

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.: 11HD-194

HAWAII

Grant of Term, Non-Exclusive Easement to the Association of Apartment Owners of The Whale's Tail for Landscaping Purposes, Lalamilo, South Kohala, Hawaii, Tax Map Key: (3) 6-9-002: portion of 009 & 010.

APPLICANT:

The Association of Apartment Owners (AOAO) of The Whale's Tail, an unincorporated condominium association.

LEGAL REFERENCE:

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

LOCATION:

Portion of Government lands of Puako Beach Lots, situated at Lalamilo, South Kohala, Hawaii, Tax Map Key: (3) 6-9-002: portion of 009 & 010, as shown on the attached map labeled **Exhibit A**.

AREA:

0.1327 acres (5,779 square feet), more or less.

ZONING:

State Land Use District: Urban/ Conservation  
County of Hawaii CZO: Urban/ Open

Note: Portions of the subject State property located mauka of the Puako Beach Drive are designated Conservation, however, the portions included in this request are located makai of the Puako Beach Drive and are designated Urban.

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:

A portion of the subject State property is encumbered by Land Office Deed No. S-28,611, the AOAO of The Whale's Tail, Grantee, for perpetual, non-exclusive access and utility easement purposes.

CHARACTER OF USE:

For landscaping:

Right, privilege and authority to plant, remove, replant and maintain, trees, shrubs, ground covers and other plants on, over and under State-owned land and to install, remove and maintain irrigation pipes, sprinklers and tubing over, under and across State-owned land for landscaping purposes.

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:

See Exemption Notification attached below as **Exhibit D**.

DCCA VERIFICATION:

Not applicable. Applicant is an unincorporated association of condominium owners and is not required to register with DCCA.

APPLICANT REQUIREMENTS:

Applicant shall be required to:

- 1) Pay for an appraisal to determine initial rent;
- 2) Obtain a title report to ascertain AOAO of The Whale's Tail ownership of parcel identified as Tax Map Key: (3) 6-9-002: 012, where necessary, at Applicant's own cost and subject to review and approval by the Department.

REMARKS:

At its meeting of May 13, 1977, the Board of Land and Natural Resources approved the sale of a sixty-five year non-exclusive easement under Land Office Deed (LOD) No. S-26,996 to Melvin Hewett and Robert Behrens, the then owners of a landlocked parcel identified as Tax Map Key: (3) 6-9-002: 012. The subject easement traversed State lands at Lalamilo, South Kohala, Hawaii, identified as Tax Map Keys: (3) 6-9-002: portion of 010.

At its meeting of November 15, 2002, Item D-2, the Land Board approved the cancellation of LOD No. S-26,996 and direct sale to the AOAO of The Whale's Tail of a modified perpetual, non-exclusive easement under LOD No. S-28,611 for access and utility purposes over State lands at Lalamilo, South Kohala, Hawaii, identified as Tax Map Keys: (3) 6-9-002: portion of 009 & 010. The access and utility easement obligates the easement holder to "keep the easement area and the improvements thereon in a safe, clean, sanitary, and orderly condition, and not make, permit or suffer, any waste, strip, spoil or nuisance...of the easement area". The access and utility easement also obligates the easement holder to indemnify the State for any claims arising out of "any failure on the part of the Grantee to maintain the easement area...including any accident, fire or nuisance, growing out of or caused by any failure on the part of the grantee to maintain the easement area in a safe condition." The access and utility easement does not, however, expressly give the easement holder the right to plant, remove or replant trees, shrubs and ground covers or other plants in the easement area or to install, remove and maintain irrigation pipes, sprinklers and tubing over, under the easement area, for the efficient, proper and safe maintenance of the easement area. Accordingly, staff believes that the AOAO of The Whale's Tail needs a separate landscaping easement to landscape the easement area. A preliminary landscaping plan is attached as **Exhibit B**.

By letter dated September 22, 2011, Gary S. Kerwood of Schneider Tanaka Radovich Andrew & Tanaka, LLLC, on behalf of the AOAO of The Whale's Tail, requested to amend its existing perpetual access and utility easement under LOD No. S-28,611 to include landscaping purposes.

