DAMON KEY LEONG KUPCHAK HASTERT

Chairperson Laura H. Thielen

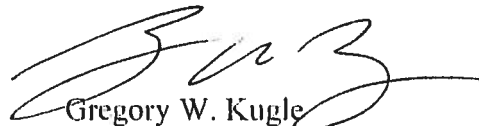
May 3, 2010

Page 3

We appreciate your anticipated cooperation with this matter. Please do not hesitate to contact the undersigned if you have any questions.

Very truly yours,

DAMON KEY LEONG KUPCHAK HASTERT



Gregory W. Kugle

Christi-Anne H. Kudo Chock

GWK/CHKC:ecc  
118047P



# **EXHIBIT**

**5b**

47794

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LAND DIVISION

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DAMON KEY LEGONG KUPCHAK HAWAIIAN LAWYERS  
2010 AUG 5 A 9:39 AM  
A LAW CORPORATION

DEPT. OF LAND &  
NATURAL RESOURCES  
STATE OF HAWAII

DEPT. OF LAND  
& NATURAL RESOURCES  
STATE OF HAWAII

Attorneys at Law

1001 Bishop Street, Suite 1600  
Honolulu, Hawaii 96813-6152

July 30, 2010

Telephone (808) 531-8031  
Facsimile (808) 531-2512  
E-Mail: info@hawaiilawyer.com  
Website: www.hawaiilawyer.com

Chairperson Laura H. Thielen  
Department of Land and Natural Resources  
State of Hawaii  
1151 Punchbowl Street, Room 130  
Honolulu, Hawaii 96813

Re: Tax Map Key (1) 3-7-002; seaward of 009

Dear Chair Thielen:

Thank you for your correspondence dated May 24, 2010, concerning the issues of easements and encroachments related to 5677 Kalaniana'ole Highway, TMK No. (1) 3-7-002;seaward of 009, which is owned by our client, TLM Partners Ltd. ("TLM"). This correspondence concerns settlement and is therefore inadmissible for any purpose pursuant to Haw. R. Evid. 408.

While we do not agree with all of the positions taken by the Department, we do believe, as discussed below, there is enough uncertainty concerning some of the issues, and the impact of potentially adverse decisions on other land around the State, such that both the Department and our client have an interest in amicably resolving the situation. Therefore, we request a meeting with you to discuss a resolution that we hope would: (1) result in the entry of an easement at fair market value; (2) establish the face of the existing seawall as the certified shoreline; (3) regulate the uses, and the parties' respective rights and obligations within the easement area, and; (4) clarify the maintenance and repair obligations of the parties with respect to the seawall and other improvements within the easement area.

While there are some factual questions, such as (1) whether the land mauka of the seawall is the product of accretion or fill, or (2) whether the State's interest in such land is fee simple absolute until title is quieted or whether it is held in trust for the beneficial abutting owner, or (3) whether the State or Territory or some other entity constructed the seawall that protects a number of homes along this stretch of Niu coastline, there are other important facts that are not in dispute and worth noting.

- Elizabeth L. Bunnings
- Eleonore B. Catalan
- John C.A. Copeland
- Matthew I. Evans
- Paul E. Eysely
- Marie D. Hester
- Caron H. Hock
- Courtney S. Kajiawa
- Charlene A. Kubota
- Christi Anne H. Eudo Chock
- Gregory W. Fugle
- Kenneth E. Kopchak
- Debra C.H. Leong
- David P. McCauley
- James C. McWhinnie
- Malik A. Abdulant
- Anna H. Oshiro
- Christopher Pan
- Michelle K. Shin
- Douglas C. Smith
- Robert H. Thomas
- Michael A. Yoshida

Of Counsel  
R. Charles Broder  
C.J. Damon, Jr.  
Harry A. Juman

Charles W. Loy  
(1999-2009)

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Admitted in California  
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EXHIBIT "5b"

DAMON KEY LEONG KUPCHAK HASTERT

Chairperson Laura H. Thielen

July 30, 2010

Page 2

TLM did not build the subject seawall. Not only was it present when TLM purchased the property, but it has been present since at least 1961. Additionally, the seawall is a continuous wall fronting multiple Niu lots, not just TLM's property, which is further proof that it was not installed by TLM. Lastly, despite this wall having been in existence for fifty (50) years, allegedly on State land, the State has never, until recently, taken the position that the wall fronting TLM's property is an encroachment onto State land for which TLM is responsible. Thus, if the land on which the seawall sits is, in fact, State land, then the seawall appears to belong to the State, not TLM. Under the State's theory, TLM should not be responsible for its installation, repair or removal. Similarly, the State would face potential liability to TLM, as well as the adjoining owners, if the wall is not maintained, or is removed, thereby causing damage to adjacent properties and TLM's property.

With respect to vegetation and also assuming that it is located on State land, rather than TLM's property, the parties appear to disagree as to who has the right or obligation to maintain the vegetation, or whether maintenance constitutes a trespass, or violation, or a reasonable exercise of an adjacent owner's rights to protect his own property from damage or vermin emanating from another's property. The State has not, to TLM's knowledge, ever maintained the vegetation present on its alleged property.

For the foregoing reasons, it is in both the State's interest, and TLM's interest, to seek an amicable resolution. TLM would be amenable to a resolution that would: (1) result in the entry of an easement at fair market value; (2) establish the face of the existing seawall as the certified shoreline; (3) regulate the uses, and the parties' respective rights and obligations within the easement area, and; (4) clarify the maintenance and repair obligations of the parties with respect to the seawall and other improvements within the easement area. The negotiations prior to this time have not resulted in an easement based on the fair market value, or that clearly sets forth TLM's rights with respect to maintenance and repair. Assuming the terms of the easement, and related shoreline certification, can be reached, then the fair market value can be determined. If the parties are unable to agree on the value, then TLM would seek the appraisal procedures as set forth in Haw. Rev. Stat. § 171-17(b). Or, in the event an amicable resolution cannot be reached in a timely manner, TLM will have no choice but to consider legal action to recover sums paid, plus interest and attorneys' fees, as well as a declaration of the parties' rights with respect to maintenance of the seawall, ownership of the property, and any such other relief that TLM may be entitled to.

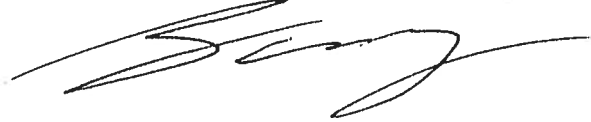
DAMON KEY LEONG KUPCHAK HASTERT

Chairperson Laura H. Thielen  
July 30, 2010  
Page 3

We look forward to meeting with you, schedule permitting, during the week of August 2<sup>nd</sup> or the week beginning August 9<sup>th</sup>, to discuss the foregoing. Thank you in advance for your continued cooperation in this matter.

