

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

April 27, 2012

PSF No.: 11HD-191

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

Hawaii

Grant of After-the-Fact Term, Non-Exclusive Easement to LBUBS 2007 – C2
Alii Drive, LLC, for Drainage and Utility Purposes; Issuance of Right-of-Entry for
Survey, Mapping and Maintenance Purposes, Auhaueake, North Kona, Hawaii,
Tax Map Key: (3) 7-5-09:43 pors.

APPLICANT:

LBUBS 2007 – C2 Alii Drive, LLC, a Hawaii limited liability company.

LEGAL REFERENCE:

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

LOCATION:

Portion of Government lands of Ahuakeae situated at North Kona, Hawaii, identified by
Tax Map Key: (3) 7-5-09:43, as shown on the attached map labeled Exhibit A.

AREA:

Parcel Area: .338 acres, more or less.

Easement Areas/Widths:

Drainage or detention basin area:	7,085 sq. ft.
Drainage line width:	10 feet
Utility line widths:	5 feet

ZONING:

State Land Use District: Urban
County of Hawaii CZO: V-.75 (resort-hotel)

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 by General Lease No. S-5188, Brad Radcliffe Anderson, Cord Dominis Anderson, and D.G. Anderson, Lessee, for commercial purposes as may be permitted under the zoning ordinances of the County of Hawaii. Lease to expire on May 18, 2039.

CHARACTER OF USE:

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

EASEMENT TERM:

Twenty-seven (27) years. The easement term will be coterminous with General Lease No. S-5188.

ANNUAL RENTAL:

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:

The Final Environmental Assessment (FEA) for the Coconut Grove Marketplace project was published in the OEQC Bulletin on November 23, 1988 with a finding of no significant impact (FONSI). The FEA covered both the private and State lands on which the project was to be developed. The use proposed for the subject State parcel was a passive park with a series of fishponds and botanical gardens. While no fishponds or botanical gardens were placed on the parcel, it has been used as a passive park. The present request for grant of easements relates to a drainage system and utilities that have been in place on the property for more than ten years. No new construction is required in conjunction with the grant of easement. Staff believes the present request is therefore exempt from HRS Chapter 343. See Exhibit B attached.

DCCA VERIFICATION:

Place of business registration confirmed:	YES <u>X</u>	NO <u>__</u>
Registered business name confirmed:	YES <u>X</u>	NO <u>__</u>
Applicant in good standing confirmed:	YES <u>X</u>	NO <u>__</u>

APPLICANT REQUIREMENTS:

Applicant shall be required to:

- 1) Pay for an appraisal to determine one-time payment for the drainage and utility easements, and pay the appraised value in full;
- 2) Pay for an appraisal to determine whether the rent payable under General Lease No. S-5188 requires downward adjustment as a result of the placement of the drainage and utility easements on the land;
- 3) Provide survey maps and descriptions according to State DAGS standards and at Applicant's own cost; and
- 4) Obtain a title report to ascertain ownership, where necessary, at Applicant's own cost and subject to review and approval by the Department.

REMARKS:

LBUBS 2007 - C2 Alii Drive, LLC (Applicant) is the owner of the Coconut Grove Marketplace (Marketplace) retail complex situated in Kailua-Kona on Tax Map Keys: (3) 7-5-9:25, 27 & 28 (together, the Private Parcels). Applicant acquired the fee interest

in Parcels 25 and 28, and the leasehold interest in Parcel 27, through a foreclosure action against their prior owner, LRG Real Estate LP (LRG), a Hawaii limited partnership. The Private Parcels surround the subject State parcel, designated as TMK: (3) 7-5-9:43, on three sides. See map attached as Exhibit A.

When the Marketplace was initially constructed in the late 1990s, it included the State parcel through General Lease No. S-5188, and the State parcel and Private Parcels were developed as an integrated complex. At that time, there was a unity of title to the Private Parcels and the leasehold interest in the State parcel. However, that unity ended due to the foreclosure action against LRG and other parties.

At the present time, the lessees under General Lease S-5188 object to Applicant using the lease premises as part of the Marketplace, without compensating lessees for that use in any way. Applicant has submitted an application for access, drainage and utility easements over the State land to allow it to continue to use pathways, drainage features and utility lines that are already in place. A review of the lease history is necessary to put Applicant's request in context.

