

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

April 27, 2012

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

Ref. No.: LODS-28,998

Hawaii

Amend Prior Board Action of December 8, 2006, Item D-7, Grant of Perpetual, Non-Exclusive Easement to Kona Residence Trust for Access and Utility Purposes, Puuanahulu, North Kona, Hawaii, Tax Map Key: (3) 7-1-003: portion of 002. The Purpose of the Amendment is to Authorize the Use of Non-Standard Provisions in the Grant of Non-Exclusive Easement Instrument Including, Without Limitation, Those Relating to Abandonment, Withdrawal, Liability Insurance and Pollution Control Measures;

Amend Prior Board Action of June 23, 2011, Item D-8, Acceptance of Department of Transportation's (DOT) Grant of Limited Vehicle Access Rights onto the Queen Kaahumanu Highway, Relating to Issuance of Grant of Perpetual, Non-Exclusive Easement (LODS-28,998) to Kona Residence Trust for Access and Utility Purposes at Puuanahulu, North Kona, Hawaii, Tax Map Key: (3) 7-1-003: portion of 002. The Purpose of the Amendment is to Authorize the Non-Exclusive Assignment of the Access Rights to Kona Residence Trust and Approve the form of Such Assignment.

BACKGROUND:

At its meeting of December 8, 2006, under agenda item D-7, the Board of Land and Natural Resources approved the grant of a perpetual, non-exclusive easement to the Kona Residence Trust (KRT) for access and utility purposes over State lands at Puuanahulu, North Kona. See Exhibit 1 attached. KRT owns a landlocked parcel makai of the State lands, and the easement was intended to allow access and utilities from the KRT parcel to Queen Kaahumanu Highway. However, specific authorization was needed from the Department of Transportation (DOT) to access the highway at the point KRT desired.

At its meeting of June 23, 2011, under agenda item D-8, the Board accepted a Grant of Limited Vehicle Access Rights (GLVAR) onto Queen Kaahumanu Highway from DOT. See Exhibit 2 attached. The Board and DOT thereafter executed the GLVAR with a date

of September 2, 2011. The GLVAR gave the Board the right to access Queen Kaahumanu Highway from the subject State lands at the point where the KRT easement corridor meets the road right-of-way.

Based on the Board approvals and executed GLVAR, the Department of the Attorney General (DAG) prepared two documents: 1) Grant of Non-Exclusive Easement (Grant of Easement), and 2) Non-Exclusive Assignment of Grant of Limited Vehicle Access Rights and Consent (Assignment). The Grant of Easement is the legal instrument that allows KRT to use a portion of the State lands for access and utilities. The Assignment is the instrument that allows KRT to use the access rights that DOT granted to the Board in the GLVAR. DAG prepared these documents using the standard drafting provisions.¹

REMARKS:

When the Grant of Easement and Assignment were sent to KRT for signature, KRT's counsel requested a number of revisions to the documents. Some of the requested changes were stylistic, and others were substantive. Some of the substantive changes, while not objectionable to staff, were such a departure from the standard provisions used by DAG that staff determined use of the non-standard provisions would require Board review and approval.² Staff deemed other requested changes to be unacceptable and so notified KRT's counsel.

Attached as Exhibit 3 is a copy of Grant of Easement "redlined" or marked to show KRT's proposed changes to the original document DAG prepared.³ It is additionally marked to show Land Division staff's edits and comments to KRT's requested changes.⁴ Following is a summary of the substantive changes KRT is requesting that staff has no objection to, but is seeking Board approval of their use in the document (the numbers below correspond to the numbered paragraphs of the Grant of Easement instrument).

10. Abandonment. The standard grant of easement provision DAG uses states that an easement will be automatically forfeited if it is not used for a consecutive period of one year. KRT requests a modification of the language to require non-use for a

1 There is a third document between KRT and the DOT regarding KRT's use of the road right-of-way for Queen Kaahumanu Highway. This document was negotiated between counsel for DOT and KRT and does not directly involve the Board.

2 The Board's December 8, 2006 approval of the issuance of the Grant of Easement specifically stated that it was subject to the "standard terms and conditions of the most current perpetual easement document form, as may be amended from time to time." See recommendation C.1 of Exhibit 1.

3 KRT's deletions of material from the original DAG document are depicted in red strikethrough. KRT's additions to the document are shown in double-underscored blue font.

4 Land Division's deletions of KRT's material are depicted by black strikethrough. Land Divisions' proposed new material or restoration of the original DAG material is shown in green font, as are Land Division's comments in the footnotes.

period of two years, and that the forfeiture is not automatic. Rather, the Board would have to follow certain notice procedures to terminate the easement.

15. **Withdrawal.** The standard grant of easement form DAG uses includes a reserved right for the Board to withdraw the easement area or any portion for public use or purposes. KRT requested deletion of this provision in its entirety. Staff countered with a revised withdrawal provision that requires the Board to compensate KRT in the event the easement area or a portion has to be withdrawn for public purposes.
18. **Liability insurance.** The standard easement form DAG uses requires the grantee to provide proof of insurance to the State within 15 days after the effective date of the grant instrument. KRT is requesting that this period be extended to 30 days.
23. **Pollution control measures.** The standard provision requires the grantee to take corrective action immediately to address pollution or contamination issues. KRT is requesting the substitution of the adjective "promptly" in place of "immediately" in two places in section 23.

With respect to the Assignment of the GLVAR, at the time this matter was before the Board on June 23, 2011, Item D-8, it was not clear to staff that an assignment would be required. Preparation of the Assignment was proposed after the Board action to clarify KRT's access rights. A copy of the Assignment instrument is attached hereto as Exhibit 4.⁵ Attached as Exhibit 5 is a copy of an email dated April 13, 2012 from Land Division Administrator Russell Tsuji to counsel for KRT, which details the parties' respective positions on the foregoing items and other provisions of the documents.

RECOMMENDATION:

That the Board:

1. Amend its prior Board action of December 8, 2006, under agenda item D-7, by revising recommendation C.1 to read as follows:

The standard terms and conditions of the most current perpetual easement document form, as may be amended from time to time; provided, however, that the Board approves the use of the non-standard terms indicated the Grant of Easement set forth in Exhibit 3 attached hereto, including, without limitation, the non-standard

⁵ The Assignment originally prepared by DAG repeated most of the provisions of the Grant of Easement. KRT's counsel had many of the same proposed changes for the original Assignment that it has for Grant of Easement. After consulting with DAG, staff believes the Assignment can be shortened and simplified to the version attached as Exhibit 4 without relinquishing any protections for the State.

terms contained in sections 10, 15, 18, and 23 of the Grant of Easement.

2. Amend its prior Board action of June 23, 2011, under agenda item D-8, by revising the recommendation to read as follows:

That the Board accept the Department of Transportation's Grant of Limited Vehicle Access Rights onto the Queen Kaahumanu Highway for establishing an additional driveway from the subject State property. The Board approves the Non-Exclusive Assignment of Limited Vehicle Access Rights and Consent to Kona Residence Trust in substantially the form attached hereto as Exhibit 4.

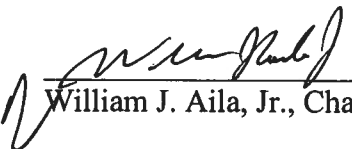
3. Except as modified above, all terms and conditions listed in the Board actions of December 8, 2006, Item D-7, and June 23, 2011, Item D8, shall remain the same.

Respectfully Submitted,



Kevin E. Moore
Assistant Administrator

APPROVED FOR SUBMITTAL:



William J. Aila, Jr., Chairperson

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

December 8, 2006

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

PSF No.: 06HD-202

HAWAII

**Grant of Perpetual, Non-Exclusive Easement to Kona Residence Trust for
Access and Utility Purposes, Puuanahulu, North Kona, Hawaii, Tax Map Key:
3rd/ 7-1-03: portion of 2**

APPLICANT:

Allen D. Israel, as Trustee of the Kona Residence Trust, under unrecorded Revocable Trust, dated 12/16/88, whose mailing address is c/o Clifford J. Miller of P.O. Box 2800, Honolulu 96803.

LEGAL REFERENCE:

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

LOCATION:

Portion of Government lands of Puuanahulu Homesteads, Kapalaoa Section situated at Puuanahulu, North Kona, Hawaii, identified by Tax Map Key: 3rd/ 7-1-03: portion of 2, as shown on the attached map labeled Exhibit A.

AREA:

1.130 acres, more or less.

ZONING:

State Land Use District: Conservation
County of Hawaii CZO: Conservation

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act

DHHL 30% entitlement lands pursuant to the Hawaii State Constitution: NO

CURRENT USE STATUS:

Encumbered under, Governor's Executive Order No. 4161 to Department of Land and

Natural Resources, Division of State Parks.

CHARACTER OF USE:

For access and utility:

Right, privilege and authority to construct, use, maintain and repair a right-of-way over, under and across State-owned land for access and utility 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.

RENTAL REOPENINGS:

Not applicable.

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

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, that 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."

The existence of the subject roadway predates the creation of the Conservation District.

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 initial one-time payment;
- 2) Provide survey maps and descriptions according to State DAGS standards and at Applicant's own cost;

REMARKS:

By letter dated July 20, 2006, Robert G. Klein, representing the Kona Residence Trust

(KRT), requested a perpetual, non-exclusive easement over State Lands at Puuanahulu, South Kona, Hawaii, Tax Map Key: 3rd/7-1-03: portion of 2. Purpose for obtaining the easement is to establish legal accesses for its private properties identified as Tax Map Keys: 3rd/7-1-03: 4, 5, 6 and 11. The easement being requested consists of an existing graveled roadway, which was originally constructed and used as a service road for ranching operations over the past fifty years.

Land Patent Grant No. S-14,088, dated August 19, 1963, in conformity with the laws of the State of Hawaii relating to public lands, and pursuant to the provisions of Joint Resolution No. 12, Session Laws of Hawaii 1949, approved on September 1, 1950 by Public Law 746, 81st Congress, 2nd Session (64 Stat. 572), as amended by Public Law 620, 83rd Congress, 2nd Session (68 Stat. 764), and by Public Law 720, 85th Congress (72 Stat. 710), was granted and confirmed unto Nancy Ah Nee, Mrs. Abraham Hepa (aka: Nancy Hepa), Lei Kuanoni, George Alapai, David Alapai, Kiliona (James) Alapai, and Simeon Alapai, as joint tenants. All of the land situate at Kapakaoa, Puuanahulu, in the District of North Kona, Island of Hawaii, bound and described as Lot 39, Puuanahulu Homesteads.

At its meeting of March 12, 1971, Item F-4, the Board approved the issuance of a termed, non-exclusive easement to a Mr. Nat Wolozin, et, al., over the same easement alignment for access purposes to property, identified as Tax Map Key: 3rd/7-1-03: 5.

At its meeting of March 24, 1972, Item F-5, the Board rescinded its prior actions of 3/12/71, Item F-4, at the request of Mr. Wolozin's attorney. No particular explanations were given for the request to rescind.

At its meeting of June 23, 1972, Item F-6, the Board approved a set aside to the Department of Transportation, Highways Division, for its proposed Keahole to Anaehoomalu Section of the Kailua-Kawaihae Road (now known as the Queen Kaahumanu Highway).

At its meeting of January 25, 2002, Agenda Item D-18, and of April 28, 2006, Item D-7, approved as amended, the Board approved set asides to the Division of State Parks and Division of Forestry and Wildlife over portions of government lands of Puuanahulu and Puuwaawaa for their respective management.

KRT 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.

Various governmental agencies were solicited for comments. All respondents had no objections to the request as indicated below:

AGENCIES	COMMENTS
County of Hawai'i	
Parks & Recreation	No comments
Planning	No response
Public Works	No comments

State of Hawai'i	
DHHL	No objections
DLNR- Aquatic Resource	No response
DLNR-DOCARE	No objections
DLNR- Historic Preservation	No response
DLNR- Na Ala Hele	No response
DLNR- OCCL	No response
DLNR- Parks	No objections, see comments
Other:	
Office of Hawaiian Affairs	No response
Puuwaawaa Advisory Committee	No objections, see comments

The Division of State Parks had no objections to the request, but mentioned that Governor's concurrence might be required as the use of the subject roadway is not consistent with the Executive Order issued for park purposes.

The Puuwaawaa Advisory Committee had no objections to the request, but recommended that allowances be made to provide for future potential realignment of the subject roadway to coincide with any developmental plans consistent with its use under Governor's Executive Order No. 4161 for park purposes.

The Department of Hawaiian Home Lands had no objections to the request, but wanted provisions allowing for public beach accesses over the subject roadway.