Very truly yours,

DAMONKEY LEONG KUPCHAK HASTERT



Gregory W. Kugle  
Christi-Anne H. Kudo Chock

GWK/CIHKC:ds  
cc: TLM Limited Partnership  
Mr. Barry Cheung  
121452P

# **EXHIBIT**

**5c**

6837c

**DAMON KEY LEONG KUPCHAK HASTERT**  
A LAW CORPORATION

2010 NOV -8 P 3:13

DEPT. OF LAND &  
NATURAL RESOURCES  
STATE OF HAWAII  
November 2, 2010

Attorneys at Law

1001 Bishop Street, Suite 1600  
Honolulu, Hawaii 96813-6952

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E-Mail: info@hawaiilawyer.com

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- Caron N. Ikeda
- Courtney S. Kajiikawa
- Chikako A. Kubota
- Christal Anne H. Kudo Chook
- Gregory W. Fogle
- Kenneth R. Kupchak
- Denis C.H. Leong
- David P. McCauley
- James C. McWhinle
- Mark M. Muralani
- Anna H. Oshio
- Michelle M. Shin
- Douglas C. Smith
- Robert H. Thomas
- Michael A. Yoshida

Of Counsel

- R. Charles Bucklen
- C.J. Damon, Jr.
- Harry A. Inman

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(1929-2000)

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Chairperson Laura H. Thielen  
State of Hawaii, Department of Land and Natural Resources  
1151 Punchbowl Street, Room 130  
Honolulu, Hawaii 96813

**Re: TAX MAP KEY (1) 3-7-002: SEAWARD OF 009**

Dear Chair Thielen:

We represent TLM Partners Ltd. ("TLM"), which is the owner of 5677 Kalamianuole Hwy, Honolulu, HI 96821, Tax Map Key: (1) 3-7-002:009 ("Property"). This correspondence responds to yours dated October 18, 2010.

TLM hereby demands return of the \$135,135.00, which the Department of Land and Natural Resources ("DLNR" or "Department") has been holding for the past year. TLM's money must be returned forthwith because: (1) TLM was wrongly informed that an easement was required; (2) to date, no easement has been granted, and; (3) the Department's legal authority to demand or grant the subject easement is questionable at best. Please immediately return TLM's funds to it. The check can be mailed directly to:

TLM Partners Ltd.  
1568 Calzada Avenue  
Santa Ynez, CA 93460

Please confirm that the funds will be transmitted by November 12, 2010, or otherwise respond to this request by that date. If this demand for the return of the funds must be addressed to the Board, then please have this matter put on the agenda at the earliest possible time.

**EXHIBIT "5c"**



DAMON KEY LEONG KUPCHAK HASTERT

Chairperson Laura H. Thielen

November 2, 2010

Page 2

The October 18 correspondence mischaracterizes Analytical Planning ("AP")'s June 6, 2008 correspondence. AP used the term "fill" in quotes, indicating that the term was not AP's term, but a term used by others. Furthermore, AP is not a soils engineer, coastal engineer or other expert for purposes of determining the nature of the land in question. Finally, and perhaps most importantly, DLNR could not have relied on this "admission" because DLNR's own files are replete with references to the land located behind this common seawall along Niu beach as being "accreted land":

Staff review of the available evidence suggests that the encroachment area in question may have been **an accretion area in existence before October 1, 1964**, which is the year that the Conservation District law came into effect. This possible **accretion area** was artificially stabilized without authorization from any agency.... Thus staff cannot substantially prove that any portion of the encroachment area was ever located within the Conservation District.

*See* Correspondence from Dierdre Mamiya, Administrator, Department of Land and Natural Resources, to Warren Bucher, Ph.D., dated July 31, 2002 (enclosed, emphasis added).

Ms. Mamiya's letter is significant for several reasons. First, it is describing a parcel just 3 lots away from TLM's parcel. Second, it is also describing the same common seawall that was built prior to 1961 and which protects all of the lots along this section of Niu. Third, it characterizes the land mauka of the seawall as "accretion". Fourth, it concedes that DLNR could not prove that this accretion area was ever located within the Conservation District, which means that DLNR could not prove that this accretion area was located makai of the shoreline. In sum, while AP made no admissions on TLM's behalf, DLNR files are replete with admissions of its own.

Furthermore, historically, TLM's makai property line was located at the high water mark, not further inland. In the original Land Commission Award of Niu Valley to Alexander Adams (enclosed), the makai boundary was "along Sea." In the 1927 file plan, the makai description of Lot 28 also states "high water mark at sea shore to a t on coral." Thus, historically, the makai boundary of TLM's lot, and

DAMON KEY LEONG KUPCHAK HASTERT

Chairperson Laura H. Thielen  
November 2, 2010  
Page 3

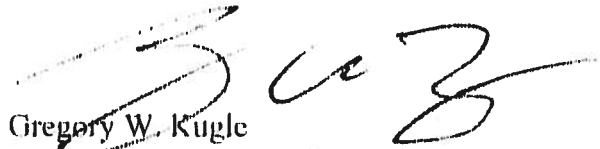
the privately owned lots along Niu beach, was the high water mark. It was not further inland.

Moreover, our prior correspondence simply pointed out that assuming arguendo the State holds legal and beneficial title to the land in question, then the seawall located on that land would also belong to the State and it would be unfair and improper to force TLM to remove it. The fact that the seawall is a common, integrated seawall fronting a number of properties along Niu is evidence that it was not built by any one owner to protect any one individual parcel, but was instead a regional project. Certainly TLM, which acquired this parcel several decades after the seawall was built, should not remove it. Moreover, whoever removes the seawall, or requires its removal, will undoubtedly face liability from nearby property owners. DLNR has determined that removal of the seawall would result in erosion and damage to properties on either side of TLM's property, to a loss of the "State" land, and would also endanger TLM's property and house. Should DLNR remove the seawall, or order a third party to remove it, DLNR will create a dangerous condition.

We appreciate your anticipated cooperation with this matter. Please do not hesitate to contact the undersigned if you have any questions.

Very truly yours,

DAMON KEY LEONG KUPCHAK HASTERT



Gregory W. Kugle  
Christ-Anne H. Kudo Chock

GWK/CHKC:ccc/ds  
Enclosures

cc: TLM Partners Ltd. (w/enclosures)  
128823P

REF:PB:MA



**STATE OF HAWAII**  
**DEPARTMENT OF LAND AND NATURAL RESOURCES**  
LAND DIVISION  
P.O. BOX 021  
HONOLULU, HAWAII 96809

AQUATIC RESOURCES  
BOATING AND OCEAN RECREATION  
CONSERVATION AND  
RESOURCES ENFORCEMENT  
CONVEYANCES  
FORESTRY AND WILDLIFE  
HISTORIC PRESERVATION  
LAND DIVISION  
STATE PARKS  
WATER RESOURCE MANAGEMENT

File Number Encroachment: OA-02-27

Warren Bucher, Ph. D.  
Oceanit  
1001 Bishop Street  
Pacific Tower, Suite 2970  
Honolulu, HI 96813

JUL 3 | 2002

Dear Mr. Bucher:

**Subject: Shoreline Encroachment (Sea Wall and Fill) at 5691 Kalaniana'ole Highway  
[TMK: (1) 3-7-02:008]**

Coastal Lands Program (CLP) staff has reviewed this case, which involves your client's seawall and encroachment area at Nui, Oahu. Based upon information you have submitted on behalf of your clients, Ada Murakami and Michael Gallagher, the seawall and encroachment area in question consists of approximately 2000 square feet. According to previous information that the applicant's attorney has submitted to the Department, the Cassidy family had constructed the seawall fronting the encroachment area at some date between 1954 and 1960.

According to submitted evidence it appears that seawall defining the encroachment area in question was built at some date between 1954 and 1961. Two R.M. Towill aerial photos have been submitted, one from 11/17/1954 that shows no seawall structure Makai of parcel [TMK (1) 3-7-02:008] and one from 01/20/1961 which appears to show a seawall structure located Makai of the parcel in question as well as a seawall fronting the neighboring parcel.