Upon reviewing the above request, staff did not feel comfortable in amending the existing perpetual access and utility easement to add perpetual landscaping rights. As a result, staff discussed with Mr. Kerwood the situation and recommended instead a separate termed landscaping easement, which would overlay the existing access and utility easement.

At its meeting of November 10, 2011, item D-9, the Land Board approved a direct lease to the Hawaii Conference Foundation (Hokuloa Church) of all TMK: (3) 6-9-002:009 and 010 for church and landscaping purposes, which will be subject to the existing access and utility easement that encumbers portions of TMK: (3) 6-9-002:009 and 010. The new landscaping easement will occupy the same portions of TMK: (3) 6-9-002: 009 and 010 as the existing access and utility easement and will not impose any further material encumbrance on the property being leased to the Hawaii Conference Foundation (Hokuloa Church).

The landscaping easement will benefit both the State and the Hawaii Conference Foundation (Hokuloa Church) by relieving the State and the Hawaii Conference Foundation (Hokuloa Church) of tree-trimming and land maintenance burdens for the duration of the landscaping easement.

The AOAO of The Whale's Tail 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.

On November 30, 2011, various government agencies and interest groups were solicited for comments with the results indicated below.

AGENCIES	COMMENTS
<b>County of Hawaii:</b>	
Fire Department	No comments
Planning Department	No objections
Police Department	No objections
Public Works	No response
Department of Water Supply	No response
<b>State of Hawaii:</b>	
DLNR - DOFAW	No response
DLNR-Na Ala Hele	No response
DLNR - Historic Preservation	No response
DLNR - OCCL	No response
<b>Other Agencies/ Interest Groups:</b>	
Hawaii Conference Foundation	** See comments below
Office of Hawaiian Affairs	No objections

Jean Campbell of Alston Hunt Floyd & Ing, a Law Corporation, representing the Hawaii Conference Foundation, provided comments that it had no objections to the issuance of the landscape easement. In an effort to coordinate the look of Lot 10 from the street, to protect the historical integrity of the Church, the AOAO of The Whale's Tail has agreed that only the following trees, shrubs, ground covers and other plantings are approved for use within the landscape easement area:

- a. The trees, shrubs, ground covers and other plantings shown in the Landscape Plans included with the AOAO of The Whale's Tail's application: and
- b. All Native, Polynesian and 19<sup>th</sup> Century period vegetation, including, without limitation, (i) all plant species included in the Final Environmental Assessment, Lease of State Land, Hokuhoa United Church of Christ, August 2011, published with a Findings of No Significant Impact on September 8, 2011 in The Environmental Notice by the Office of Environmental Quality Control, Department of Land and Natural Resources, State of Hawaii (the "Final EA"), for use by the Church on its leased properties and (ii) all plants listed in the Plant Reference Guide dated June 18, 2008. (**Exhibit C**)

Within the first 30 feet of the landscaped easement area (beginning at the boundary of the landscape easement area and the public right of way), only the trees, shrubs ground covers and other plantings described in (b) may be used, except with the Church's consent.

To the extent not otherwise included in (a) or (b) above, all trees shrubs and ground cover existing within the landscape easement area as of December 15, 2011 are approved by the Church and may be maintained and replaced in substantially their current locations.

The AOAO of The Whale's Tail has acknowledged that certain existing plantings may need to be relocated to accommodate construction of the rock wall and will cooperate with the Church in its planting and construction efforts.

The request qualifies for an exemption from the preparation of an environmental assessment as the subject area has been previously cleared and consists primarily of a paved driveway. The proposed use will result in no known significant impacts, whether immediate or cumulative, to the natural, environmental and/or cultural resources in the area. As such, staff believes that the proposed use would involve negligible or no expansion or change in use of the subject area beyond that previously existing.