Prior to the issuance of the grant of easement document, KRT is required to obtain from the Department of Transportation, Right-of-Way Branch, an approval for vehicular accesses onto the Queen Kaahumanu Highway. That any modifications to the existing roadway might require special permits from the Office of Conservation and Coastal Lands and approval of the Governor since the use is not consistent with the Governor's Executive Order.

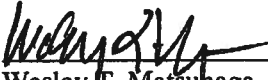
RECOMMENDATION: That the Board:

- A. 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.
- B. 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) 7-1-003: 4, 5, 6, and 11, 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.
- C. Subject to the Applicant fulfilling all of the Applicant requirements listed above,

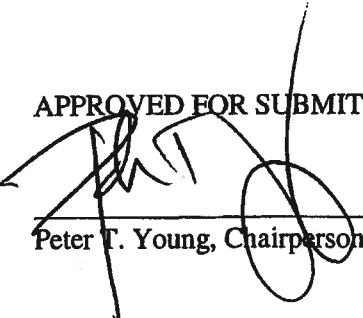
authorize the issuance of a perpetual non-exclusive easement to Allen D. Israel, as Trustee of the Kona Residence Trust, under unrecorded Revocable Trust, dated 12/16/88, covering the subject area for access and utility purposes under the terms and conditions cited above, which are by this reference incorporated herein and further subject to the following:

1. The standard terms and conditions of the most current perpetual easement document form, as may be amended from time to time;
 2. Should future development necessitate a relocation of the easement granted, or any portion thereof, the relocation shall be accomplished at the Grantee's own cost and expense; provided, however, that if other lands of the Grantor are available, the Grantor will grant to the Grantee without payment of any monetary consideration, a substitute easement of similar width within reasonable vicinity of the original alignment, which substitute easement shall be subject to the same terms and conditions as that herein granted and as required by law;
 3. That the Division of State Parks reserves the right to:
 - a) utilize the subject roadway for the public's use of the Executive Order area;
 - b) demand a realignment of the existing roadway, if necessary, to be consistent with any proposed master plans for development of the adjoining State property under Executive Order No. 4161.
 4. The easement shall run with the land and shall inure to the benefit of the real property described as Tax Map Keys: 3rd/ 7-1-03: 4, 5, 6, and 11, 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. 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. Matsuhaga
Acting District Land Agent

APPROVED FOR SUBMITTAL:


Peter T. Young, Chairperson

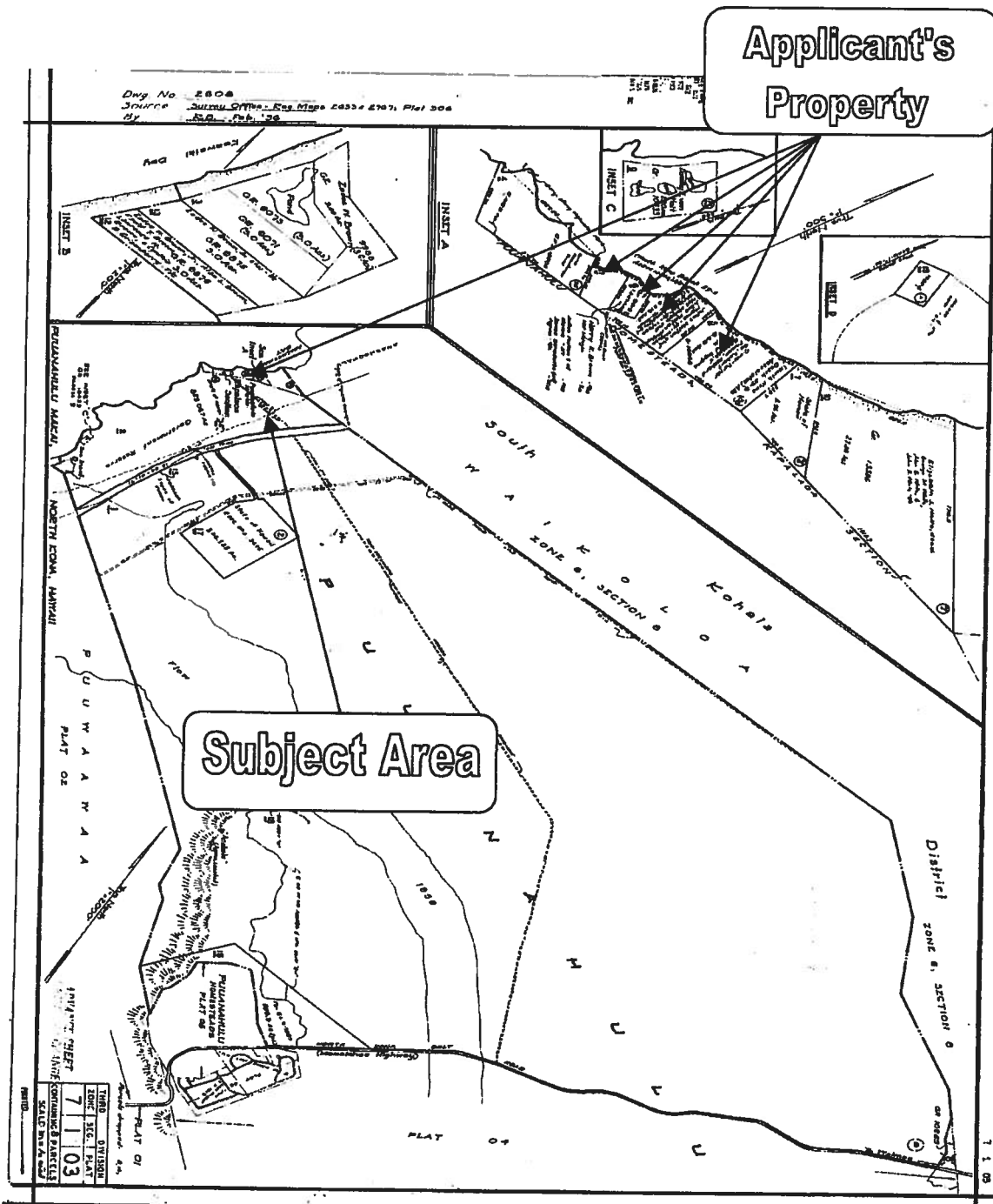


EXHIBIT A



EXHIBIT A



Recent aerial view toward makai over Queen Kaahumanu Highway of existing gravel road and gate.

EXHIBIT A



Recent aerial view toward mauka of approximate mid-point of existing gravel road.

EXHIBIT A



Recent aerial view toward mauka over Kapalaoa oceanfront of existing gravel road.

EXHIBIT A

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

June 23, 2011

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

Ref. No.: LODS-28,998

HAWAII

Acceptance of Department of Transportation's (DOT) Grant of Limited Vehicle Access Rights onto the Queen Kaahumanu Highway, Relating to Issuance of Grant of Perpetual, Non-Exclusive Easement (LODS-28,998) to Kona Residence Trust for Access and Utility Purposes at Puuanahulu, North Kona, Hawaii, Tax Map Key: (3) 7-1-003: portion of 002.

BACKGROUND:

At its meeting of December 8, 2006, under agenda item D-7, the Board of Land and Natural Resources approved Grant of Perpetual, Non-Exclusive Easement to the Kona Residence Trust (KRT) for access and utility purposes at Puuanahulu, North Kona, Hawaii, Tax Map Key: (3) 7-1-003: portion of 002. (Exhibit A)

In attempting to process DLNR's grant of easement document to KRT, staff was notified by the Department of Accounting and general Services, Survey Section that approval for limited vehicular accesses onto the Queen Kaahumanu Highway was required from the Department of Transportation, Highways Division prior to the easement being granted. An approval of a grant of vehicle access rights from DOT would in turn update DOT's Right-of-Way Maps to authorize the point of permitted vehicular accesses to the highway.

Staff was informed that currently on record, the subject State property has three (3) such permitted vehicular access points to the Queen Kaahumanu Highway, indicated on the DOT Right-of-Way Maps. DOT asked the State if it was willing to relocate one of its existing permitted vehicular access points to the KRT access location. As the other locations permitting vehicle access to the highway from the State property are already in use and located at potential future major intersections, relocation of such access points would not be realistic, nor in the State's best interest. One such location is at the intersection for the Puuanahulu Landfill, mauka of the highway. As a result, staff recommended that if KRT wanted to establish its existing driveway access as a permitted vehicular access point to the Queen Kaahumanu Highway, it would need to negotiate

APPROVED BY THE BOARD OF
LAND AND NATURAL RESOURCES
AT ITS MEETING HELD ON *TH*
June 23, 2011

EXHIBIT 2

D-8

with the DOT in obtaining an additional vehicle access point for the subject State property. KRT would be responsible to meet the DOT requirements and would be responsible for any expenses, costs, fees, and considerations associated with establishing the vehicle access point.

To date, KRT has paid the Department of Land and Natural Resources \$45,000 for the grant of perpetual, non-exclusive easement over the State property, and is now preparing to pay DOT Highways \$10,000 for the approved access onto the Queen Kaahumanu Highway.


A copy of the Department of Transportation's Grant of Limited Vehicle Access Rights document is attached as **Exhibit B**.

Once the Grant of Limited Vehicle Access Rights is fully executed, staff will proceed with the grant of easement to KRT as authorized in the Board's prior action of December 8, 2006, Item D-7.

RECOMMENDATION:

That the Board accept the Department of Transportation's Grant of Limited Vehicle Access Rights onto the Queen Kaahumanu Highway for establishing an additional driveway from the subject State property.

Respectfully Submitted,



Wesley T. Matsunaga
Land Agent *WEM*

APPROVED FOR SUBMITTAL:



William J. Aila, Jr., Chairperson

6/20/11 Land Division

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23-7

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

December 8, 2006

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

PSP No. 06HD-102

HAWAII

Grant of Perpetual, Non-Exclusive Easement to Kona Residence Trust for
Access and Utility Purposes, Punalahua, North Kona, Hawaii, Tax Map Key:
3rd 7-1-003: portion of 2

APPLICANT:

Allan D. Israel, as Trustee of the Kona Residence Trust, under unrecorded Revocable Trust,
dated 12/16/88, whose mailing address is c/o Clifford J. Miller of

LEGAL REFERENCE:

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

LOCATION:

Portion of Government lands of Punalahua Homesteads, Kapoho Section situated at
Punalahua, North Kona, Hawaii, identified by Tax Map Key: 3rd 7-1-003: portion of 2, as
shown on the attached map labeled Exhibit A.

AREA:

1.130 acres, more or less.

ZONING:

State Land Use District: Conservation
County of Hawaii CZO: Conservation

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act

DHHL 30% easement lands pursuant to the Hawaii State Constitution: NO

CURRENT USE STATUS:

Encumbered under Governor's Executive Order No. 4161 to Department of Land and

APPROVED BY THE BOARD OF
LAND AND NATURAL RESOURCES
AT ITS MEETING HELD ON

December 8, 2006

D-7

EXHIBIT A

Natural Resources, Division of State Parks.

CHARACTER OF USE:

For access and utility:

Right, privilege and authority to construct, use, maintain and repair a right-of-way over, under and across State-owned land for access and utility 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.

RENTAL REOPENINGS:

Not applicable.

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

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, that 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."

The existence of the subject roadway predates the creation of the Conservation District.

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 initial one-time payment;
- 2) Provide survey maps and descriptions according to State DAGS standards and at Applicant's own cost;

REMARKS:

By letter dated July 20, 2006, Robert G. Klein, representing the Kona Residence Trust

EXHIBIT A

(KRT), requested a perpetual, non-exclusive easement over State Lands at Puuanahulu, South Kona, Hawaii, Tax Map Key: 3rd/7-1-03: portion of 2. Purpose for obtaining the easement is to establish legal accesses for its private properties identified as Tax Map Keys: 3rd/7-1-03: 4, 5, 6 and 11. The easement being requested consists of an existing graveled roadway, which was originally constructed and used as a service road for ranching operations over the past fifty years.

Land Patent Grant No. S-14,088, dated August 19, 1963, in conformity with the laws of the State of Hawaii relating to public lands, and pursuant to the provisions of Joint Resolution No. 12, Session Laws of Hawaii 1949, approved on September 1, 1950 by Public Law 746, 81st Congress, 2nd Session (64 Stat. 572), as amended by Public Law 620, 83rd Congress, 2nd Session (68 Stat. 764), and by Public Law 720, 85th Congress (72 Stat. 710), was granted and confirmed unto Nancy Ah Nee, Mrs. Abraham Hepa (aka: Nancy Hepa), Lei Kuanoni, George Alapai, David Alapai, Kiliona (James) Alapai, and Simeon Alapai, as joint tenants. All of the land situate at Kapakaoa, Puuanahulu, in the District of North Kona, Island of Hawaii, bound and described as Lot 39, Puuanahulu Homesteads.