The Board of Land and Natural Resource (BLNR) recently established a policy to allow the disposition of shoreline encroachments by either removal or issuance of an easement. In carrying-out this policy, the Department established criteria to guide decision-making over specific cases. The criteria are as follows:

1. Protect/preserve/enhance public shoreline access;
2. Protect/preserve/enhance public beach areas;
3. Protect adjacent properties;
4. Protect property and important facilities/structures from erosion damages; and
5. Apply "no tolerance" policy for recent or new unauthorized shoreline structures

In addition, the Department developed a "Shoreline Encroachment Information Sheet" that is intended to provide the State with additional information to guide the Department's decisions on the disposition of shoreline encroachments. This form has been completed and submitted. On July 3, 2002 staff visited the site to investigate the encroachment and to gather

reconnaissance information to support a recommendation for either removal of the encroachment or issuance of an easement. Of primary importance are the Department's objectives to protect and preserve shoreline resources and shoreline access.

Surrounding Land Uses:

It was observed during the site visit that surrounding uses are residential. It appears that the abutting neighbor's seawall to the east is contiguous with the seawall in question. The land area behind the neighboring parcel [TMK (1) 3-7-02:007] seawall is not an encroachment area. The land area behind the seawall of parcel :007 lies within the recorded boundaries of that parcel. The area behind the neighboring parcel [TMK (1) 3-7-02:020] to the west appears to be an encroachment area. The owner of parcel :20 was informed in 1990 to either remove the encroaching seawall or apply for an easement for the area from the State.

Beach Resources:

CLP staff inspected the area. The beach area mostly consists of mudflats. In some areas there is a thin layer of sand.

Public Access:

There is no nearby easy public access to the shoreline in this area. The closest ocean access is at Niu Stream approximately four or five parcels to the west side of the property.

Effect of Removing the Encroachment on:

*Beach Resources:* Removal of the seawall would be inconsequential as there is no beach in the vicinity. Public recreation such as fishing, boating and surfing takes place offshore of the parcel.

*Public Access:* CLP staff has determined that public access would not be enhanced by removal of the encroachment.

*Affect on Adjacent Properties:* Removal of the seawall in question could cause damage to the seawall fronting parcel TMK (1) 3-7-02:007, which appears to be contiguous with the seawall in question.

Staff observed during the site visit that the subject seawall appears long established. The encroaching wall is contiguous with the seawall fronting the neighboring parcel to the east. The submitted evidence (aerial photos) suggests the seawall was in existence prior to 1961. The encroachment area in question is quite substantial in size (approximately 2000 square feet) but based on inspection of the submitted aerial photo it appears that is area was in existence prior to the construction of the seawall in question. The neighboring parcel to the east [TMK (1) 3-7-02:007] currently has property boundaries that extend much further Makai than the seaward boundary of the parcel in question. The property to the east has had its present Makai boundary included in its parcel description since at least 1949. This is evidence that the land Makai of parcel :008 seaward boundary has been in existence for a substantial length of time.

Further evidence to the long term existence to the area fronting subject parcel :008 is documentation at State Survey regarding the neighboring parcel to the west [TMK (1) 3-7-

02:020]. A certified shoreline for parcel :020 was rejected in 1990 because of the low concrete wall fronting that parcel. The low concrete wall adjoins the seawall fronting the parcel :008. In 1990 the owner of parcel :020 was given two options by the Department to rectify the situation and receive a certified shoreline; either remove the structure or apply for an easement from the State for the encroachment area.

Staff review of the available evidence suggests that the encroachment area in question may have been an accretion area in existence before October 1, 1964, which is the year that Conservation District law came into effect. This possible accretion area was artificially stabilized without the authorization from any agency. As the shoreline was artificially stabilized the landowner is no longer able to make an accretion claim for the encroachment area in question. The seawall that stabilized the accretion area was constructed prior to October 1, 1964 when Conservation District law came into effect. Thus staff cannot substantially prove that any portion of the encroachment area was ever located within the Conservation District.

Upon review and consideration of the information gathered on this case, staff has determined that the issuance of an easement for the encroachment area would have no adverse impacts on natural resources, including beach resources. Therefore, the Coastal Lands Program has no objections to an easement request being processed. The Oahu District Land Office calculates the monetary amount required to dispose this use of State land through an easement. The landowner should note that they may be subject to the administrative penalty system for unauthorized use of State land pursuant to section 171-6, Hawaii Revised Statutes.

We hope this letter helps resolve some of the outstanding issues regarding your property. Please feel free to contact Masa Alkire of the Coastal Lands Program at 587-0382. Please contact the Oahu District Land Office at 587-0433 regarding the processing of an easement.

Aloha,



Dierdre S. Mamiya  
Administrator

Cc: Oahu Board Member  
Oahu District Land Office  
City and County of Honolulu DPP  
Chairperson's Office

This is a Claim for a tract of Land called "Niu", in the district of Waikato. Consisting of 200 Acres and a Tract Land belonging to "Niu", called "Kawaiata", consisting of 1,700 acres.

From the Testimony of Poo "Tikuanooa", and Mr. J., it appears, that the claimant was created Lord or Nonohiki of this Land in the time of Tamahamohi; and that he has exercised the Nonohikiship of the same, without dispute ever since the Year of our Lord 1832. It further appears, that the Claimant obtained his Rights in this Land in the same way that he obtained his Rights in the Land comprised in the Claim N<sup>o</sup> 301; namely, in remuneration for services rendered the King as Sea Captain or Sailing Master.

The Board are of the opinion, that the Claimant's Rights in these Lands are as large as those possessed by any Chief or other high Nonohiki in Lands possessed by them; namely a Feudal title less than allodial, subject to the Rights of Tenants.

We do therefore award to Alexander Adams, the Claimant, a Feudal title less than allodial, in the Land of "Niu", and in the Tract Land of "Kawaiata" according to the Meters and bounds of the annexed Survey, made by T. Mitchell Esq. on 11<sup>th</sup> day of February A.D. 1848. The Claimant is to respect the Rights of all Tenants of these Lands, and may commute this Title for a Fee simple, as prescribed by Law.

Notes of Survey of "Niu", in Waikato.

Commencing at Rock marked + at Makai S.W. Corner of this Land by spring of water - joining Waitupe at Sea - and running N. 29. 30 W. 52 or 39 1/2 ft. up Pali and along middle of Ridge separating Niu from Waitupe Valley to large Rocks at angle. Thence N. 45. 1/2 W. 110 ft. 46 ft. along Waitupe on top of Ridge to a tree on last bare peak at foot of woods. Thence N. 15. 00. 76 ft.



along Waitepe to mauka N. W. peak of this land on top of Mountain next to Koolau. Then following along on top of Mountain ridge, the mauka side of this land and Koolau to Mountain peak at mauka E. peak of this, to land called "Kulionou" in Koolau. Then following along down Ridge separating this from Koolau to Road on top of Sea Pali little above Sea - thence S.  $33^{\circ} 30'$  E. 6 Ch.  $39 \frac{1}{2}$  ft. down Pali along Kulionou to Rock near Corner of Kalopatch little above Sea, at the Mookai S. E. Corner of this land, then along Sea to place of Commencement. This land has a Sea to it as marked on map. and contains an area of