---

**RECOMMENDATION:** That the Board:

1. Declare that, after considering the potential effects of the proposed disposition as provided by Chapter 343, HRS, and Chapter 11-200, HAR, this project will probably have minimal or no significant effect on the environment and is therefore exempt from the preparation of an environmental assessment.
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: (3) 6-9-002:012, 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 55-year term, non-exclusive easement to AOAO of The Whale's Tail covering the subject area for landscaping 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 easement document form, as may be amended from time to time;
  - B. The easement shall run with the land and shall inure to the benefit of the real property described as Tax Map Key: (3) 6-9-002: 012, provided however: (1) it is specifically understood and agreed that the easement shall immediately cease to run with the land upon the expiration or other termination or abandonment of the easement; and (2) if and 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 the easement document;
  - C. In an effort to coordinate the look of Lot 10 from the street and to protect the historical integrity of the Church, the AOAO of The Whale's Tail has agreed that only the following trees, shrubs, ground covers and other plantings are approved for use within the landscape easement area:
    - 1) The trees, shrubs, ground covers and other plantings shown in the Landscape Plans included with the AOAO of The Whale's Tail's application: and
    - 2) All Native, Polynesian and 19<sup>th</sup> Century period vegetation, including, without limitation, (i) all plant species included in the Final EA for use by the Church on its leased properties and (ii) all plants listed in the Plant Reference Guide dated June 18, 2008.

---

Within the first 30 feet of the landscaped easement area (beginning at the boundary of the landscape easement area and the public right of way), only the trees, shrubs ground covers and other plantings described in C (1) may be used, except with the Church's consent.

To the extent not otherwise included in C (1) or C (2) above, all trees shrubs and ground cover existing within the landscape easement area as of December 15, 2011 are approved by the Church and may be maintained and replaced in substantially their current locations.


The AOAO of The Whale's Tail has acknowledged that certain of

January 27, 2012

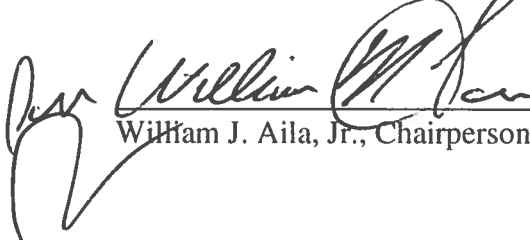
the existing plantings may need to be relocated to accommodate construction of the rock wall and will cooperate with the Church in its planting and construction efforts.

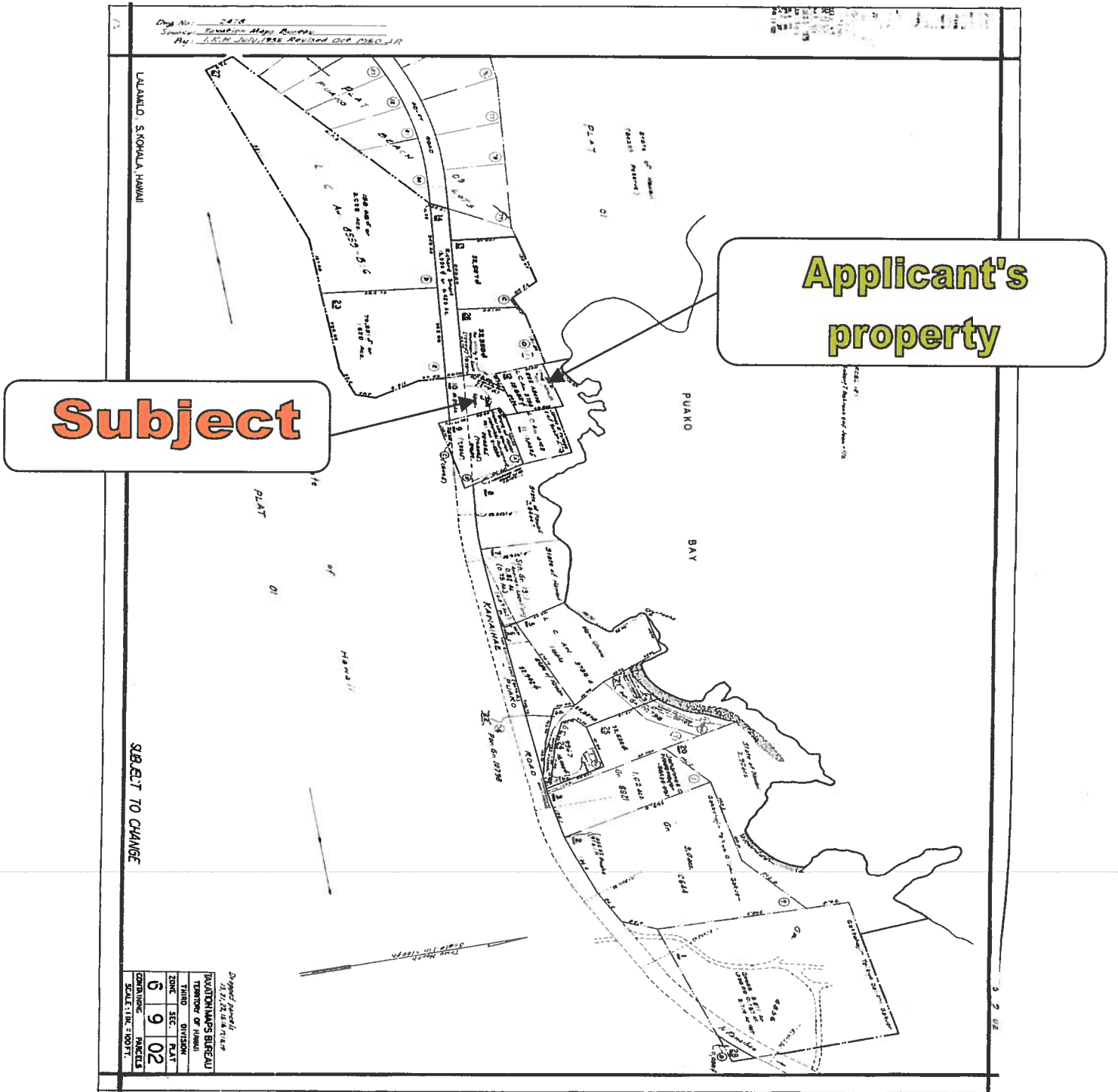
- D. Review and approval by the Department of the Attorney General; and
- E. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