At its meeting of March 12, 1971, Item F-4, the Board approved the issuance of a termed, non-exclusive easement to a Mr. Nat Wolozin, et, al., over the same easement alignment for access purposes to property, identified as Tax Map Key: 3rd/7-1-03: 5.

At its meeting of March 24, 1972, Item F-5, the Board rescinded its prior actions of 3/12/71, Item F-4, at the request of Mr. Wolozin's attorney. No particular explanations were given for the request to rescind.

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At its meeting of January 25, 2002, Agenda Item D-18, and of April 28, 2006, Item D-7, approved as amended, the Board approved set asides to the Division of State Parks and Division of Forestry and Wildlife over portions of government lands of Puuanahulu and Puuwaawaa for their respective management.

KRT 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.

Various governmental agencies were solicited for comments. All respondents had no objections to the request as indicated below:

County of Hawai'i	
Parks & Recreation	No comments
Planning	No response
Public Works	No comments

EXHIBIT A

State of Hawai'i	
DHHL	No objections
DLNR- Aquatic Resource	No response
DLNR-DOCARE	No objections
DLNR- Historic Preservation	No response
DLNR- Na Ala Hele	No response
DLNR- OCCL	No response
DLNR- Parks	No objections, see comments
Other:	
Office of Hawaiian Affairs	No response
Puuwaawaa Advisory Committee	No objections, see comments

The Division of State Parks had no objections to the request, but mentioned that Governor's concurrence might be required as the use of the subject roadway is not consistent with the Executive Order issued for park purposes.

The Puuwaawaa Advisory Committee had no objections to the request, but recommended that allowances be made to provide for future potential realignment of the subject roadway to coincide with any developmental plans consistent with its use under Governor's Executive Order No. 4161 for park purposes.

The Department of Hawaiian Home Lands had no objections to the request, but wanted provisions allowing for public beach accesses over the subject roadway.

Prior to the issuance of the grant of easement document, KRT is required to obtain from the Department of Transportation, Right-of-Way Branch, an approval for vehicular accesses onto the Queen Kaahumanu Highway. That any modifications to the existing roadway might require special permits from the Office of Conservation and Coastal Lands and approval of the Governor since the use is not consistent with the Governor's Executive Order.

RECOMMENDATION: That the Board:

- A. 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.
- B. 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) 7-1-003: 4, 5, 6, and 11, 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.
- C. Subject to the Applicant fulfilling all of the Applicant requirements listed above,

EXHIBIT A

authorize the issuance of a perpetual non-exclusive easement to Allen D. Israel, as Trustee of the Kona Residence Trust, under unrecorded Revocable Trust, dated 12/16/88, covering the subject area for access and utility purposes under the terms and conditions cited above, which are by this reference incorporated herein and further subject to the following:

1. The standard terms and conditions of the most current perpetual easement document form, as may be amended from time to time;
 2. Should future development necessitate a relocation of the easement granted, or any portion thereof, the relocation shall be accomplished at the Grantee's own cost and expense; provided, however, that if other lands of the Grantor are available, the Grantor will grant to the Grantee without payment of any monetary consideration, a substitute easement of similar width within reasonable vicinity of the original alignment, which substitute easement shall be subject to the same terms and conditions as that herein granted and as required by law;
 3. That the Division of State Parks reserves the right to:
 - a) utilize the subject roadway for the public's use of the Executive Order area;
 - b) demand a realignment of the existing roadway, if necessary, to be consistent with any proposed master plans for development of the adjoining State property under Executive Order No. 4161.
 4. The easement shall run with the land and shall inure to the benefit of the real property described as Tax Map Keys: 3rd/ 7-1-03: 4, 5, 6, and 11, 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. 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 F. Matsuhaga
Acting District Land Agent

APPROVED FOR SUBMITTAL:


Peter F. Young, Chairperson

EXHIBIT A

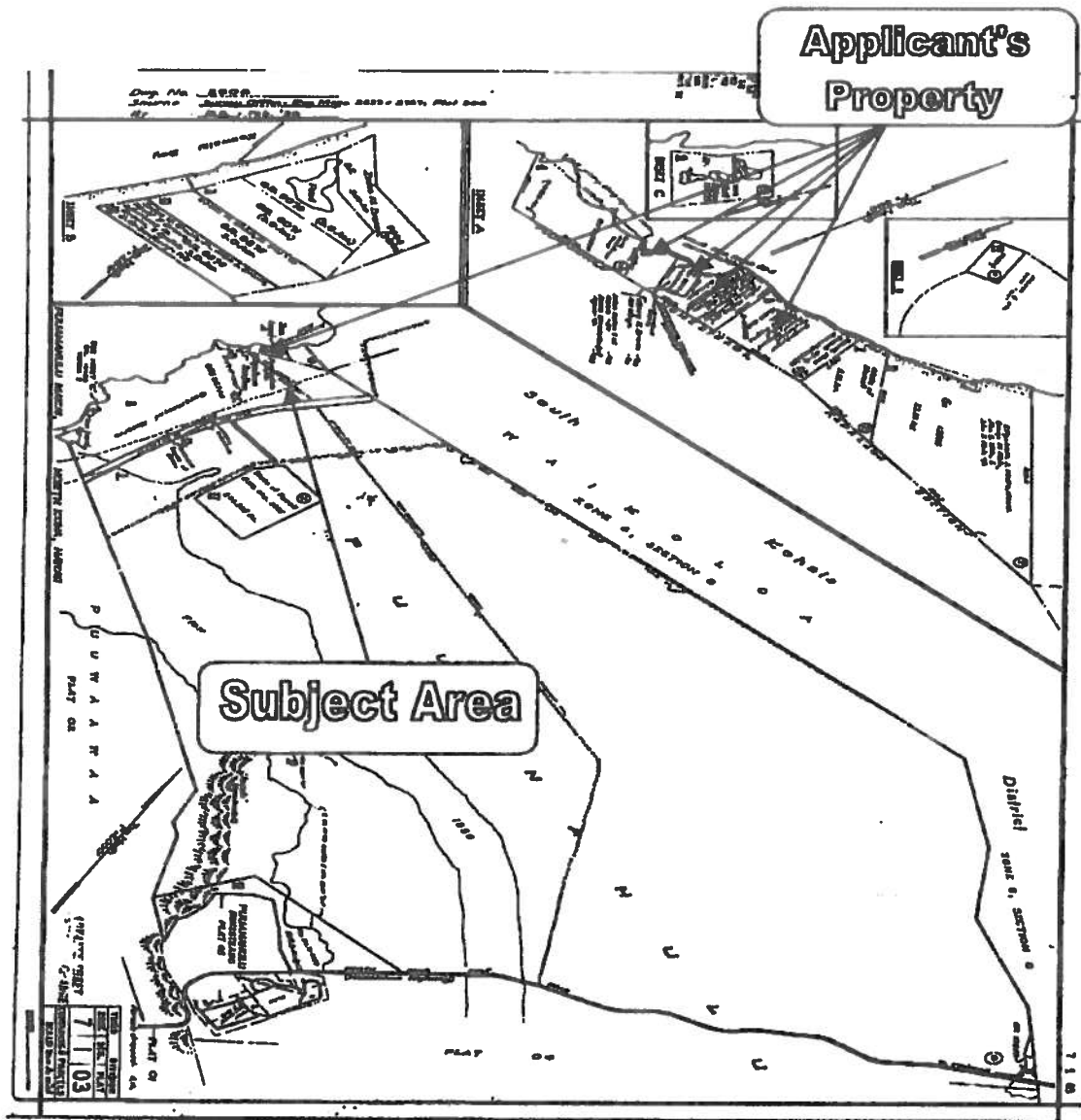


EXHIBIT A

EXHIBIT A

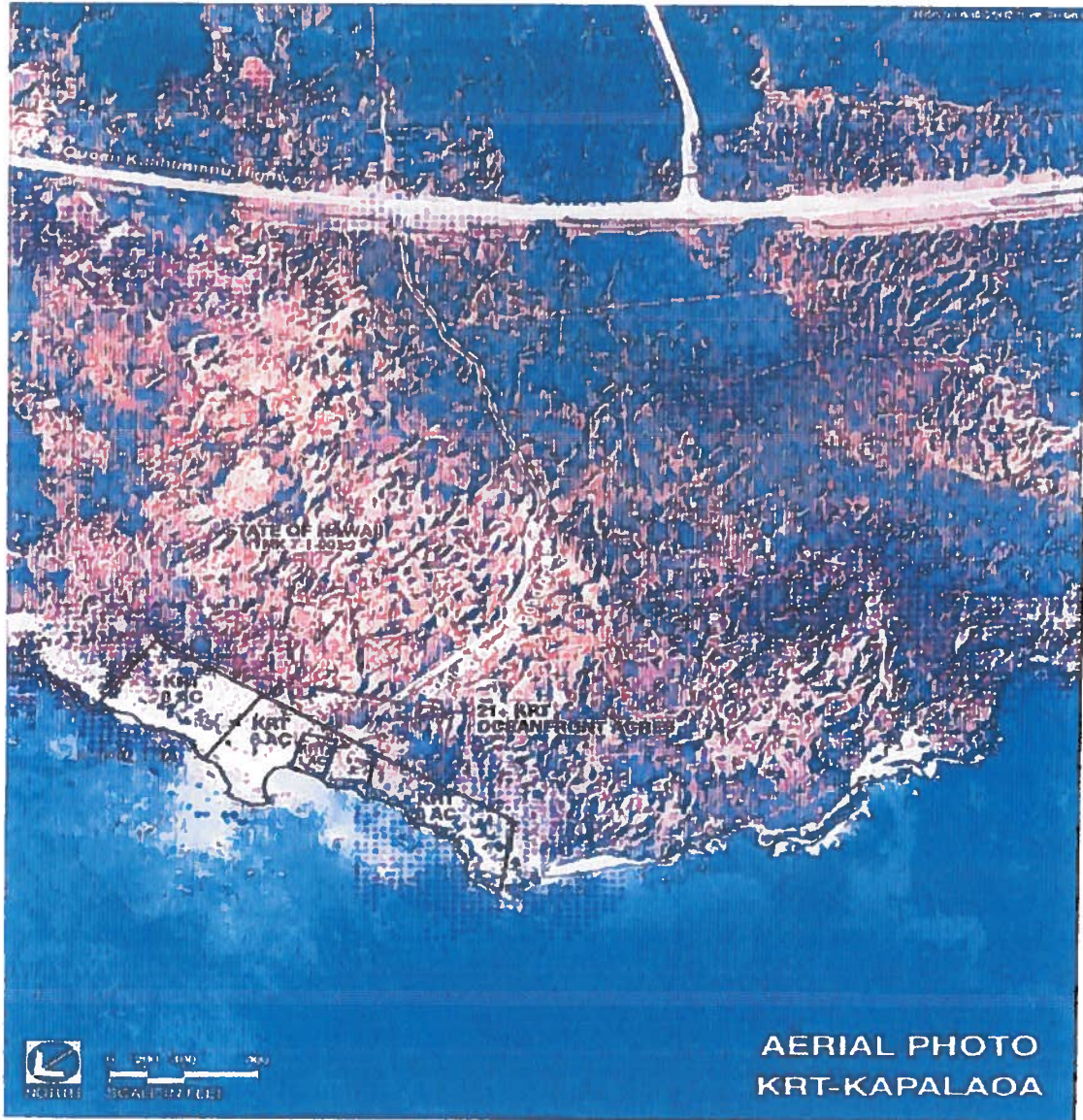


EXHIBIT A



EXHIBIT A



EXHIBIT A

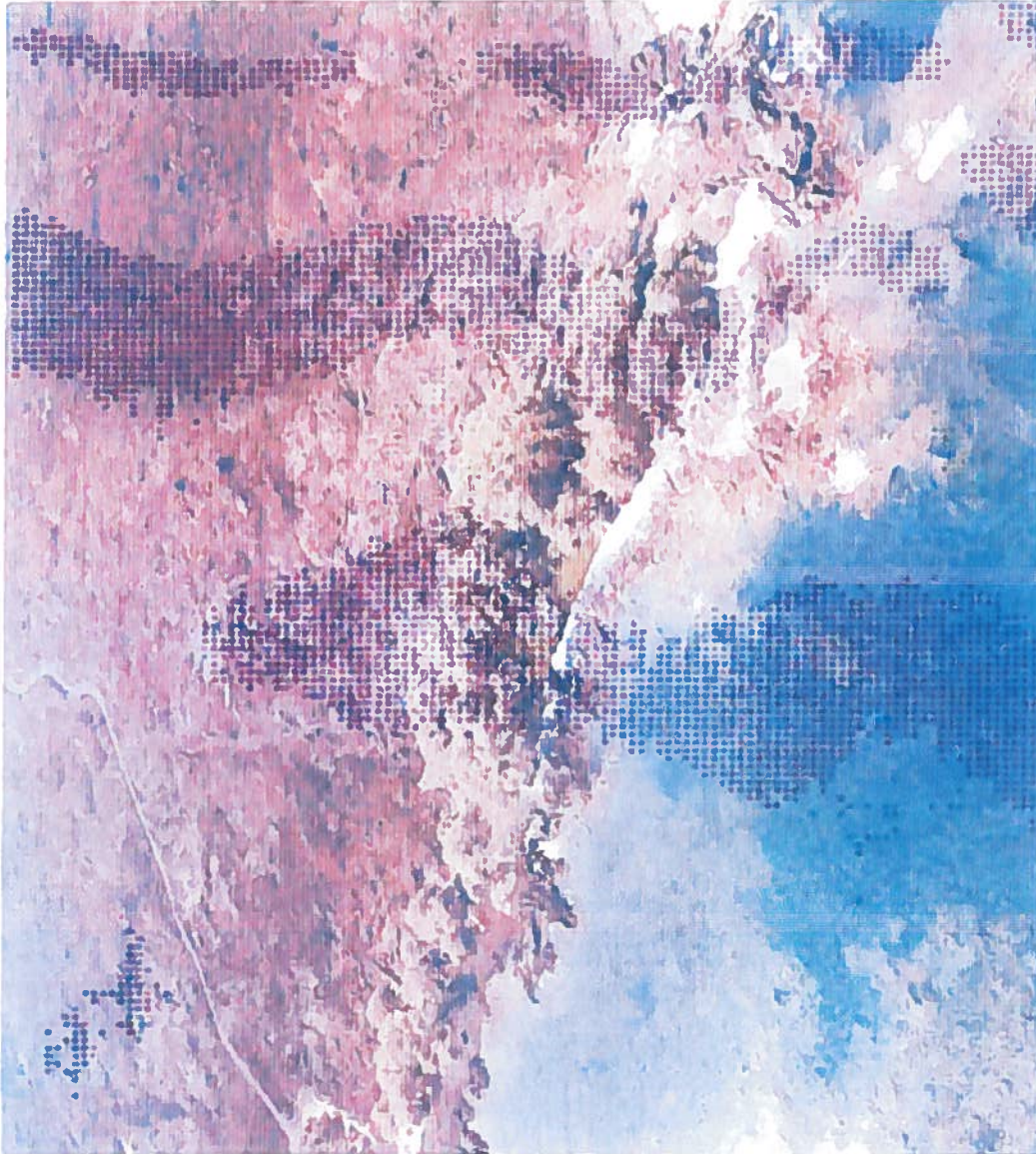


EXHIBIT A

LAND COURT SYSTEM	REGULAR SYSTEM
Return by Mail <input type="checkbox"/>	Pickup <input checked="" type="checkbox"/> To:
This document contains 8 pages (including this page)	
Tax Key: (3) 7-1-03:002	

GRANT OF VEHICLE ACCESS RIGHTS

GRANTOR: STATE OF HAWAII
Department of Transportation
869 Punchbowl Street
Honolulu, Hawaii 96813

GRANTEE: DEPARTMENT OF LAND AND NATURAL RESOURCES
1251 Punchbowl Street, Room 13C
Honolulu, Hawaii 96813

EXHIBIT B

GRANT OF LIMITED VEHICLE ACCESS RIGHTS

THIS INDENTURE, made this _____ day of _____, 2011,
by the STATE OF HAWAII, through its Director of Transportation, hereinafter referred to as the
"GRANTOR", and the STATE OF HAWAII, by its Board of Land and Natural Resources,
whose principal place of business and mailing address is 1151 Punchbowl Street, Room 130,
Honolulu, Hawaii 96813, hereinafter referred to as the "GRANTEE".

WITNESSETH THAT:

WHEREAS, the GRANTOR is the owner of the Queen Kaahumanu Highway as shown
on the Right-of-Way Map for the project known as KAILUA-KAWAIIAE ROAD, Project No.
19 RC-01-71, North Kona, Island of Hawaii, Hawaii, (hereafter referred to as the "Project"),
filed in the Highways Division, Department of Transportation, State of Hawaii, dated
September 19, 1972 and also along Tax Map Key No. (3) 7-1-03:002; and

WHEREAS, the GRANTEE is the owner of property identified by Tax Map Key No.
(3) 7-1-03: 002, and

WHEREAS, the GRANTEE desires vehicle access rights from Tax Map Key No
(3) 7-1-3:002 onto Queen Kaahumanu Highway; and

WHEREAS, the GRANTOR is willing to allow GRANTEE vehicle access rights for
egress and ingress over and across said BOUNDARY "1", more particularly described attached
hereto as Exhibit A, and shown on Exhibit B.

EXHIBIT B

NOW THEREFORE, the GRANTOR, for good and valuable consideration paid by the GRANTEE, the receipt whereof is hereby acknowledged, and pursuant to Section 264-13, Hawaii Revised Statutes, does hereby renise, release, give, grant and convey unto the GRANTEE, its successors, and assigns, vehicle access rights for egress and ingress to Queen Kaahumanu Highway, over and across BOUNDARY "1".

TO HAVE AND TO HOLD the same together with any and all rights, privileges and appurtenances, thereto belonging or appertaining to or held and enjoyed therewith, unto the GRANTEE, until the STATE OF HAWAII, Department of Transportation implements its plan to upgrade Queen Kaahumanu Highway to a high speed access controlled facility, once an alternate means of access is provided, direct access onto Queen Kaahumanu Highway will be restricted.

The GRANTEE hereby acknowledges that the conveyance by the GRANTOR of the limited vehicle access rights for ingress over and across BOUNDARY "1" has been made pursuant to the GRANTEE's request.

EXHIBIT B

IN WITNESS WHEREOF, the GRANTOR and GRANTEE have executed this
instrument on the day and year first above written.

GRANTOR:

**STATE OF HAWAII
DEPARTMENT OF TRANSPORTATION**

By _____
Print Name: _____
Its: _____

GRANTEE:

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

By _____
Print Name: _____
Its Chairperson of Board of Land and Natural Resources

**APPROVED AS TO LEGALITY, FORM,
EXCEPTIONS, AND RESERVATIONS:**

Deputy Attorney General

Dated: _____

Deputy Attorney General

Dated: _____

EXHIBIT B

DESCRIPTION

KAILUA-KAWAIIHAE ROAD
Project No. 19 BC-01-71
Boundary "1"

Being a section of the North right-of-way boundary of Kailua-Kawaihae Road, Project No. 19 BC-01-71,
and along Addition to State Park Reserve, Executive Order 4161

Situated at Puunahulu, North Kona, Island of Hawaii, Hawaii

Beginning at the Northeast end of the right-of-way boundary and on the North side of Kailua-Kawaihae
Road, Project No. 19 BC-01-71, the coordinates of said point of beginning referred to Government Survey
Triangulation Station "AKAHIPU" being 54,069.80 feet North and 28,186.31 feet East, thence running by
azimuths measured clockwise from True South:

1. Along the North side Kailua-Kawaihae Road, Project No. 19 BC-01-71, on a curve to the left with
a radius 14,250.04 feet, the chord azimuth and distance being:
45° 44' 06.16" 34.00 feet to a point on the North
boundary of this right-of-way.

Vehicle access shall be permitted into and from Kailua-Kawaihae Road, Project No. 19 BC-01-71,
over and across Course 1 of the above described Boundary "1".

2158 North King Street
Suite 200
Honolulu, Hawaii 96819
October 28, 2010



BELT COLLINS HAWAII LTD.


Licensed Professional Land Surveyor
Certificate Number 12672

EXHIBIT A

1

EXHIBIT B

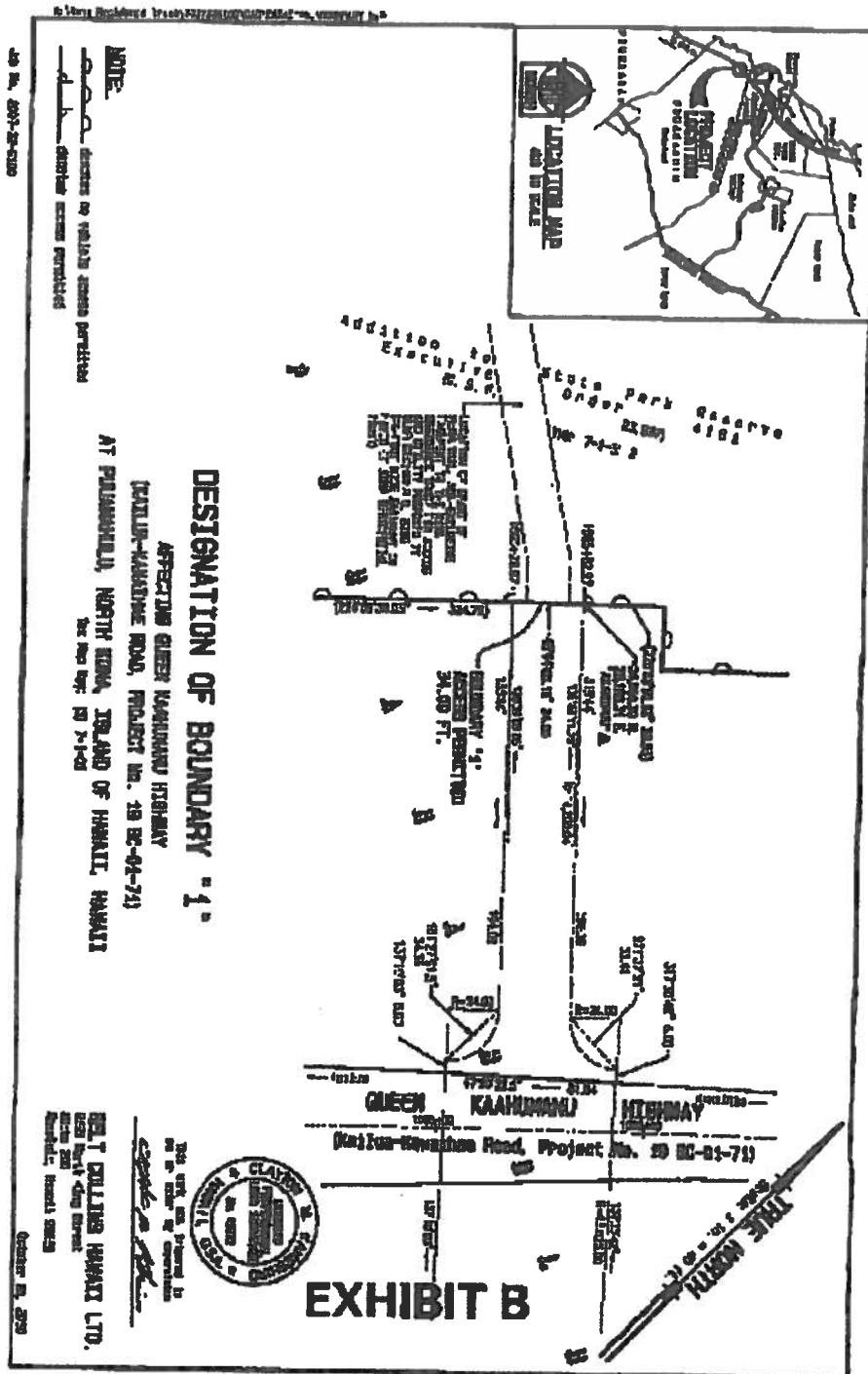


EXHIBIT B

Kona Residence Trust may decide in [~~the~~ such] Trustee's sole and absolute discretion, whose address is c/o Clifford Miller, Post Office Box 2800, Honolulu, Hawaii [~~96803,-~~ 96803-2800] (hereinafter referred to as the ["Grantee"]).