Feb. 11. 1848

Acres 24.12

See Page 190 for diagram

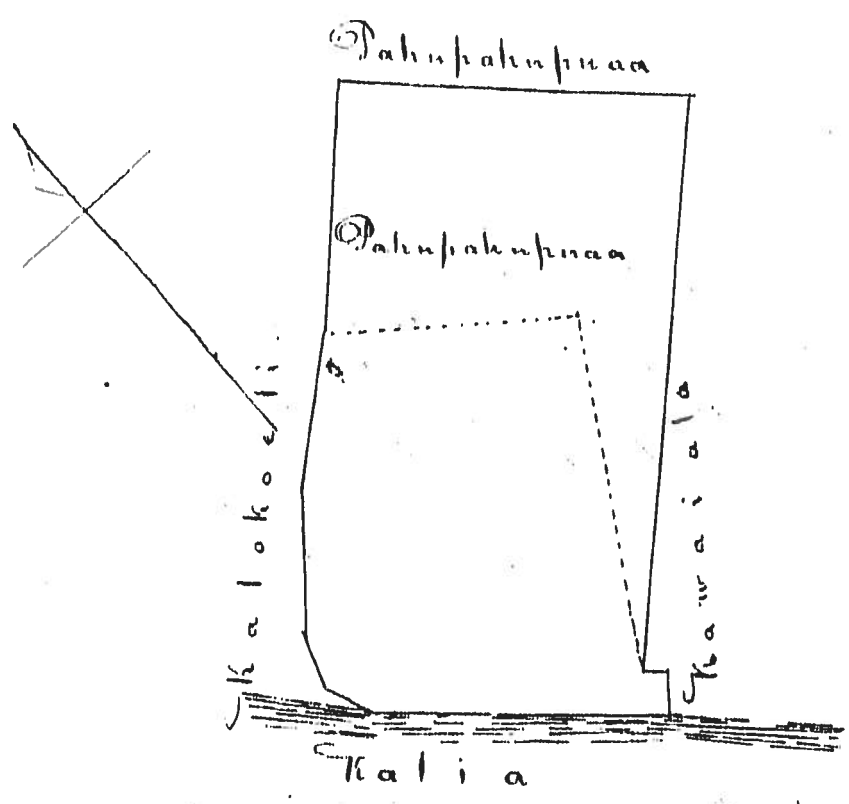
"Notes of Survey of Kato Lands in Waikiki called Kawaiata alua in Niu"

"Commencing at Mookai S. Corner of this land on Mauka side of stream called Kalia, and running N.  $44^{\circ}$  W. 3 Ch.  $63 \frac{1}{2}$  ft. along Kalia stream to slight angle - thence N.  $19^{\circ}$  W. 58 ft. to Mookai W. Corner of this land - thence N.  $24^{\circ}$  E.  $46 \frac{1}{2}$  ft. along Kaloheoheo to slight angle - thence N.  $43^{\circ} 45'$  E. 2 Ch. to slight angle - thence N.  $55^{\circ}$  E. 2 Ch.  $11 \frac{1}{2}$  ft. along Kaloheoheo to slight angle - thence N.  $48^{\circ} 30'$  E. 3 Ch.  $33 \frac{1}{2}$  ft. to Mauka N. Corner of this land - thence S.  $42^{\circ}$  E. 1 Ch.  $63 \frac{3}{4}$  ft. along Pahipahupuaa to mauka E. Corner of this land - thence S.  $51^{\circ}$  W. 8 Ch. along Kawaiata to corner - then offset  $31 \frac{1}{2}$  ft. to left to corner - thence S.  $42^{\circ} 30'$  W.  $38 \frac{1}{2}$  ft. to place of Commencement including an area of

Feb. 11. 1848

Acres 4  $\frac{1}{100}$

T. M. Keefe Sur.



Cook's Adjudication of C. N. 802. Mr. Adams' Lt.

To "Incidental Expenses & action of Commission" in this Ct. 19 January 1848  
 draft deposition of Lt. reduced  
 Citation  
 draft testimony Reduced & Eng. & anal. plan? Lt  
 Survey of S. Adams for two lands  
 Engrossed Copy of do  
 Report this day rendered by Commissioners on the above claim

1
1
1
50
75
20
6
5

State Kahuwala  
 29 January 1849

W. L. Lee  
 J. H. Smith  
 S. M. K. and others  
 by Kahuwala  
 Council

35 25

This is a Claim for a tract of Land called "Niu", in the district of Waikiki Oahu; consisting of 2.5.2.2 acres and a Kalo land belonging to "Niu", called "Kawaiakala", consisting of 1.700 acres.

From the Testimony of "Poo" Nekuanaoa, and Mr. Si, it appears, that the claimant was created Roid or Kionohiki of this Land in the time of Kamehameha I; and that he has exercised the Kionohikihip of the same, without dispute ever since the Year of our Roid 1822. It further appears, that the Claimant obtained his Rights in this Land in the same way that he obtained his Rights in the Land comprised in the Claim N<sup>o</sup> 301; namely, in Remuneration for services rendered the King as Sea Captain or Sailing Master.

The Board are of the opinion, that the Claimant's Rights in these Lands are as large as those possessed by any Chief or other high Kionohiki in Lands possessed by them; namely a Feehold title less than allodial, subject to the Rights of Tenants.

We do therefore award to Alexander Adams, the Claimant; a Feehold title less than allodial, in the Land of "Niu"; and in the Kalo Land of "Kawaiakala" according to the Meters and bounds of the annexed Survey, made by J. Atwater Esq. on 12<sup>th</sup> day of February A.D. 1848. The Claimant is to respect the Rights of all Tenants of these Lands; and may commute this Title for a Fee simple, as prescribed by Law.

Notes of Survey of "Niu", in Waikiki.

Commencing at Rock marked + at Mahele S. W. Corner of this Land by spring of water - joining Waikiki at Sea - and running N. 29.30 W. 52 Ch 39 1/2 ft. up Pali and along middle of Ridge separating Niu from Waikiki Valley to large Rock at angle. Thence N 71.1/2 W. 114 ft. 46 ft. along Waikiki on top of Ridge to a tree on last bare peak at foot of woods. Thence N. 15. 59. 76 Ch

along Waikape to Mauka N. W. peak of this land on top of Mountain next to Koolau. Then following along on top of Mountain ridge, the Mauka side of this land and Koolau to Mountain peak at Mauka E. peak of this, to land called "Kulioou" in Koolau, then following along down ridge separating this from Koolau to Rocks on top of Sea Pali little above Sea - thence S.  $33^{\circ} 30'$  E. 6 Ch.  $39 \frac{1}{2}$  ft. down Pali along Kulioou to Rocks near Corner of Kalo patch little above Sea, at the Mauka S. E. Corner of this land, then along Sea to place of Commencement. This land has a Sea to it as marked on map. and contains an area of

Feb. 11. 1848

Acres 24.12

See Page 190 for diagram

"Notes of Survey of Kalo Land in Waikiki called  
"Kawaiiaata alua in Niu"

"Commencing at Mauka S. Corner of this land on Mauka side of stream called Kalia, and running N.  $44^{\circ}$  W. 3 Ch.  $63 \frac{1}{2}$  ft. along Kalia stream to slight angle - thence N.  $19^{\circ}$  W. 58 ft. to Mauka W. Corner of this land - thence N.  $24^{\circ}$  E.  $46 \frac{1}{2}$  ft. along Kalo Kalo to slight angle - thence N.  $43^{\circ} 45'$  E. 2 Ch. to slight angle - thence N.  $55^{\circ}$  E. 2 Ch.  $11 \frac{1}{2}$  ft. along Kalo Kalo to slight angle - thence N.  $48^{\circ} 30'$  E. 3 Ch.  $33 \frac{1}{2}$  ft. to Mauka N. Corner of this land - thence S.  $42^{\circ}$  E. 1 Ch.  $62 \frac{3}{4}$  ft. along Pahupahu to Mauka E. Corner of this land - thence S.  $51^{\circ}$  W. 8 Ch. along Kawaiiaata 182 to corner - then offset -  $21 \frac{1}{2}$  ft. to left to corner - thence S.  $42^{\circ} 30'$  W.  $38 \frac{1}{2}$  ft. to place of Commencement including an area of