Respectfully Submitted,

  
\_\_\_\_\_  
Wesley T. Matsunaga  
Land Agent

APPROVED FOR SUBMITTAL:

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



**EXHIBIT A**



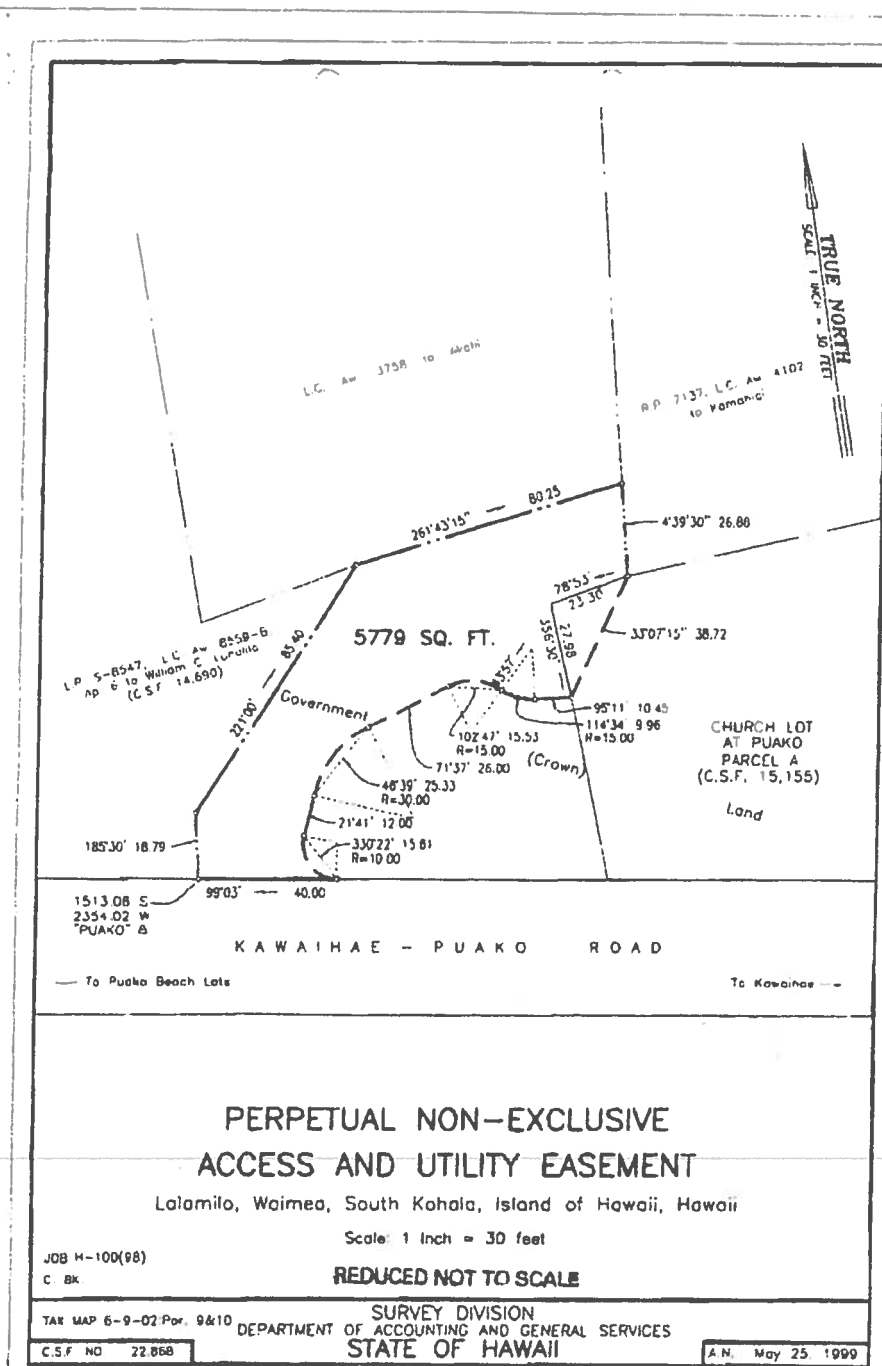


EXHIBIT A

EXHIBIT A

EXHIBIT B

APPLICANT'S LANDSCAPE PLAN

*Unless otherwise defined in this Exhibit B - Landscape Plan, capitalized terms used herein are defined in the Request for State Lands (Direct Negotiation) - Application Form to which this Exhibit B - Landscape Plan is attached.*

**Purpose:** To facilitate the ease of maintenance of the Unpaved Areas, promote the health of the trees and plants located in the Unpaved Areas, help prevent the accumulation of debris and decayed plant material, reduce the danger of fire, and significantly minimize the proliferation of rodents and other pests.

**Landscape Elements:** Applicant proposes to retain existing noni (*morinda citrifolia*), plumeria (*plumeria alba*), ulu (*artocarpus altilis*) and banana (*musa acuminata/balbisiana*) trees, as well as existing low growing native ground cover and lawn. As need or opportunity arises, Applicant may replant these varieties or supplement or replace them with the following representative landscape elements:

- **Large Trees** such as:
  - Noni (*morinda citrifolia*)
  - Breadfruit/ulu (*artocarpus altilis*)
  - Royal Palm (*roystonea regia*)
- **Medium Trees** such as:
  - plumeria (*plumeria alba*)
  - plumeria (*plumeria rubra*)