WITNESSETH THAT:

The Grantor, pursuant to Section 171-13, Hawaii Revised Statutes, for and in consideration of the sum of FORTY FIVE THOUSAND AND NO/100 DOLLARS (\$45,000.00), the receipt of which is hereby acknowledged, and of the terms, conditions, and covenants herein contained, and on the part of the Grantee to be observed and performed, does hereby grant unto the Grantee, the following non-exclusive and perpetual easement rights:

Right, privilege and authority to construct, use, maintain and repair a right-of-way for access and utility purposes to and from (a) the Grantee's land described in Exhibit "C" attached hereto (hereinafter referred to as the "Grantee's Land"), and (b) the State of Hawaii's land described in Exhibit "D" and delineated on Exhibit "E" attached hereto (hereinafter referred to as the "Queen Kaahumanu Highway Access Area");¹

in, over, under and across that certain parcel of land [~~("easement area")~~] situate at Puuanahulu, North Kona, Island of Hawaii, Hawaii, being identified as ["Perpetual Non-Exclusive Access and Utility Easement"], [containing an area of 1.868 acres, more particularly described in Exhibit ["A"] and delineated on Exhibit ["B"], both of which are attached hereto and made parts hereof, said exhibits being respectively, a survey description and survey map prepared by the Survey Division, Department of Accounting and General Services, State of Hawaii, designated C.S.F. No. 24,402 and dated March 1, [~~2007,~~ 2007 (the "easement area")], TOGETHER WITH the rights of ingress and egress to and from the easement area for all purposes in connection with the rights hereby granted. The parties acknowledge and agree that this Grant relates only to the easement area; Grantee's use of the Queen Kaahumanu Highway

¹ References to property descriptions added consistent with the BLNR's approval and for the purpose of clarifying the description of the land benefitted by the easement.

Access area is governed by a separate agreement between Grantee and the State of Hawaii, Department of Transportation described in Section 26 below.²

TO HAVE AND TO HOLD the easement rights unto the Grantee[~~7~~
~~its~~] and the Grantee's successors -in-trust, successors, and assigns, in perpetuity,

SUBJECT, HOWEVER, to the following terms, conditions and covenants:

1. [~~1.~~] The Grantee shall at all times with respect to the easement area use due care for public safety and agrees to indemnify, defend, and hold the Grantor harmless from and against any claim or demand for loss, liability, or damage, including claims for bodily injury, wrongful death, or property damage, arising out of or resulting from: 1) any act or omission on the part of the Grantee relating to the Grantee's use, occupancy, maintenance, or enjoyment of the easement area; 2) any failure on the part of the Grantee to maintain the easement area and sidewalks, roadways and parking areas adjacent thereto in the Grantee's use and control, and 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; and 3) from and against all actions, suits, damages, and claims by whomsoever brought or made by reason of the Grantee's non-observance or non-performance of any of the terms, covenants, and conditions of this [~~grant~~] Grant of non-exclusive easement on the part of the Grantee to be observed or performed, or the rules, regulations, ordinances, and laws of the federal, state, municipal or county governments applicable to the easement area.³

2. [~~2.~~] The Grantor reserves unto itself, its successors and assigns, the full use and enjoyment of the easement area and to grant to others rights and privileges for any and all purposes affecting the easement area, provided, however, that the rights herein reserved shall not be exercised

² Clarification that the present Grant of easement does not extend to the Queen Kaahumanu road right-of-way itself.

³ Language added to clarify that Grantee's indemnity only applies to breaches of provisions which Grantee is obligated to perform.

by the Grantor [~~and similar~~]or any other grantee(s) of Grantor in any manner which interferes unreasonably with the [~~herein~~]Grantee[~~in the~~]'s use of the easement area for the purposes for which [~~this~~]the easement described herein is herein granted to GrantorGrantee.

3. [~~3.~~—All improvements placed in or upon the easement area by the Grantee shall be done without cost or expense to the Grantor and shall remain the property of the Grantee and may be removed or otherwise disposed of by the Grantee at any time; provided, that the removal shall be accomplished with minimum disturbance to the easement area which shall be restored to its original condition, or as close thereto as reasonably possible, within a reasonable time after removal.

4. [~~4.~~—Upon completion of any work performed in or upon the easement area by or at the direction of the Grantee, the Grantee shall remove therefrom all of the Grantee's and Grantee's contractors' equipment and unused or surplus materials, if any, and shall leave the easement area in a clean [~~and sanitary~~]⁴and sanitary⁵ condition reasonably satisfactory to the Grantor.

5. [~~5.~~—~~This~~The easement granted herein shall run with the [~~land~~]easement area⁶, and shall inure to the benefit of the real property described as tax map key nos. (3) 7-1-003:004, 005, [~~006 and 011,~~]006, and 11, which real property is also described in Exhibit "C" attached hereto, providing that the Grantee shall be required to carry liability insurance covering the easement area and comply with all other terms and conditions as provided herein, and that the Grantee, or authorized representative of the Grantee's estate, when [~~this~~]the easement granted herein is sold, assigned, conveyed, or otherwise transferred, shall notify the Grantee's successors or assigns of the insurance requirement in writing, separate and apart from this [~~easement document~~]Grant.

6. [~~6.~~—The Grantee shall keep the easement area and the improvements thereon in a safe, reasonably clean,

⁴ The easement will be used for vehicular access and although it can be cleaned, it cannot be made "sanitary".

⁵ DLNR prefers to keep "sanitary" in the document. It is possible for any land to be made unsanitary or sanitary.

⁶ "Run with the land" is a term of art. The easement rights will run with the land described later in this paragraph.

[~~sanitary~~]⁷sanitary, and orderly condition, and shall not make, permit or suffer, any waste, strip, spoil, nuisance or unlawful, improper, or offensive use of the easement area by any party acting under the Grantee.⁸

7. [~~7.~~—Should future development necessitate a relocation of the easement granted herein, or any portion thereof, the relocation shall be accomplished at the Grantee's own cost and expense; provided, however, that if other lands of the Grantor are available, the Grantor will grant to the Grantee without payment of any monetary consideration, a substitute easement of similar width within the reasonable vicinity of the original alignment of the easement area, which substitute easement shall be subject to the same terms and conditions as [~~that~~]the easement herein granted and as required by law.

8. [~~8.~~—The Grantee covenants, for [~~itself, its~~]the Grantee and the Grantee's successors -in-trust, successors, and assigns, that the use and enjoyment of the [~~land~~]easement herein granted shall not be in support of any policy which discriminates against anyone based upon race, creed, sex, color, national origin, religion, marital status, familial status, ancestry, physical handicap, disability, age or HIV (human immunodeficiency virus) infection.

9. [~~9.~~—The Grantee, in the exercise of the rights granted herein, shall comply with all of the requirements of [~~the~~] federal, state, and county authorities applicable to the easement area and shall observe all county ordinances and state and federal laws, rules and regulations, now in force or which may hereinafter be in force, applicable to the easement area.⁹

10. [~~10. These easement rights shall cease and terminate, and the easement area shall automatically be forfeited to the Grantor, without any action on the part of the Grantor, in the event of non-use or abandonment by the Grantee of the easement area, or any portion thereof, for a consecutive period of one (1) year.~~]In the event of non-use or abandonment by the Grantee of the easement area for a consecutive period of two

⁷ Same footnote as 3 above.

⁸ Language added to clarify Grantee's scope of responsibility.

⁹ Language added to clarify Grantee's scope of responsibility for easement area.

(2) years, the Grantor shall have the right to terminate this Grant. Such right shall be exercised by the Grantor by written notice from the Grantor to the Grantee of the Grantor's intention to terminate this Grant. If, within one hundred twenty (120) days from the date of the Grantee's receipt of such notice, the Grantee notifies the Grantor that the Grantee used the easement area within such two-year period and has not abandoned the easement area, the Grantor will not have the right to terminate this Grant on the basis of non-use or abandonment by the Grantee and instead this Grant shall continue in full force and effect. If the Grantee fails to respond to such notice within said one hundred twenty (120) days by notifying the Grantor in writing that the Grantee has not abandoned and is still using the easement area, the Grantor may terminate this Grant by giving to the Grantee written notice of termination.¹⁰¹¹

11. [~~11.~~—The Grantee shall, upon termination or revocation of [~~this~~]the easement granted herein, peaceably deliver unto the Grantor possession of the [~~premises~~]easement area, together with all improvements existing or constructed thereon or Grantee shall remove such improvements and shall restore the [~~premises~~]easement area to its original state, or as reasonably close thereto as possible, within a reasonable time and at the expense of the Grantee, at the option of the Grantor. If the Grantee does not remove the improvements or restore the [~~premises~~]easement area to the satisfaction of the Grantor, the Grantor may effect such action and the Grantee agrees to pay all reasonable costs and expenses for such action. Furthermore, upon the termination[~~or revocation~~] of this [~~easement~~]Grant, should the Grantee fail to remove any and all of Grantee's personal property from the [~~premises~~]easement area, after notice thereof, the Grantor may remove any and all of Grantee's personal property from the [~~premises~~]easement area, and either deem the property abandoned and dispose of the property or place the property in storage at the cost and expense of Grantee and the Grantee does agree to pay all costs and expenses for disposal, removal, or storage of the personal property. This

¹⁰ New language replacing deleted language mirrors what has been agreed to in Section 14 of the Use and Occupancy Agreement entered into by the Grantee and DOT ("UOA").

¹¹ This is a non-standard provision that will need to be presented to the BLNR at a public meeting for approval.

provision shall survive the termination of [~~the easement~~]this Grant.

12. [~~12.~~— In case the Grantor shall, without any fault on its part, be made a party to any litigation commenced by or against the Grantee as a result of this grant of non-exclusive easement (other than condemnation proceedings), the Grantee shall pay all reasonable costs, including reasonable attorney's fees and expenses incurred by or imposed on the Grantor; furthermore, the Grantee shall pay all reasonable costs, including reasonable attorney's fees and expenses, which may be incurred by or paid by the Grantor in enforcing the covenants and conditions of this grant of non-exclusive easement, or in the collection of [~~delinquent rental, fees, taxes, and~~] any and all [~~other~~] applicable charges attributed to [~~said~~]the easement area payable by the Grantee pursuant to this Grant.¹²

13. [~~13.~~— The Grantee shall not cause or permit the escape, disposal or release of any hazardous materials except as permitted by law. Grantee shall not allow the storage or use of such materials in any manner not sanctioned by law or by the highest standards prevailing in the industry for the storage and use of such materials, nor allow to be brought onto the easement area by any person acting under the Grantee,¹³ any such materials except to use in the ordinary course of Grantee's business, and then only after written notice is given to Grantor of the identity of such materials and upon Grantor's consent which consent may be withheld at Grantor's sole and absolute discretion. If any lender or governmental agency shall ever require testing to ascertain whether or not there has been any release of hazardous materials by Grantee, then the Grantee shall be responsible for the reasonable costs thereof. In addition, Grantee shall execute reasonable affidavits, representations and the like from time to time at Grantor's request concerning Grantee's best knowledge and belief regarding the presence of hazardous materials on the easement area placed or released by Grantee.⁶

¹² Language deleted because no rent, additional fees or taxes are payable by Grantee.

¹³ Language added to clarify scope of Grantee's responsibility and conforms to Section 17 of UOA.

The Grantee agrees to indemnify, defend, and hold Grantor harmless, from any damages and claims resulting from the release of hazardous materials on the easement area occurring while Grantee is in possession, or elsewhere if caused by Grantee or persons acting under Grantee. These covenants shall survive the expiration or earlier termination of this ~~[easement]~~Grant.

For the purpose of this ~~[easement]~~Grant "hazardous material" shall mean any pollutant, toxic substance, hazardous waste, hazardous material, hazardous substance, or oil as defined in or pursuant to the Resource Conservation and Recovery Act, as amended, the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, the Federal Clean Water Act, or any other federal, state, or local environmental law, regulation, ordinance, rule, or bylaw, whether existing as of the date hereof, previously enforced, or subsequently enacted.

14. [~~14.~~ Time is of the essence in this ~~[agreement]~~Grant and if the Grantee shall abandon the premises, or if [~~this~~]the easement [~~and premises~~]area shall be attached or taken by operation of law, or if any assignment is made of the Grantee's property for the benefit of creditors, or if Grantee shall fail to observe and perform any of the material covenants, terms, and conditions contained in this ~~[easement]~~Grant and on its part to be observed and performed, and this failure shall continue for a period of more than sixty (60) calendar days after delivery by the Grantor of a written notice of breach or default, by personal service, registered mail or certified mail to the Grantee at its last known address and to each mortgagee or holder of record having a security interest in the [~~premises~~]easement area, the Grantor may, subject to the provisions of section 171-21, Hawaii Revised Statutes, at once re-enter the [~~premises~~]easement area, or any part, and upon or without the entry, at its option, terminate this ~~[easement]~~Grant without prejudice to any other remedy or right of action for any preceding or other breach of [~~contract]~~this Grant; and in the event of termination, at the option of Grantor, all improvements shall remain and become the property of the Grantor or shall be removed by Grantee.