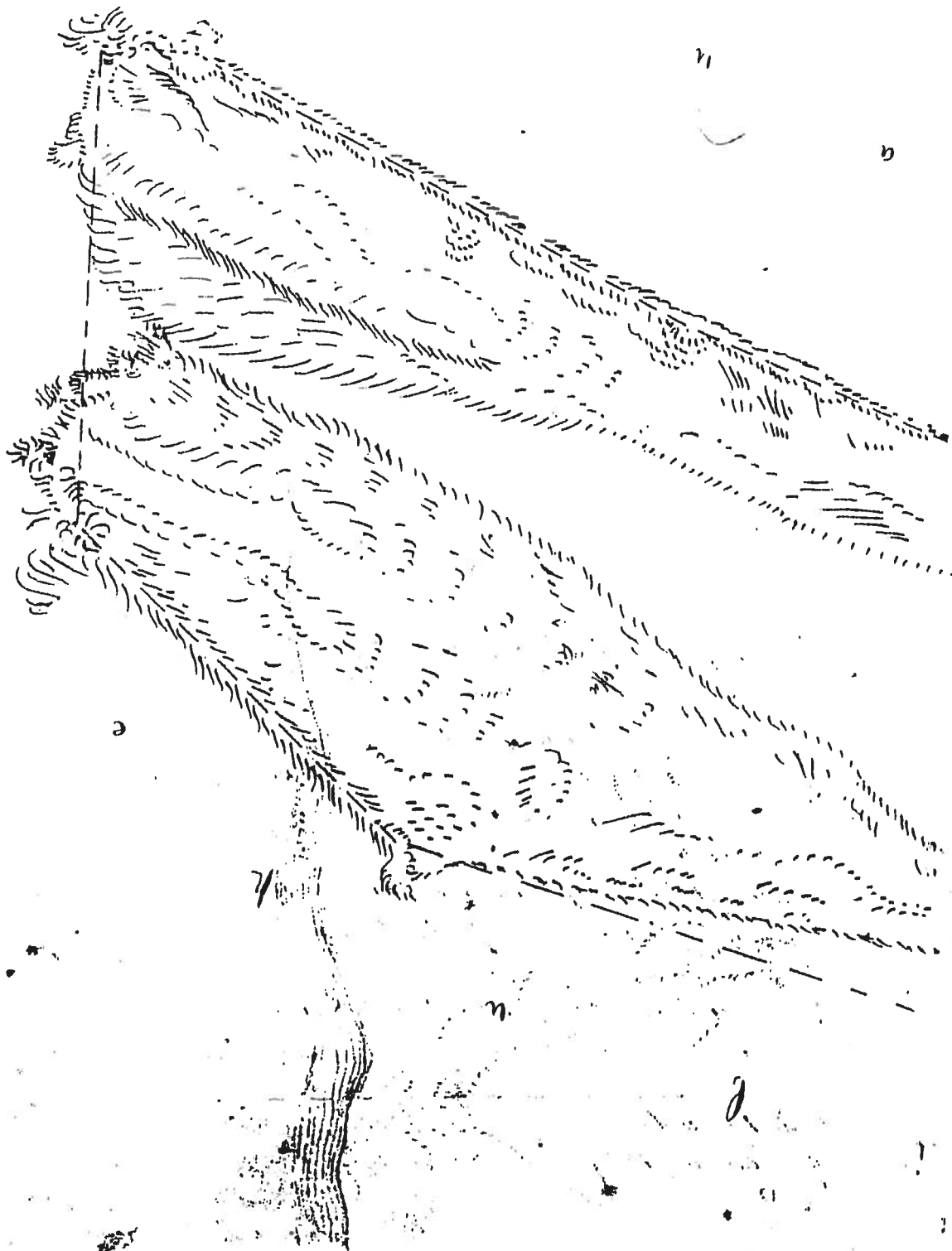
Feb. 11. 1848

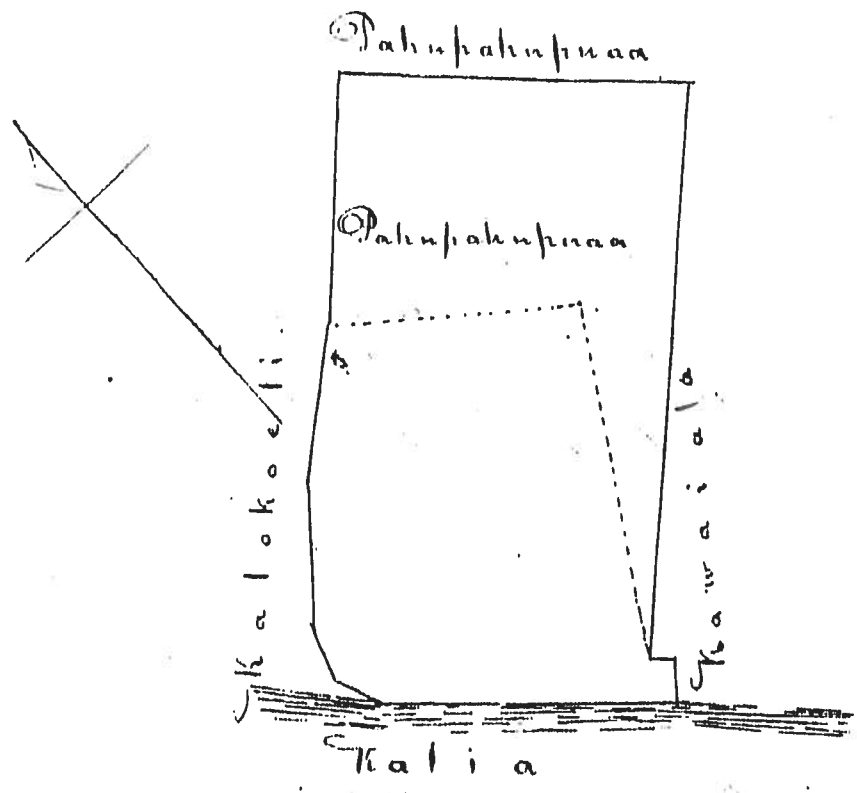
Acres 1.  $\frac{1}{10}$ 

T. M. Keat, Sur.

190

Page 107. Cl. 802.





Cook's Adjudication of C. N. 802. Mer. Adams Lt.