  - Kukui Nut (*Aleurites moluccana*)
- **Small Trees** such as:
  - banana (*musa acuminata/balbisiana*)
  - milo, portia tree (*Thespesia populnea*)
  - areca palm (*dypsis lutescens*)
- **Accent Shrubs** such as:
  - ti (*Cordyline fruiticosa*)
  - croton (*codiaeum variegatum*)
  - Red Ginger (*Alpinia purpurata*)
  - Tahitian Gardenia (*Gardenia teitensis*)
  - koki 'o keokeo (*Hibiscus arnottianus*)
  - Hibiscus (*Hibiscus rosa-sinensis (red)*)
  - naupaka kahakai, beach naupaka (*Scaevola sericea*)
  - Blue Plumbago (*Plumbago auriculata*)

EXHIBIT B

EXHIBIT B

- **Ground Cover and Flowers** such as:

- Anthurium* (*Anthurium xferrierense*)
- Guadalup heliconia (*Heliconia psittacorum hybrid*)
- Monstera/Swiss cheese plant (*Monstera deliciosa*)
- Laua'e/Maile (*Phymatosorus grossus*)
- Sword fern (*Nephrolepis sp. – Kupukupu*)

- Irrigation:** Applicant will install, where appropriate, typical irrigation systems to be supplied by Applicant's existing freshwater supply system located within the Easement Area.
- Timing:** Existing landscape features would be continued and replanted, replaced or supplemented from time to time as need or opportunity arises. The proposed irrigation system would be installed upon approval of the amendment to the Grant of Easement.
- Site Plan:** A Site Plan showing the Easement Area showing existing and proposed typical landscape features is attached to this Exhibit B.