15. Grantor reserves the right to withdraw the easement area or any portion thereof for public use or purposes, at any time during the term of this Grant upon the giving of reasonable notice to Grantee. Upon withdrawal of the easement area, Grantor shall return to Grantee a portion of the consideration paid hereunder by Grantee. Any payment to Grantee shall be reduced by the following: (i) any non-refundable portion of the consideration, if any, that Grantor was required by statute to pay to any other entity or body, and (ii) the fair market value of the easement area for the term which Grantee enjoyed the use of the easement area as determined by staff or independent appraisal paid for by Grantor.¹⁴

~~15. The Grantor reserves the right to withdraw the easement for public use or purposes, at any time during this grant of easement upon the giving of reasonable notice by the Grantor and without compensation.~~

¹⁵Notwithstanding anything contained in Section 14 hereinabove, in the event the Grantee receives written notice from the Grantor that the Grantee has failed to observe or perform any material covenant contained in this Grant and on the Grantee's part to be observed and performed, and the Grantee undertakes to cure such failure within forty-five (45) days of its receipt of such notice and pursues such cure with diligence to completion, the Grantor will not terminate this Grant as permitted by Section 14 hereinabove and instead the Grantee shall have such additional reasonable period of time as shall be necessary to complete such cure.¹⁶¹⁷

16. [~~16.~~ The Grantee shall not mortgage or pledge the premises, any portion, or any interest in [~~this~~] the easement granted herein without the prior written approval of the Chairperson of the Board of Land and Natural Resources and any mortgage or pledge without such approval shall be null and void.

17. [~~17.~~ In the event the Grantor seeks to forfeit the privilege, interest, or estate created by this

¹⁴ The BLNR needs to retain the right to withdraw easement rights and other land dispositions upon payment of due compensation. This is a modification of the standard provision that will require approval by the BLNR.

¹⁵ Deleted language conflicts with DLNR's grant of perpetual rights, which are subject to termination as described in Section 15 of UOA.

¹⁶ Added language conforms to Section 13(b)(ii) of UOA.

¹⁷ This language is not acceptable as it is inconsistent with HRS Section 171-20 regarding defaults under similar state land dispositions.

[~~easement~~] Grant, each mortgagee under a recorded mortgage and each holder of [~~a~~] any other security interest under a recorded instrument encumbering such right, privilege, interest or estate may, at its option, cure or remedy [~~the~~] such default or breach within sixty (60) calendar days, from the date of such mortgagee's or holder's receipt of written notice from the Grantor [~~'s notice~~] of such default or breach, or within [~~an~~] such additional period as may be allowed by the Grantor for good cause, and add the cost thereof to the [~~mortgage-~~] debt [~~and the lien of the~~] secured by such mortgage[-] or other security interest. Upon failure of [~~the~~] such mortgagee or holder to exercise [~~its~~] such option, the Grantor may: (a) pay to [~~the~~] such mortgagee or holder from any moneys at its disposal, including [~~the~~] any special land and development fund, the amount of the debt secured by such mortgage [~~debt~~] or security instrument, together with interest and penalties, and secure an assignment of [~~the~~] such debt and mortgage or security instrument from the holder thereof, or if ownership of [~~the~~] said privilege, interest, or estate shall have vested in [~~the~~] such holder by way of foreclosure, or action in lieu thereof, the Grantor shall be entitled to the conveyance of the privilege, interest, or estate upon payment to [~~the~~] such holder of the amount of [~~the mortgage~~] such debt, including interest and penalties, and all reasonable expenses incurred by [~~the~~] such holder in connection with the foreclosure and preservation of [~~its~~] such holder's security interest, less appropriate credits, including income received from the privilege, interest, or estate subsequent to the foreclosure; or (b) if the [~~property~~] easement area cannot be reasonably reassigned without loss to the State, then terminate the outstanding privilege, interest, or estate without prejudice to any other right or remedy for any preceding or other breach or default and use its best efforts to redispense of the [~~affected land~~] easement area to a qualified and responsible person free and clear of the mortgage and the debt secured; provided that a reasonable delay by the Grantor in instituting or prosecuting its rights or remedies shall not operate as a waiver of these rights or to deprive it of a remedy when it may still otherwise hope to resolve the problems created by the breach or default. The proceeds of any redistribution shall be applied, first, to reimburse the Grantor for reasonable costs

and expenses in connection with the redistribution; second, to discharge in full any unpaid purchase price or other indebtedness owing the Grantor in connection with the privilege, interest, or estate terminated; third, to the mortgagee to the extent of the value received by the [State]Grantor upon redistribution which exceeds the fair market value of the land as previously determined by the [State]Grantor's appraiser; and fourth, to the [~~owner of the privilege, interest, or estate~~]Grantee.¹⁸

18. [~~18.~~—The Grantee shall procure and maintain, at its own cost and expense, in full force and effect throughout the term of this [~~easement~~]Grant, comprehensive general liability insurance, or its equivalent, with an insurance company or companies licensed or authorized to do business in the State of Hawaii with an AM Best rating of not less than "A-" or other comparable and equivalent industry rating, in an amount of at least \$1,000,000.00 for each occurrence and \$2,000,000.00 aggregate, and with coverage terms acceptable to the Chairperson of the Board of Land and Natural Resources. The policy or policies of insurance shall name the State of Hawaii as an additional insured and a copy shall be filed with the State of Hawaii, Department of Land and Natural Resources. The insurance shall cover the entire easement area, including all buildings, improvements, and grounds and all roadways or sidewalks on or adjacent to the easement area in the use or control of the Grantee.

The Grantee, [~~area or within fifteen easement, whichever is certificate(s) showing~~]prior to entry on and use of the easement [~~(15)~~area or within thirty (30)]^{19,20} days after the effective date of this sooner, shall furnish the Grantor with a the policy(s) to be initially in force, keep the certificate(s) on deposit during the entire easement term, and furnish a like certificate(s) upon each renewal of the policy(s). This insurance shall not be cancelled, limited in scope of coverage, or nonrenewed until after thirty (30) days written notice has

¹⁸ Changes clarify Section 17 and conform to Section 13(b) of UOA.

¹⁹ Grantee needs 30 days to satisfy requirements, which 30 days is consistent with the 30-day period provided for in the second sentence of this paragraph.

²⁰ Land Division has no objection to this change. But it is a non-standard provision that will require approval by the BLNR.

been given to the Grantor. The Grantor may at any time require the Grantee to provide Grantor with copies of the insurance policy(s) that are or were in effect during the [~~easement period~~] term of this Grant.

The Grantor shall retain the right at any time to review the coverage, form, and amount of the insurance required by this [~~easement~~] Grant. If, in the reasonable opinion of the Grantor, the insurance provisions in this [~~easement~~] Grant do not provide adequate protection for the Grantor, the Grantor may require Grantee to obtain insurance sufficient in coverage, form, and amount to provide adequate protection. The Grantor's requirements shall be reasonable but shall be designed to assure protection for and against the kind and extent of the risks which exist at the time a change in insurance is required. The Grantor shall notify Grantee in writing of changes in the insurance requirements and Grantee shall deposit copies of acceptable insurance policy(s) or certificate(s) thereof, with the Grantor incorporating the changes within thirty (30) days after receipt of the notice.

The procuring of the required policy(s) of insurance shall not be construed to limit Grantee's liability under this [~~easement~~] Grant nor to release or relieve the Grantee of the indemnification provisions and requirements of this [~~easement~~] Grant. Notwithstanding the policy(s) of insurance, Grantee shall be obligated for the full and total amount of any damage, injury, or loss caused by Grantee's negligence or neglect connected with [~~this~~] the easement granted herein.

It is agreed that any insurance maintained by the Grantor will apply in excess of, and not contribute with, insurance provided by Grantee's policy.

19. [~~19.~~—The easement area shall not be used at any time by the Grantee, its guests or invitees for parking purposes.

20. [~~20.~~—The Grantee shall at all times during the term of this [~~easement-keep~~] Grant trim all vegetation growing within, over, or onto the easement area so that it does not

present a threat to public safety by creating or contributing to roadway, waterway, or pedestrian obstruction, visual obstruction to operators of vehicles, fire hazards, or interference with or downing of power lines.

21. [~~21.~~ The Grantee shall not construct, place or maintain any building or structure over or upon the easement area, except for the purposes described in this [~~grant~~] Grant.

22. [~~22.~~ The Grantee shall comply with all applicable federal and state environmental impact regulations.

23. [~~23.~~ The Grantee shall maintain and employ debris, pollution and contamination control measures, safeguards and techniques to prevent debris, pollution or contamination to the ocean waters, streams or waterways resulting from the Grantee's, its invitee's, or its agent's use, maintenance, repair and operation of the easement area, and shall take immediate corrective action in the event of such pollution or contamination to [~~immediately~~] promptly²¹ remove the cause of such pollution or contamination, and shall [~~immediately~~] promptly²² clean the easement area and its surrounding waters of such pollutant or contaminant and restore to the Grantor's satisfaction the areas affected by such pollution or contamination, all at the Grantee's own cost and expense.

24. [~~24.~~ The easement area is encumbered by Governor's Executive Order No. 4161 to the State of Hawaii, Department of Land and Natural Resources, Division of State Parks, and therefore this [~~grant of easement~~] Grant is subject to the State of Hawaii Governor's approval. Said approval was obtained on December 10, 2010.

[~~25. The easement area is encumbered by Governor's Executive Order No. 4161 to the State of Hawaii, Department of State Parks, and therefore this grant of easement is subject to the State of Hawaii Department of State Parks's approval. Said approval was obtained on January 3, 2011.~~]²³

²¹ Land Division has no objection to this change. But it is a non-standard provision that will require approval by the BLNR.

²² Land Division has no objection to this change. But it is a non-standard provision that will require approval by the BLNR.

²³ Deleted because it is duplicative of Section 24 and the date stated in Section 25 is not accurate.

25. [~~26.~~—The State of Hawaii, Department of Land and Natural Resources, Division of State Parks, reserves the right to:

a. utilize the subject roadway for the public's use of the Executive Order No. 4161 area; and

b. [~~requires~~]require a realignment of the existing roadway, if necessary, to be consistent with any proposed master plans for development of the adjoining [~~state~~]State property under Executive Order No. 4161.

26. [~~27.~~—The State of Hawaii, Department of Transportation has plans to upgrade Queen Kaahumanu Highway[~~Once an alternate means of access is provided,~~] to a high-speed access-controlled facility and direct access onto Queen Kaahumanu Highway[~~Boundary "1," will be restricted. The Grantee, its successors~~] is to become restricted. In connection with the foregoing, Grantee and the State of Hawaii, Department of Transportation ("DOT") have entered into that certain Use and Occupancy Agreement No. 106 dated January 27, 2012, but effective as of December 13, 2011, which in Section 15 thereof sets forth the terms and conditions under which the DOT may replace the Queen Kaahumanu Highway Access Area with an alternative access to Queen Kaahumanu Highway. If and when such alternative access is provided, the Grantee, for the Grantee and the Grantee's successors-in-trust, successors, and assigns, agrees that [~~it~~]the Grantee and the Grantee's successors-in-trust, successors, and assigns, shall not demand from the Grantor or the ~~State of Hawaii, Department of Transportation~~ ~~(["DOT"])~~DOT any monetary consideration or otherwise for the [~~lost of access and restriction of access granted hereunder.~~]substitution of such alternative access for the Queen Kaahumanu Highway Access Area. Furthermore, the Grantee, [~~its~~]for the Grantee and the Grantee's successors-in-trust, successors, and assigns, shall indemnify, defend and hold harmless the Grantor and the DOT from any claims against Grantee, its successors-in-trust, successors, and assigns, due to [~~the lost of access and restriction of~~]such substitution of such alternative access affecting the Grantee[~~'s, and its~~] or Grantee's successors[~~-and~~]-in-trust, successors, or assigns or

any entities of persons [~~relying on said access~~]claiming by or through the Grantee or Grantee's successors-in-trust, successors, or assigns.²⁴

27. [~~28.~~ The DOT approves of the terms and conditions of this [~~easement~~]Grant as indicated by its signature herein.

28. Miscellaneous.²⁵

28.1 Binding Effect. All provisions contained in this Grant shall be binding upon and inure to the benefit of the Grantor and Grantee and their respective successors-in-trust, successors, and permitted assigns, and shall run with the easement area and inure to the benefit of and run with the Grantee's Land.

28.2 Singular, Plural. All words used herein the singular number shall extend to and include the plural. All words used in any gender shall extend to and include all genders.