To Incidental Expenses in	1
action of Commis. in this Ct. 19 January 1823	1
draft deposition of Lt. reduced	1
Citation	50
draft testimony Reduced & Eng. on 19 Jan. 23	75
Survey of Lt. Meale's for two lands	20
Expenses Copy of do	6
Report this day rendered by Commissioners	5
on the above claim	
	<hr/>
	35 25

State Records  
29 January 1829

W. L. Lee  
J. P. Smith  
S. M. K. and others  
By Hawaiian  
Council





# **EXHIBIT**

**5d**

DAMON KEY LEONG KUPCHIAK HASTERI  
A LAW CORPORATION

December 9, 2010

RECEIVED  
LAND DIVISION  
2010 DEC 13 A 9 51  
DEPARTMENT OF LAND & NATURAL RESOURCES  
STATE OF HAWAII

Attorneys at Law

1001 Bishop Street, Suite 1600  
Honolulu, Hawaii 96813-6157

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- Diane D. Hefert
- Caron H. Hoku
- Conroy S. Kaplowat
- Christine A. Kubota
- Christi-Anne H. Kudo Choek
- Gregory W. Kugle
- Kenneth P. Kupchak
- Damon K. Leong
- David P. McCauley
- James C. McWhinnie
- Paul M. Moulton
- Anne H. Oshiro
- Christopher P. Papp
- Michelle H. Shin
- Douglas C. Smith
- Robert H. Thomas
- Michael A. Yoshida

Of Counsel  
P. Charles Bucken  
C. J. Damon Jr.  
Henry A. Johnson

Charles W. Fay  
(1999-2000)

Admitted in Law in and California  
Admitted in California  
Admitted in New York and  
District of Columbia



Being business clients  
would like to see the  
reputation of legal advice  
and the reputation of the  
lawyer.

Mr. Barry Cheung  
Oahu District Land Office  
State of Hawaii Department of Land and Natural Resources  
Post Office Box 621  
Honolulu, Hawaii 96809

Re: Tax Map Key No. (1) 3-7-002:009

Dear Mr. Cheung,

In response to your letter of November 29, 2010, we respectfully disagree with the Department of Land and Natural Resources' characterization of our position and the events that have transpired in regards to Tax Map Key No. (1) 3-7-002:009 seaward.

Therefore, we request that the issue of reimbursement be added to the agenda of the Board of Land and Natural Resources' January, or next available, meeting.

If you have any questions, please feel free to contact the undersigned.

Very truly yours,.

DAMON KEY LEONG KUPCHIAK HASTERI

*(Handwritten signature)*  
Gregory W. Kugle  
Christi-Anne H. Kudo Choek

GWK/CHK:ds  
cc: Mr. Thomas McConnell  
130731P

# **EXHIBIT**

**6a**

LINDA LINGLE  
GOVERNOR OF HAWAII

Laura H. Theelen  
CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSIONER OF WATER RESOURCES MANAGEMENT



STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
LAND DIVISION

POST OFFICE BOX 621  
HONOLULU, HAWAII 96809

May 24, 2010

Mr. Gregory W. Kugle  
Ms. Christi-Anne H. Kubo Chock  
Damon Key Leong Kupchak Hastert  
1003 Bishop Street, Suite 1600  
Honolulu, Hawaii 96813-6452

Dear Mr. Kugle & Ms. Chock

In response to your letter dated May 3, 2010 regarding questioning the need, as well as, the Board of Land and Natural Resource's (Board) authority to issue the proposed easement at TMK: (1) 3-7-002: Seaward of 009, it is our position that any improvement outside the recorded boundary of the private property that falls on State land is an encroachment. An easement will legitimize the situation in which people are causing encroachment on State lands.

By the topographical survey map conducted by Towill, Shigeoka & Associates dated, November 20, 2007, a portion of lanai, landscaping area, and seawall are located seaward of the recorded boundary of your client's property. Therefore, these improvements are encroaching on State lands.

In your letter, you mentioned that there was no evidence indicating the subject area was not accreted land. However, you fail to point out that there is a lack of any evidence establishing that the subject area was in fact accreted lands. Furthermore, even if there was some evidence establishing that the subject area was in fact accreted lands, there is no record of the subject area being adjudicated by the court as accreted lands and belong to the abutting landowner. Therefore, we believe the subject area is currently owned by the State of Hawaii.

From the photos submitted by your client's consultant, we cannot agree that the current state of the vegetation at 5677 Kalaniana'ole Highway is naturally occurring phenomenon. The area is well-maintained with grass nicely mowed. A manicured lawn on State land is, at minimum, an unauthorized use, if not outright encroachment.

The Board, pursuant to §171(6)(12), HRS, has the power to remove, or remedy any encroachment on State land. And, under §171(6)(15), HRS, the Board has the authority to address the unauthorized, or prohibited use of State lands. The non-conforming nature of the encroachments relates to its "zoning" status. Your allegations of the "lawful" nature of the

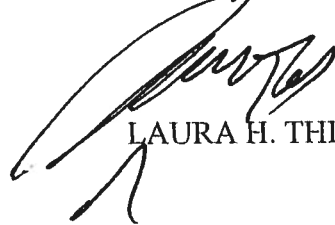
Kugle, G./Kubo-Chock, C.  
May 24, 2010  
Page 2.

structures may be relevant to its status under building permit laws; however, it does not address the trespass issues on State land. Zoning, and land ownership rights are two separate matters.

Therefore, we determined that an easement is needed to legitimize the encroachment at the subject location. Should you choose to remove the encroachment, please inform us in advance of this action so we can ensure that no one's land is damaged, including State land.

Please feel free to contact Mr. Barry Cheung of Oahu District Land Office at #587-0430 should you have any questions.

Sincerely,



LAURA H. THIELEN

cc: Sam Lemmo, OCCL



# **EXHIBIT**

**6b**

LINDA FINGLE  
GOVERNOR OF HAWAII



LAURA H. THIELEN  
CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
CONSERVATION WATER RESOURCES MAHAOLELE



STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
LAND DIVISION

POST OFFICE BOX 621  
HONOLULU, HAWAII 96809

October 18, 2010

Ref: 08od-068

Mr. Gregory W. Kugle  
Ms. Christi-Anne H. Kudo Chuck  
Damon Key Leong Kupchak Hastert  
1003 Bishop Street, Suite 1600  
Honolulu, Hawaii 96813-6452

Dear Mr. Kugle & Ms. Chock

Subject: TLM Partners Ltd. Niu, Honolulu, Oahu, TMK (1) 3-7-002:seaward of 009

Thank you for your letter dated July 30, 2010 wherein you queried the State's ownership of the subject area, and reiterated your client did not build the seawall. Your client is also asking for the refund of \$135,135.00 paid to resolve the encroachment.


We respectfully point out to you that your client's agent, Analytical Planning Consultants, Inc., stated in its letter dated June 6, 2008 that enclosed was a "[p]hoto taken from the house showing much of the "fill" (emphasis added) area". Accordingly, the Department took this as an admission that the subject land is in fact "fill" or reclaimed lands. Therefore, the statement in your letter dated May 3, 2010 that "[i]t was settled in Hawaii that accreted land belongs to the littoral owner" does not appear applicable in this case, and we believe the issuance of a non-exclusive easement in this case is proper.

Further, we do not agree with your statement that "the seawall appears to belong to the State, not TLM..." In the aforementioned letter from your client's agent, the subject location of the State owned strip of land was described as the "sea wall encroachment in front of the existing house". The proposed easement seeks to resolve all such encroachments.

If you wish to discuss this matter further, you may contact Russell Tsuji, Land Administrator at 587-0414 or Barry Cheung of Oahu District Land Office at 587-0430.

Sincerely,

A handwritten signature in black ink, appearing to read "LH Thielen".