---

**EXHIBIT B**

**EXHIBIT B**

Landscape Site Plan  
 for  
 Unpaved Areas of Existing Easement Area  
 (Grant of Non-Exclusive Easement - LOD No. 28,611)  
 TMK (3) 6-9-02: por. 009 and 010

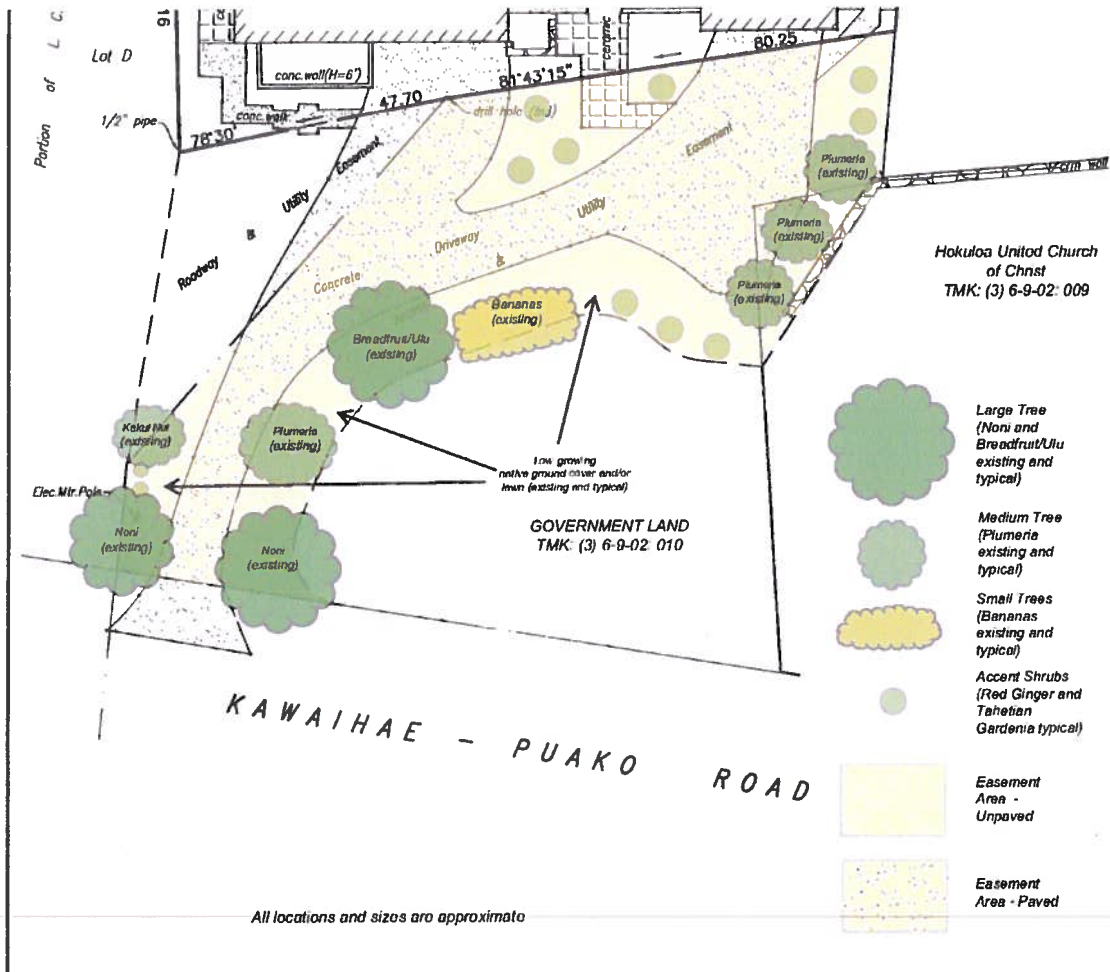


EXHIBIT B

EXHIBIT B

HOKULOA UNITED CHURCH OF CHRIST  
location: 69-1600 Puako Beach Drive, Kamuela, HI 96743  
mail: P. O. Box 384239, Waikoloa, Hawaii 96738  
(808) 883-8295, 938-3966