Lease History

At its meeting of June 24, 1988, Item F-5, the Board approved the sale of a lease of the subject State land at public auction for the purpose of "[b]y itself or in consolidation with abutting parcels, commercial use(s) as may be permitted under the zoning ordinance of the County of Hawaii." General Lease No. S-5188 covering Tax Map Key: (3) 7-5-09:43 (Parcel 43) was thereafter sold at public auction held on May 18, 1989. Lanihau Partners L.P. (Lanihau), as the successful bidder, was issued a 50-year lease for commercial purposes.

According to County of Hawaii Planning Department records, the Planning Commission issued SMA Use Permit No. 277 on December 28, 1988 to allow for the construction of a commercial specialty center and related improvements on the Private Parcels. After Lanihau acquired the lease of Parcel 43 at auction, the Planning Commission on September 27, 1990 approved an amendment to SMA Use Permit No. 277 to allow Parcel 43 to be developed as a passive park in the center of the commercial complex. General Lease No. S-5188 itself sets forth requirements pertaining to open space on the parcel at Section 37:

Lessee shall at its own expense, develop and maintain a landscaped, coastal-view park on not less than fifty percent (50%) of the leased premises in accordance with plans and specifications submitted by the Lessee to and approved by the Chairperson prior to construction.

Section 34 of the lease required lessee to expend not less than \$50,000 for on-site improvements within two years of May 19, 1989, which was the commencement date of the lease. The lease additionally required the lessee to post a performance bond in the amount of \$50,000 to guarantee construction of the improvements. On or about October 29, 1990, the Chairperson approved preliminary plans for the property that showed walkways, ponds and two small gazebos proposed for construction. However, the improvements were not constructed within the two-year deadline.

At its meeting of July 26, 1991, the Board consented to Lanihau's sublease of the land to Old Kailua Town Associates (OKTA). The Sublease was dated November 13, 1989, and the Chairperson signed the consent thereto on December 20, 1991. By mutual Cancellation and Surrender of Sublease dated April 6, 1993, Lanihau and OKTA cancelled the Sublease.

The file contains an inspection report dated March 10, 1998 stating in part "State owned area graded w/utility and foundation work begun. Buildings surrounding property partially framed." Apparently, no ponds or gazebos were ever constructed on parcel 43. At its meeting of April 23, 1999, Item D-1, the Land Board approved the release of the \$50,000 performance bond for the construction of improvements. The staff submittal states in part: "A volleyball court (sand type) ha[s] been built and the grounds ha[ve] been landscaped, per March 2, 1999 inspection." The file contains no inspection report for March 2, 1999. Nor does the file contain any revised plans showing departure from the preliminary plans approved by the Chairperson in 1990.

Although not mentioned in the staff submittal for the April 23, 1999 meeting, the volleyball court serves as a component of a larger drainage system. In heavy rains, an underground system of drains and pipes collects surface runoff at the surrounding Marketplace, as well as Kuakini Highway, and directs it to a discharge point on Parcel 43. Water exits the discharge point and enters the sand volleyball court and surrounding area, which functions as a detention basin. Staff understands that beneath the sand of the volleyball court is a porous lining over an aggregate base that allows the water to percolate into the ground.

At its meeting of May 15, 1998, the Board consented to the assignment of General Lease No. S-5188 from Lanihau, as assignor, to L. Radcliffe Greenwell, as Trustee under the certain unrecorded L. Radcliffe Greenwell Revocable Living Trust Agreement dated April 28, 1983 (Radcliffe Greenwell Trust), as assignee. The Board additionally consented to the assignment of the lease from the Radcliffe Greenwell Trust, as assignor, to Patricia G. Greenwell, as Trustee under the certain unrecorded Patricia G. Greenwell Revocable Living Trust Agreement dated May 5, 1983 (Patricia Greenwell Trust), as assignee. Further, the Board consented to a sublease by Patricia Greenwell Trust, as sublessor, to Brian Anderson and Joan Greenwell Anderson, as sublessee (Brian and Joan

Anderson). The Chairperson signed the necessary consent instruments for these transactions. The sublease to Brian and Joan Anderson was apparently cancelled in 2010.

At its meeting of January 8, 2010, Item D-15, the Board consented to the assignment of General Lease No. S-5188 from the Patricia Greenwell Trust to Brad Radcliffe Anderson, Cord Dominis Anderson, and D.G. Anderson (Lessees). The Chairperson signed the consent to the assignment on August 31, 2010.

Ownership of the Private Parcels

According to public records, at the time the Marketplace was constructed, the Private Parcels were owned by the Patricia Greenwell Trust and later by LRG Real Estate LP. Records of the Department of Commerce and Consumer Affairs show that LRG was formed on December 24, 1998. The current general partner of LRG is Iolani CGM LLC, a member-managed Hawaii limited liability company whose member is Brad Anderson.