 Laura H. Thielen  
Chairperson

**EXHIBIT "6b"**

# **EXHIBIT**

**6c**

LINDA LINGEE  
GOVERNOR OF HAWAII



LAURA H. THIELEN  
Honorable  
Member of the Board of Land and Natural Resources  
Department of Land and Natural Resources  
Honolulu, Hawaii

PAUL J. CONRY  
Honorable  
Member of the Board of Land and Natural Resources  
Department of Land and Natural Resources  
Honolulu, Hawaii

JENNIFER N. CHIEK  
Honorable  
Member of the Board of Land and Natural Resources  
Department of Land and Natural Resources  
Honolulu, Hawaii

AGNES HONORABLE  
Member of the Board of Land and Natural Resources  
Department of Land and Natural Resources  
Honolulu, Hawaii

ROBERT HONORABLE  
Member of the Board of Land and Natural Resources  
Department of Land and Natural Resources  
Honolulu, Hawaii

KEVIN HONORABLE  
Member of the Board of Land and Natural Resources  
Department of Land and Natural Resources  
Honolulu, Hawaii



STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES

POST OFFICE BOX 621  
HONOLULU, HAWAII 96809

November 29, 2010

Mr. Gregory W. Kugle  
Ms. Christi-Anne H. Kudo Chock  
Damon Key Leong Kupchak Hastert  
1003 Bishop Street, Suite 1600  
Honolulu, Hawaii 96813-6452

Dear Mr. Kugle & Ms. Chock:

In response to your letter dated November 2, 2010, the Board of Land and Natural Resources authorized the issuance of a non-exclusive easement to remedy an encroachment on State land. The easement has not been consummated only because your client refused to sign the easement document. We enclose another copy of the easement document for execution should you wish to reconsider your position.

Alternatively, the proper forum to present your arguments is at a future meeting of the Board. Please let us know if you would like this matter presented to the Board.

If you have any further questions, you may contact Russell Tsuji, Land Administrator at 587-0414, or Barry Cheung of our Oahu District Land Office at 587-0430.

Sincerely,

*for*  
*Paul J. Conry*  
LAURA H. THIELEN

Enclosure

RECEIVED  
LAND ADMINISTRATION  
2010 NOV 29 P 2:07

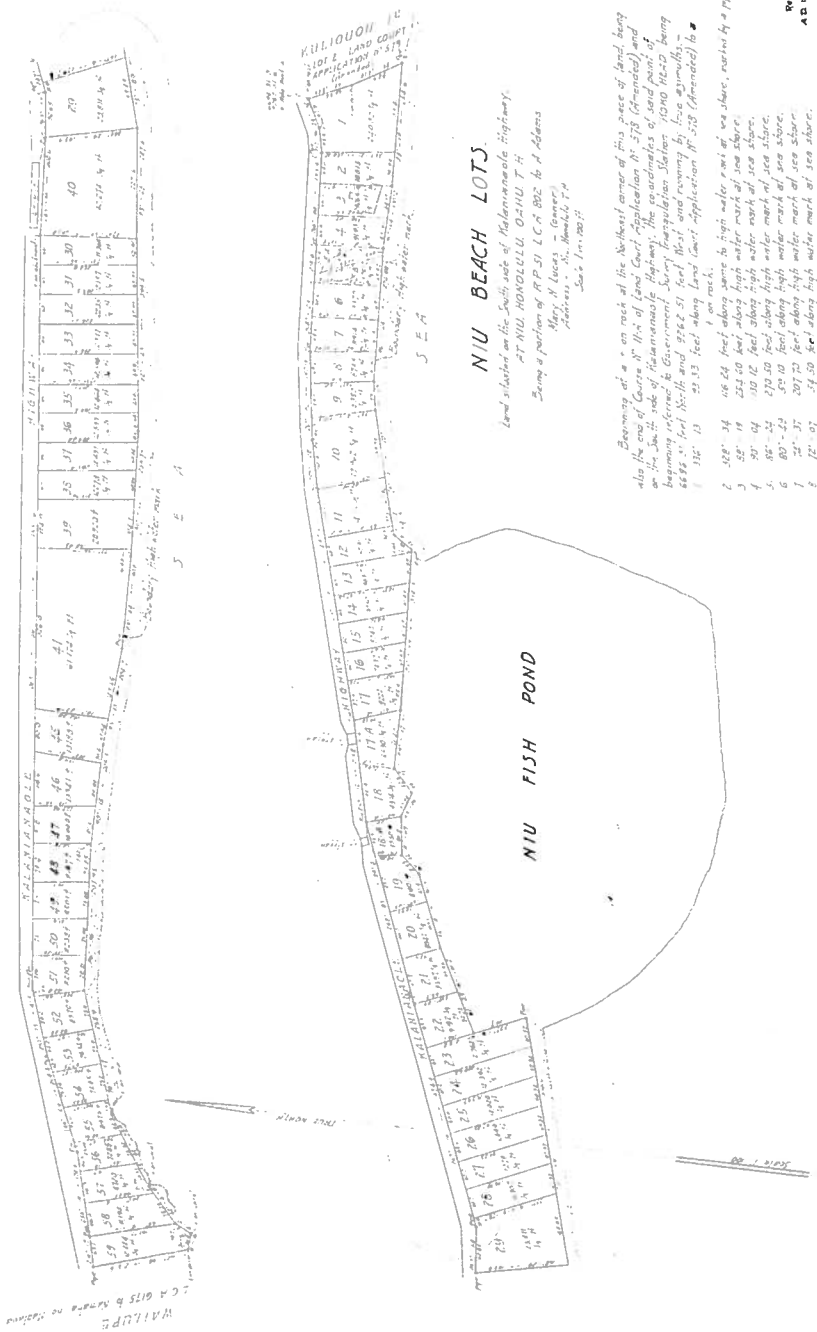
EXHIBIT "6c"

# **EXHIBIT**

**7**

- 11- 13- 10 feet along high water mark of sea shore to a pipe
- 14- 15- 10 feet along high water mark of sea shore to a pipe
- 16- 17- 10 feet along high water mark of sea shore to a pipe
- 18- 19- 10 feet along high water mark of sea shore to a pipe
- 20- 21- 10 feet along high water mark of sea shore to a pipe
- 22- 23- 10 feet along high water mark of sea shore to a pipe
- 24- 25- 10 feet along high water mark of sea shore to a pipe
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- 80- 81- 10 feet along high water mark of sea shore to a pipe
- 82- 83- 10 feet along high water mark of sea shore to a pipe
- 84- 85- 10 feet along high water mark of sea shore to a pipe
- 86- 87- 10 feet along high water mark of sea shore to a pipe
- 88- 89- 10 feet along high water mark of sea shore to a pipe
- 90- 91- 10 feet along high water mark of sea shore to a pipe
- 92- 93- 10 feet along high water mark of sea shore to a pipe
- 94- 95- 10 feet along high water mark of sea shore to a pipe
- 96- 97- 10 feet along high water mark of sea shore to a pipe
- 98- 99- 10 feet along high water mark of sea shore to a pipe
- 100- 101- 10 feet along high water mark of sea shore to a pipe

Received for filing this 12th day of August  
 A.D. 1927 at 11:15 A.M. and filed in file No. 272  
 Registrar of Conveyances  
 Territory of Hawaii  
 Office of Conveyances  
 Honolulu, T.H.  
 August 21, 1927



**NIU BEACH LOTS**

Land situated on the South side of Makaleia Highway,  
 Niuhou, Honolulu, Territory of Hawaii.  
 Being a portion of P.P. 31 & C.C. 882 to A. Adams  
 Agent, of Honolulu, Hawaii, T.H.  
 Date: Jan. 1, 1927.