PLANT REFERENCE GUIDE  
6/18/08

<u>Common Name</u>	<u>Latin Name</u>	<u>Origin</u>
Hala Tree	<i>Pandanus tectorius</i>	Indigenous
Kou Tree	<i>Cordia subcordata</i>	Indigenous
Loulu Palm	<i>Pritchardia</i> sp.	Endemic
White Native Hibiscus, Koki'o Ke'o Ke'o	<i>Hibiscus waimeae</i>	Endemic
Naupaka	<i>Scaevola sericea</i>	Indigenous
Laua'e Fern	<i>Microsorium scolopendria</i>	Polynesian
Kupukupu Fern	<i>Nephrolepis cordifolia</i>	Indigenous
Ti , Ki	<i>Cordyline fruticosa</i>	Polynesian
Lilinoe Ti	<i>Cordyline</i> ssp.	Polynesian
Pa'uohi'iaka	<i>Jacquemonitia ovakiforlia sandwicensis</i>	Endemic
'Ilima	<i>sida fallax</i>	Indigenous
Ma'o hau hele	<i>hibiscus brackenridgei</i>	Endemic

The definition of endemic (as quoted from Heidi Bornhorst's book, "Growing Native Hawaiian Plants") is: A native plant that evolved into a species unique to Hawaii i.e. not found anywhere else but here. Indigenous means: native plants found naturally in Hawaii and in many other parts of the world as well.

Plants identified by:

Gene Power, Gene T. Power and Associates, Landscape Architect  
Erin Lee, Director of Landscape, Hualalai Resort

**EXHIBIT C**

NEIL ABERCROMBIE  
GOVERNOR OF HAWAII



WILLIAM J. AILA, JR.  
CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE MANAGEMENT



**STATE OF HAWAII**  
*DEPARTMENT OF LAND AND NATURAL RESOURCES*  
**LAND DIVISION**

POST OFFICE BOX 621  
HONOLULU, HAWAII 96809

**EXEMPTION NOTIFICATION**

Regarding the preparation of an environmental assessment pursuant to Chapter 343, HRS and Chapter 11-200, HAR

**Project Title:** Issuance of termed, non-exclusive easement to the Association of Apartment Owners of The Whale's Tail for landscaping purposes.

**Project / Reference No.:** PSF No.: 11HD-194

**Project Location:** Lalamilo, South Kohala, Hawaii, Tax Map Key: 3<sup>rd</sup>/ 6-9-002: portion of 009 & 010.

**Project Description:** Grant of Term, Non-Exclusive Easement for Landscaping Purposes.

---

**Chap. 343 Trigger(s):** Use of State Lands

**Exemption Class No. and Description:** In accordance with the "Division of Land Management's Environmental Impact Statement Exemption List", approved by the Environmental Council and dated April 28, 1986, the subject request is exempt from the preparation of an environmental assessment pursuant to:

**Exemption Class No. 1**, which states, "Operations, repairs or maintenance of existing structures, facilities, equipment or topographical features, involving negligible or no expansion or change of use beyond that previously existing." and

**EXHIBIT D**

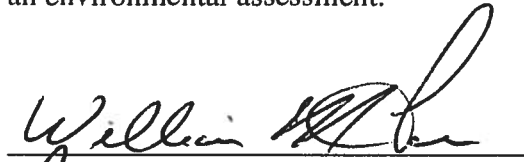
**Exemption Class No. 4**, which states, "Minor alterations in the conditions of land, water or vegetation."

Exemption Item Description from Agency Exemption List: Operations, repairs or maintenance of existing structures, facilities, equipment or topographical features, involving negligible or no expansion or change of use beyond that previously existing.

Minor alterations in the conditions of land, water or vegetation.

Consulted Parties: Office of Conservation and Coastal Lands

Recommendation: That the Land Board find the issuance of a grant of easement for landscaping purposes is exempt from Chapter 343, HRS, as it will probably have minimal or no significant effect on the environment and is presumed to be exempt from the preparation of an environmental assessment.

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

12/29/11

\_\_\_\_\_  
Date

---

**EXHIBIT D**