28.3 Headings. The headings and captions herein are for convenience of reference only and are not intended to fully describe, define or limit the provisions of this Grant to which they may pertain.

28.4 Consent of Assignor. Except as otherwise expressly set forth herein, the consent or approval of the Grantor to any request of the Grantee for such consent or approval or the exercise of any consent or approval right by the Grantor shall not be unreasonably withheld or delayed by the Grantor, and no consideration shall be required by the Grantor for any such consent or approval.²⁶

28.5 Force Majeure. If the performance or observance by the Grantee of any covenant, condition, obligation or agreement of the Grantee set forth in this Grant is prevented, delayed or otherwise impeded by any Force Majeure Event (as such capitalized term is hereinafter defined in this paragraph 28.5), the Grantee shall be excused from the performance or observance

²⁴ Section 26 has been revised to conform with Section 15 of UOA.

²⁵ All subsections of Section 24 conform to Sections 20 to 36 of UOA.

of such covenant, condition, obligation or agreement until such Force Majeure Event has ended and the Grantee has had a reasonable time thereafter in which to complete the performance or observance of such covenant, condition, obligation or agreement. A "Force Majeure Event" shall mean any circumstance which is not within the reasonable control of the Grantee, such as strikes; lockouts; acts of God; civil commotion; fire or any other casualty; governmental action; or other similar cause or circumstance which is not within the reasonable control of the Grantee.

28.6 Notices. Any notices, requests, demands, consents or other communications provided for or permitted by this Grant, including, without limitation, a notice of default, shall be given in writing and: (a) mailed as registered or certified mail, addressed to a party hereto at its post office address herein specified or the last such address designated by such party in writing to the other; or (b) deposited with a reputable national overnight delivery service properly addressed to such party; or (c)²⁷ delivered personally to such party, or if such party is a corporation, to any officer of such party, or if such party is a limited liability company, to the managing member of such party, as the case may be; or (d) sent by facsimile transmission ("Fax") to the Fax number, if any, of such party as specified hereinbelow or such other Fax number designated by such party in writing to the other.²⁸ Any such written notice shall be deemed received at the time of such personal delivery, or receipt of Fax, or at 5:00 P.M. on the fourth business day after being deposited with the United States postal service as aforesaid. The initial addresses and Fax numbers of the Grantor and the Grantee for purposes of this Paragraph 28.6 are:

If to Grantor: ~~STATE OF HAWAII~~Chairperson
Board of Land and Natural Resources
75 Aupuni Street, Room 204P.O. Box 621
HileHonolulu, Hawaii 9672096809-0621
Phone: (808) 974-6203587-0419

²⁶ The deleted language is unacceptable as a consent fee is required by Land Division rules, Presently the fee is \$25.

²⁷ Overnight delivery is not one of the permitted notice methods under HRS Section 171-20 regarding defaults under similar dispositions.

²⁸ Fax delivery is not one of the permitted notice methods under HRS Section 171-20 regarding defaults under similar dispositions.

Fax: (808) 974-6222

With a copy to:

Phone: ()

Fax: ()

If to Grantee: ALLEN D. ISRAEL, Trustee of the
Kona Residence Trust
c/o Robert G. Klein
McCorrison Miller Mukai MacKinnon
P.O. Box 2800
Honolulu, Hawaii 96803-2800
Phone: (808) 529-7300
Fax: (808) 524-8293

And a copy to: Clifford J. Miller
McCorrison Miller Mukai MacKinnon
P.O. Box 2800
Honolulu, Hawaii 96803-2800
Phone: (808) 529-7308
Fax: (808) 535-8002²⁹

or, in each case, to such other address or Fax numbers as may
hereafter have been designated by such party in accordance with
the above procedures.

28.7 No Obligation to Third Parties. The execution
and delivery of this Grant shall not be deemed to confer any
rights upon, nor obligate either the Grantor or the Grantee to,
any person or entity not a party to this Grant.

~~28.8~~ No Waiver. No delay or failure on the part of
either party hereto in exercising any right, power or privilege
under this Grant or under any other instrument or document given
in connection with or pursuant to this Grant shall impair any
such right, power or privilege or be construed as a waiver of
any default or any acquiescence therein. No single or partial
exercise of any such right, power or privilege shall preclude

²⁹ Land Division's computerized land inventory system can only accept one address for any tenant or grantee.

the further exercise of such right, power or privilege. No waiver shall be valid against either Party unless made in writing and executed by such Party against whom enforcement of such waiver is sought, and then only to the extent expressly specified therein.

~~28.928.8 Enforcement. In the event a dispute arises concerning the performance, meaning or interpretation of any provision of this Grant or any document executed in connection with this Grant, the prevailing party in such dispute shall be awarded any and all costs and expenses incurred by such party in enforcing, defending or establishing its rights hereunder or thereunder, including, without limitation, court costs and reasonable attorneys' fees, subject to appropriation and allocation as required by law. In addition to the foregoing award of costs and fees, the prevailing party shall also be entitled to recover its reasonable attorneys' fees incurred in any post judgment proceedings to collect or enforce any judgment, subject to appropriation and allocation as required by law. This provision is separate and several and shall survive the merger of this Grant or any such other document into any judgment on this Grant or such document.~~³⁰

28.1028.9 Legal Representation. Each party hereto has been represented by legal counsel in connection with the negotiation of the transactions herein contemplated and the drafting and negotiation of this Grant. Each such party and its counsel have had an opportunity to review and suggest revisions to the language of this Grant. Accordingly, no provision of this Grant shall be construed for or against or interpreted to the benefit or disadvantage of such party by reason of such party having or being deemed to have structured or drafted such provision.

~~28.1128.10~~ Merger of Prior Agreements. This Grant and the Exhibits hereto constitute the entire agreement between the parties hereto with respect to the subject matter hereof and supersede all prior agreements and understandings between the

³⁰ This provision is unacceptable. The state does not agree to payment of fees and costs that may result from litigation.

parties relating to such subject matter, which shall be of no further force or effect as of the effective date of this Grant.

28.1228.11 Severability. If any provision of this Grant, or the application thereof to any person, place, or circumstance, shall be held by a court of competent jurisdiction to be invalid, unenforceable or void, the remainder of this Grant and such provisions as applied to other persons, places and circumstances shall remain in full force and effect.

28.1328.12 Exhibits. All references in this Grant to Exhibits shall, unless otherwise expressly provided, be deemed to be references to the Exhibits attached to this Grant. All such Exhibits are incorporated into this Grant as though fully set forth herein.

28.1428.13 Amendments. This Grant may be amended or modified only by a written instrument executed by the Grantor and the Grantee.

28.1528.14 Recording. This Grant or a short form memorandum of this Grant may be recorded by the Grantor or Grantee in the Bureau of Conveyances of the State of Hawaii.

28.1628.15 Counterparts, Facsimile. This Grant may be executed in several counterparts, each of which shall be an original, but all of which shall constitute but one and the same instrument. Counterpart copies bearing facsimile signatures shall be binding upon the Grantor and the Grantee, but the Grantor and the Grantee shall exchange originally executed counterparts as soon as reasonably practicable.

28.1728.16 Governing Law. This Grant shall be governed by and construed in accordance with the laws of the State of Hawaii.

[Remainder of page left intentionally blank]

IN WITNESS WHEREOF, the STATE OF HAWAII, by its Board of Land and Natural Resources, has caused the seal of the Department of Land and Natural Resources to be hereunto affixed and the [~~parties hereto~~ Grantor and the Grantee] have caused this [~~Indenture~~ Grant] to be executed as of the day, month, and year first above written.

STATE OF HAWAII

Approved by the Board of Land and Natural Resources at its meeting held on December 8, 2006

By _____
WILLIAM J. AILA, JR.
Chairperson, Board of Land and Natural Resources

GRANTOR

APPROVED AS TO FORM:

JULIE H. CHINA
Deputy Attorney General

ALLEN D. ISRAEL, Trustee
aforesaid

Dated: _____

GRANTEE

STATE OF HAWAII

APPROVED AS TO LEGALITY, FORM, EXCEPTIONS, AND RESERVATIONS:

By _____
GLENN M. OKIMOTO
Director, Department of Transportation

ROWENA A. SOMERVILLE
Deputy Attorney General

DOT

Dated: _____

STATE OF HAWAII)
) SS.
CITY AND COUNTY OF HONOLULU)

Form
Tab 5

On this _____ day of _____, 2012, before me appeared WILLIAM J. AILA, JR., to me personally known, who being by me duly sworn or affirmed, did say that such person executed this _____ page GRANT OF NON-EXCLUSIVE EASEMENT, dated _____, 2011, in the Third Circuit of the State of Hawaii, as the free act and deed of such person, and if applicable in the capacity shown, having been duly authorized to execute such instrument in such capacity.

(Signature of Notary)

Print Name of Notary:

NOTARY PUBLIC, State of Hawaii

My commission expires: _____

31

³¹ The Grant will be signed under departmental seal. Notary is not required.

STATE OF _____)
_____) SS.
COUNTY _____)

On this _____ day of _____, 2012, before me personally appeared ALLEN D. ISRAEL, Trustee as aforesaid, to me personally known, who, being by me duly sworn or affirmed, did say that such person executed the foregoing instrument as the free act and deed of such person, and if applicable in the capacity shown, having been duly authorized to execute such instrument in such capacity.

(Official Stamp or Seal)

Signature:

Print Name:

Notary Public, State of

My commission expires:

STATE OF HAWAII _____)
_____) SS.
CITY AND COUNTY OF HONOLULU _____)

On this _____ day of _____, 2012, before me
appeared GLENN M. OKIMOTO, to me personally known, who being by
me duly sworn or affirmed, did say that such person executed this
_____ page GRANT OF NON-EXCLUSIVE EASEMENT, dated
_____, 2011, in the Third Circuit of the State of
Hawaii, as the free act and deed of such person, and if
applicable in the capacity shown, having been duly authorized to
execute such instrument in such capacity.

(Signature of Notary)

Print Name of Notary:

NOTARY PUBLIC, State of Hawaii

My commission expires:

32

³² The Grant will be signed under departmental seal. Notary is not required.

Exhibit "A"

NOTE: Reminder to attached Exhibit A: identified as "Perpetual Non-Exclusive Access and Utility Easement", containing an area of 1.868 acres, more particularly described in Exhibit "A", a survey description prepared by the Survey Division, Department of Accounting and General Services, State of Hawaii, designated C.S.F. No. 24,402 and dated March 1, 2007 (the "easement area")

Exhibit "B"

NOTE: Reminder to attach Exhibit B: identified as "Perpetual Non-Exclusive Access and Utility Easement", containing an area of 1.868 acres, as delineated on Exhibit "B", a survey map prepared by the Survey Division, Department of Accounting and General Services, State of Hawaii, designated C.S.F. No. 24,402 and dated March 1, 2007 (the "easement area")

Exhibit "C"

NOTE: Reminder to attach Exhibit C: Grantee's land: real property described as tax map key nos. (3) 7-1-003:004, 005, 006, and 11

Exhibit "D"

NOTE: Reminder to attach Exhibit D: State of Hawaii's land

Exhibit "E"

NOTE: Reminder to attach Exhibit E: delineated as the "Queen Kaahumanu Highway Access Area"

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LAND COURT SYSTEM) REGULAR SYSTEM

Return by Mail () Pickup () To:

Total Number of Pages:

LOD S-29,104 Tax Map Key No. (3)7-1-003:Por. 002

NON-EXCLUSIVE ASSIGNMENT OF GRANT OF LIMITED
 VEHICLE ACCESS RIGHTS AND CONSENT

WHEREAS, at its meeting held on December 8, 2006, under Agenda Item D-7 ("Board Submittal"), the Board of Land and Natural Resources approved a grant of a perpetual non-exclusive easement to Allen D. Israel, Trustee of the Kona Residence Trust, under that certain unrecorded Kona Residence Trust Revocable Trust Agreement dated December 16, 1988 ("KRT"); and

WHEREAS, the Board Submittal required that KRT obtain an approval from the State of Hawaii, Department of Transportation ("DOT"), Right-of-Way Branch, for vehicular access onto the Queen Kaahumanu Highway; and

WHEREAS, KRT obtained such approval and to effectuate such vehicular access, the State of Hawaii, through its Director of Transportation, as Grantor, and the State of Hawaii, by its Board of Land and Natural Resources, as Grantee, entered into

that certain Grant of Limited Vehicle Access Rights dated September 2, 2011, recorded in the Bureau of Conveyances of the State of Hawaii, as Document No. 2011-153289, which conveys to said Grantee vehicle access rights for egress from and ingress to Queen Kaahumanu Highway over and across Boundary 1, which is described and delineated in Exhibits A and B attached to said Grant of Limited Vehicular Access Rights ("Boundary 1"), a copy of which Grant of Limited Vehicular Access Rights is attached hereto as Exhibit "A" and made a part hereof; and

WHEREAS, that certain unrecorded Use and Occupancy Agreement dated January 27, 2012, but effective as of December 13, 2011, by and between the DOT, by its Director of Transportation, and KRT, provides for the use by KRT of certain land abutting Boundary 1 for ingress to and egress from the land described in Exhibit D and depicted on Exhibit E of that certain Grant of Non-Exclusive Easement entered into as of the _____ day of _____, 2012, by and between the State of Hawaii, by its Board of Land and Natural Resources, and KRT, which is recorded in said Bureau of Conveyances as Document No. _____ (the "Grant of Non-Exclusive Easement");

NOW THEREFORE, the State of Hawaii, by its Board of Land and Natural Resources (hereinafter referred to as the "Assignor"), pursuant to Section 171-13, Hawaii Revised Statutes, for good and valuable consideration, the receipt of which is hereby acknowledged, and of the terms, conditions and covenants herein contained and on the part of the Assignee to be observed and performed, does hereby sell, assign, transfer, set over, deliver and convey unto KRT (hereinafter alternatively referred to as the "Assignee"), having a post office address in care of Clifford J. Miller, P.O. Box 2800, Honolulu, Hawaii 96803-2800, a non-exclusive right to and interest in said Grant of Limited Vehicular Access Rights and to Boundary 1.