- 1- 2- 10 feet along high water mark of sea shore to a pipe
- 3- 4- 10 feet along high water mark of sea shore to a pipe
- 5- 6- 10 feet along high water mark of sea shore to a pipe
- 7- 8- 10 feet along high water mark of sea shore to a pipe
- 9- 10- 10 feet along high water mark of sea shore to a pipe
- 11- 12- 10 feet along high water mark of sea shore to a pipe
- 13- 14- 10 feet along high water mark of sea shore to a pipe
- 15- 16- 10 feet along high water mark of sea shore to a pipe
- 17- 18- 10 feet along high water mark of sea shore to a pipe
- 19- 20- 10 feet along high water mark of sea shore to a pipe
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- 23- 24- 10 feet along high water mark of sea shore to a pipe
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- 37- 38- 10 feet along high water mark of sea shore to a pipe
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- 51- 52- 10 feet along high water mark of sea shore to a pipe
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- 69- 70- 10 feet along high water mark of sea shore to a pipe
- 71- 72- 10 feet along high water mark of sea shore to a pipe
- 73- 74- 10 feet along high water mark of sea shore to a pipe
- 75- 76- 10 feet along high water mark of sea shore to a pipe
- 77- 78- 10 feet along high water mark of sea shore to a pipe
- 79- 80- 10 feet along high water mark of sea shore to a pipe
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- 95- 96- 10 feet along high water mark of sea shore to a pipe
- 97- 98- 10 feet along high water mark of sea shore to a pipe
- 99- 100- 10 feet along high water mark of sea shore to a pipe



# **EXHIBIT**

**8**



**EXHIBIT "8"**

# **EXHIBIT**

**9**

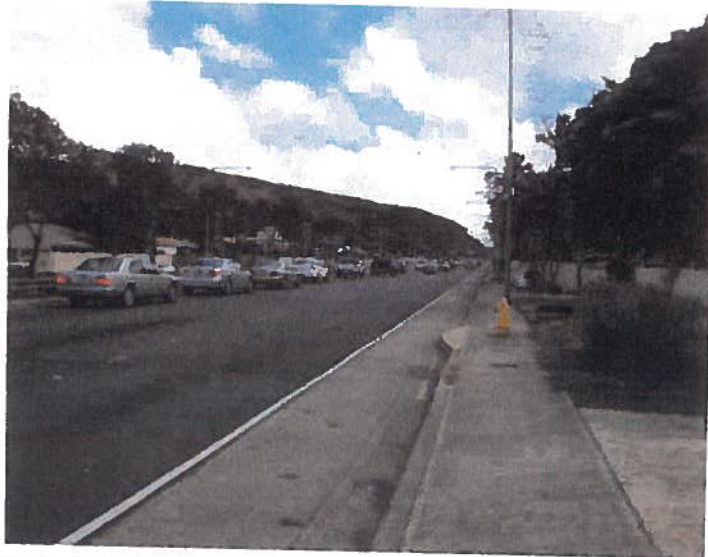
## Subject Photo Page

Borrower/Client	TLM Partners, Ltd		
Property Address	5677 Kalaniana'ole Hwy		
City	Honolulu	County	Honolulu
		State	Hawaii
Lender	Dept of Land & Natural Resources		Zip Code 96821-2303



### Subject Front

5677 Kalaniana'ole Hwy  
Sales Price N/A  
Gross Living Area  
Total Rooms  
Total Bedrooms  
Total Bathrooms  
Location Niu Beach  
View 16,317sf/Ocean Frt  
Site  
Quality  
Age



### Street Scene



### Subject Aerial

# Subject Photo Page

Borrower/Client TLM Partners, Ltd			
Property Address 5677 Kalaniana'ole Hwy			
City Honolulu	County Honolulu	State Hawaii	Zip Code 96821-2303
Lender Dept of Land & Natural Resources			



## Subject Rear Yard & Lanai

5677 Kalaniana'ole Hwy  
Sales Price N/A  
Gross Living Area  
Total Rooms  
Total Bedrooms  
Total Bathrooms  
Location Niu Beach  
View 16,317sf/Ocean Frt  
Site  
Quality  
Age



## Subject Rear Yard & Lanai



# Subject Photo Page

Borrower/Client	TLM Partners, Ltd		
Property Address	5677 Kalaniana'ole Hwy		
City	Honolulu	County	Honolulu
Lender	Dept of Land & Natural Resources	State	Hawaii
		Zip Code	96821-2303



## Subject SE Rear Corner

5677 Kalaniana'ole Hwy  
Sales Price N/A  
Gross Living Area  
Total Rooms  
Total Bedrooms  
Total Bathrooms  
Location Niu Beach  
View 16,317st/Ocean Frt  
Site  
Quality  
Age



## Rear Yard/Seawall

Looking East



## Seawall Looking East



Borrower/Client	TLM Partners, Ltd		
Property Address	5677 Kalaniana'ole Hwy		
City	Honolulu	County	Honolulu
		State	Hawaii
Lender	Dept of Land & Natural Resources	Zip Code	96821-2303



**SW Rear Corner**

5677 Kalaniana'ole Hwy  
 Sales Price N/A  
 Gross Living Area  
 Total Rooms  
 Total Bedrooms  
 Total Bathrooms  
 Location Niu Beach  
 View 16,317sf/Ocean Frt  
 Site  
 Quality  
 Age



**Rear Yard/Seawall**

Looking West



**Seawall Looking West**

# **EXHIBIT**

**10**

TLM-Seawall Encroachment and Filled Lands Case  
Other Lot Owners in the Surrounding Area that have Sought or Obtained Easements

	TMK	Date of OCCL's letter	Owner	File #	GL#	Area (sf)	Consideration (\$)	Date of Commencement
1	(1) 3-5-001:004	6/8/2009	Fialko		GL5986	773	83,020	6/23/2010
2	(1) 3-5-003:010	9/23/2005	WF Coastal Proeprties, LLC		GL5932	2197	34,140	4/23/2008
3	(1) 3-5-022:001	9/21/2004	Nakama		GL5853	323	12,800	1/22/2007
4	(1) 3-5-022:002	10/12/1999	Chang		GL5601	111	2,100	5/1/2000
5	(1) 3-5-022:005	3/10/2006	Fox	06od-107				
6	(1) 3-5-058:010	6/8/2009	Beecom Hawaii LLP		GL5994	1460	233,770	9/1/2010
7	(1) 3-6-001:029	7/27/2000	Wo		GL5609	505	20,430	8/5/2005
8	(1) 3-6-002:002	12/8/2004	Henli Investment		GL5934	95	3,670	12/15/2010
9	(1) 3-6-002:005	6/20/2000	Felix		GL5610	843	50,700	7/15/2003
10	(1) 3-6-003:015	4/10/2002	Ueyama		GL5669	146	11,300	7/12/2002
11	(1) 3-7-002:008	7/31/2002	Gallagher	02od-242				
12	(1) 3-7-002:009	8/12/2008	TLM Partners Ltd (subject)	08od-068				
13	(1) 3-7-002:040	9/17/2003	D'Olier	03od-294				
14	(1) 3-7-002:043	3/21/2005	Cho		GL5874	199	11,530	2/7/2007
15	(1) 3-7-002:050	9/3/2003	Naniwa Shoji Co. Ltd		GL5906	777	49,700	3/1/2007
16	(1) 3-8-002:001	7/20/2004	Wu	04od-219				
17	(1) 3-8-002:004	6/9/2005	Ward	05od-158				

# **EXHIBIT**

**11**