TO HAVE AND TO HOLD the same, together with any and all rights, privileges and appurtenances thereunto belonging or appertaining to or held and enjoyed therewith, in common with the Assignor and all others having an interest in said Grant of Limited Vehicular Access Rights and Boundary 1.

SUBJECT, HOWEVER, to the following terms, conditions and covenants.

1. The Assignor and the DOT reserve unto themselves, their successors and assigns, the full use and enjoyment of Boundary 1 and the right to grant to others rights and privileges for any and all purposes affecting Boundary 1; provided, however, that the rights herein reserved shall not be exercised by the Assignor and the DOT and similar assignee(s) of Assignor or the DOT in any manner which interferes unreasonably with the Assignee's right to the use of Boundary 1 assigned by the Assignor to the Assignee pursuant to this agreement.

2. The DOT has plans to upgrade Queen Kaahumanu Highway to a high-speed access-controlled facility and direct access onto Queen Kaahumanu Highway is to become restricted. In connection with the foregoing, the DOT and the Assignee entered into that certain Use and Occupancy Agreement No. 106 dated January 27, 2012, but effective as of December 13, 2011, which in Section 15 thereof sets forth the terms and conditions under which the DOT may replace Boundary 1 with an alternative access to Queen Kaahumanu Highway. If and when such alternative access is provided, the Assignee, for the Assignee and the Assignee's successors-in-trust, successors and assigns, agrees that the Assignee and the Assignee's successors-in-trust, successors and assigns, shall not demand from the Assignor or the DOT any monetary consideration or otherwise for the substitution of such alternative access for Boundary 1. Furthermore, the Assignee, for the Assignee and the Assignee's successors-in-trust, successors and assigns, shall indemnify, defend and hold harmless the Assignor and the DOT from any claims against Assignee, or Assignee's successors-in-trust, successors and assigns, due to such substitution of such alternative access affecting Assignee's and Assignee's successors-in-trust, successors or assigns or any entities of persons claiming by or through the Assignee or Assignee's successors-in-trust, successors or assigns.

3. The DOT consents to this assignment and approves of the terms and conditions of this agreement as indicated by its signature herein.

4. All provisions contained in this agreement shall be binding upon and inure to the benefit of the respective parties hereto and their successors, successors-in-trusts and permitted assigns, and shall run with Boundary 1 and inure to the benefit of and run with Assignee's land described in Exhibit C of the Grant of Non-Exclusive Easement.

5. This agreement may be executed in several counterparts, each of which shall be an original, but all of which shall constitute but one and the same instrument. Counterpart copies bearing facsimile signatures shall be binding upon the Assignor, DOT and Assignee, but the Assignor, the DOT and the Assignee shall exchange originally executed counterparts as soon as reasonably practicable.

6. This agreement shall be governed by and construed in accordance with the laws of the State of Hawaii.

[Remainder of page left intentionally blank]

IN WITNESS WHEREOF, the STATE OF HAWAII, by its Board of Land and Natural Resources, has caused the seal of the Department of Land and Natural Resources to be hereunto affixed and the parties hereto have caused this indenture to be executed as of the day, month, and year first above written.

STATE OF HAWAII

Approved by the Board of Land and Natural Resources at its meeting held on December 8, 2006

By WILLIAM J. AILA, JR.
Chairperson, Board of Land and Natural Resources

ASSIGNOR

APPROVED AS TO FORM:

JULIE H. CHINA
Deputy Attorney General

ALLEN D. ISRAEL, Trustee
aforesaid

Dated: _____

ASSIGNEE

STATE OF HAWAII

APPROVED AS TO LEGALITY, FORM, EXCEPTIONS, AND RESERVATIONS:

By GLENN M. OKIMOTO
Director, Department of Transportation

ROWENA A. SOMERVILLE
Deputy Attorney General

DOT

Dated: _____

STATE OF _____)
) SS.
COUNTY _____)

On this ____ day of _____, 2012, before me personally appeared ALLEN D. ISRAEL, Trustee as aforesaid, to me personally known, who, being by me duly sworn or affirmed, did say that such person executed the foregoing instrument as the free act and deed of such person, and if applicable in the capacity shown, having been duly authorized to execute such instrument in such capacity.

(Official Stamp or Seal)

Signature: _____

Print Name: _____

Notary Public, State of _____

My commission expires: _____

Exhibit "A"

(NOTE: reminder to attach a copy of the Grant of Limited
Vehicular Access Rights as Exhibit "A")

Re: Kona Residence Trust - DLNR - Grant of Non-Exclusive Easement; Non-Exclusive Assignment of Grant of Limited Vehicle Access Rights 📎

Russell Y Tsuji to: Russell Y Tsuji

04/13/2012 01:49 PM

Cc: Kevin E Moore, RKlein

Judge: I need to change our response in blue per Item C below, now in Red to conform to our discussion yesterday. I want that provision as is without limitation to reference to published rules.

Russell Y Tsuji/DLNR/StateHiUS

Russell Y
Tsuji/DLNR/StateHiUS
04/13/2012 12:08 PM

To RKlein@m4law.com
cc Kevin E Moore/DLNR/StateHiUS@StateHiUS
Subject Kona Residence Trust - DLNR - Grant of Non-Exclusive Easement; Non-Exclusive Assignment of Grant of Limited Vehicle Access Rights

Aloha Judge:

I think we're basically in agreement. We'll proceed to go to the Land Board on the 27th to bless the easement document which contains quite a few nonstandard provisions. We'll provide you a copy of the Submittal once we finalize. See comments in blue below.

"Robert G. Klein" <RKlein@m4law.com>



"Robert G. Klein"
<RKlein@m4law.com>
04/04/2012 02:21 PM

To "Russell.Y.Tsuji@hawaii.gov"
<Russell.Y.Tsuji@hawaii.gov>
cc
Subject Kona Residence Trust - DLNR - Grant of Non-Exclusive Easement; Non-Exclusive Assignment of Grant of Limited Vehicle Access Rights

Aloha Russell,

Attached to this e-mail are the following:

1. DLNR's most recent version of the Grant of Non-Exclusive Easement ("DLNR Grant") marked to show the most recent changes proposed by the DLNR and also marked to highlight the DLNR's footnotes explaining the same.
2. Clean version of the DLNR's most recent draft of the DLNR Grant.

EXHIBIT 5

3. DLNR's most recent version of the Non-Exclusive Assignment of Grant of Limited Vehicle Access Rights and Consent ("DLNR Assignment") marked to show the changes negotiated with DLNR since the last draft thereof provided by KRT to DLNR
4. Clean version of DLNR's most recent version of the DLNR Assignment.
5. The DLNR's most recent draft of the DLNR Assignment incorporating suggested changes that I recommend that DLNR be asked to make to the DLNR Assignment. This version of the DLNR Assignment is marked to show all such suggested changes ("KRT's Proposed Redraft of DLNR Assignment").

The following are my comments on the DLNR's most recent version of the DLNR Grant:

A. We accept:

- The addition to the 3rd paragraph on pg. 2;
- The change to Section 2.
- The additions to Section 4.
- The change to Section 5.
- The addition to Section 6.
- The deletion of old Section 15
- All the revisions to Section 28.6.
- The deletion of Section 28.9.

B. The addition of the new Section 15 needs to be clarified. Specifically, what does the phrase "public use or purposes" in the first sentence of Section 15 mean? Also, if DLNR could provide examples of what constitutes "public use or purpose", it might help KRT to evaluate the potential of the risk of loss of the easement "for public use or purposes" and also whether KRT would be considered a part of the "public" and therefore also entitled to use the easement area for the public use or purposes to which the withdrawn easement area may be put. [The Withdraw paragraph needs be retained as broad. Example: withdrawal of thousands of acres of pasture lands from about 4 or 5 pasture leases on the Big Island to provide for a mitigation area for the Palila bird; this was as the result of the Federal/State Highway project for the new Saddle Road.](#)

C. With regard to the deletion of the last part of Section 28.4, can the deleted language be reinstated if additional language were to be added to that deleted language under which KRT would agree to pay any consent fee chargeable by the Land Division. The reinstated phrase as revised would read as follows:

" . . . , and except for standard consent fees chargeable by Grantor for the same or similar requests for consent or approval pursuant to published rules and notices available to the general public, no consideration shall be required for any such consent

or approval.”

~~This proposal is acceptable to us. We have revised our redlined document to reflect the change.~~ Stet. I'd like it to remain as in the most current draft for the reasons discussed yesterday about not knowing how the practice of consents will be handled in the future years (this is a perpetual easement).

D. Footnote 4 (footnoting Section 10) needs to be clarified. If KRT were to withdraw its request to include Section 10 in the Grant, would that satisfy DLNR's concerns or would DLNR propose to substitute a different provision for a withdrawn Section 10? The Section 10 that KRT proposed was in substitution for a Section 10 in the DLNR's initial draft of the DLNR Grant, but the footnote could be construed to mean that if KRT were to withdraw its proposed Section 10, the objection that DLNR has to Section 10 would be eliminated. If DLNR would want to reinstate the original Section 10 in response to a proposal from KRT to delete the current version of Section 10 and if all other changes to the DLNR Grant set forth in DLNR's most recent version of the DLNR Grant were acceptable to KRT, it would be acceptable to reinstate the DLNR's old Section 10.

We are not certain what you are proposing. If KRT is willing to restore the original Section 10, then that is of course acceptable to us. But we are willing to take KRT's proposed alternate language to the Board.

E. Footnote 7 (footnoting the 2nd line in the 2nd paragraph of Section 18) needs to be clarified. Assuming the footnote is to the addition of the provision allowing KRT to deliver the insurance within 30 days of the effective date of the Grant instead of 15 days, then, if KRT were to withdraw its request to increase the time to 30 days, would that satisfy DLNR's concerns? Note also that the DLNR's original version of the sentence in which the reference to 15 days was garbled and DLNR should be asked to clarify that language.

If KRT is willing to accept 15 days, then there is no issue. However, we are willing to propose the longer 30-day period to the Board.

F. Footnotes 8 and 9 (footnoting Section 23) need to be clarified. If the word “promptly” is removed and the word “immediately” is reinstated, would that address DLNR's concerns?

If KRT is willing to reinstate "immediately" in this section, then there is no issue. However, we are willing to take the proposed alternate language to the Board.

With regard to the DLNR Assignment, if DLNR were to agree to the changes shown on KRT's Proposed Revision of DLNR Assignment, the DLNR Assignment would be acceptable as revised. I would like to see if we can get as much agreement as possible before going before the Board on 4/27 so that we can get a clean decision from the Board as to what language ought to be in the documents. To the extent we disagree perhaps we can just isolate those issues and give the Board a choice. Whatever they choose, that language can go into the docs with no return to the Board..and pau!

Your proposed changes to the Assignment are acceptable to us and we intend to present the form to the Board for approval.

Robert G. Klein
McCorriston Miller Mukai MacKinnon LLP
P.O. Box 2800
Honolulu, Hawaii 96803-2800
Dir. Tel. No.: (808) 529-7323
Dir. Fax No.: (808) 535-8014
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