Analysis of Easement Request

To summarize the foregoing, at the time the drainage system, utility lines and pathways were developed on the subject State Parcel 43, the owner of the Private Parcels was Patricia Greenwell Trust or LRG, the lessee of Parcel 43 was Patricia Greenwell Trust, and the sublessee of Parcel 43 was Brian and Joan Anderson. Ideally, what should have happened prior to the construction of the improvements on Parcel 43 is the submission of detailed plans of the construction to Land Division. A review of the plans would then have shown the drainage system, utility lines and other features serving the adjoining Private Parcels, and Land Division staff could have alerted the parties that easements should be secured for these items. This did not happen.

Now the ownership of the Private Parcels has changed as a result of the foreclosure action. The Lessees of Parcel 43 have requested Applicant to remove the drainage system from the lease premises. An engineering report dated March 3, 2010 estimates the cost of the relocation of the drainage system at \$763,585. See Exhibit C attached.

Staff's assessment is that the re-design of the drainage system to remove it from Parcel 43 is not the preferred solution. The lease premises were developed as an integral part of the Marketplace. To physically sever Parcel 43 from the surrounding Private Parcels, including the removal of the underground drainage system and utilities, does not seem to promote anyone's interest. Staff is therefore recommending that the requested easements for drainage and utilities be issued after-the-fact subject to Applicant fulfilling the Applicant Requirements above. Additionally, staff is including a requirement that Applicant carry liability insurance that names both the State and the Lessees as additional insureds. The easement would be coterminous with General Lease No. S-5188, so that at

lease expiration the use of the State land can be re-evaluated.

The alignments and locations of the drainage and utility easements are approximately as shown on Exhibits D and E attached. Exhibit E shows that the drainage easement will encumber approximately 7,085 square feet. The underground pipeline for the drain will need a 10-foot wide easement, and the utility lines will require 5-foot wide easements. As is evident from Exhibit E, these easements will encumber a substantial area of the lease premises.

For two reasons, staff is recommending against the issuance of access easements over the pathways on Parcel 43. First, as a policy matter, the Board generally issues access easements only to landlocked private property. In the present case, the Private Parcels are not landlocked. Rather, the Applicant is seeking the right to use existing paved pathways that cross Parcel 43 in various directions. See Exhibit E attached.

Second, to the extent Parcel 43 is maintained as a coastal-view park (the lease requires at least 50% of the premises to be maintained as such a park), Applicant, its tenants and patrons have the same right to transit the park as the public does. Applicant has not shown why it needs the right to use all of the pathways on Parcel 43, including those that may not be located on the portion of the property devoted to a coastal-view park.

Applicant will need to enter the lease premises to properly map the drainage system and utility lines, and possibly to maintain the same. Staff is therefore recommending the issuance of a six-month right-of-entry for these purposes, which the Chairperson may extend for good cause.

The Lessees of Parcel 43 object to the grant of the easement on multiple grounds that are detailed in Lessee Andy Anderson's email of March 5, 2012, a copy of which (including attachments) is submitted herewith as Exhibit F. Staff has reviewed the objections and does not believe that Lessees' arguments justify the denial of the grant of easement, or the removal of the infrastructure previously installed in Parcel 43.

Staff recognizes that the grant of the easement may impact the fair market value of the lease premises and the rent payable under General Lease No. S-5188. The current rent under the lease is \$31,150 per year. The appraisal report that was prepared for the last rental reopening for the lease in 2009 did not factor in the burden of the drainage feature or utility lines. The report states in part that a "[r]eview of the Tax Map and Legal Description indicate[s] that there are no easement or restrictions affecting the property except the ground lease. . . . The land is improved with a sand volleyball court with adjacent landscaping including palm trees, shrubs and grass. There are also bleachers and land terracing." Accordingly, staff has included an Applicant Requirement above that Applicant pay for an appraisal to determine the fair market value of the lease premises

with the drainage and utility easements encumbering the land. In the event that such an appraisal results in a downward adjustment of the rent payable under the lease, staff will need to return to the Board with a recommendation for a rent reduction under General Lease No. S-5188.

On March 7, 2012, staff solicited comments on the proposed grant of easement from the State and County agencies identified below, with the results indicated.

Agency	Response
State:	
DLNR – Historic Preservation	“Because there is no new construction, there is no potential for Historic properties to be adversely affected.”
DLNR – Engineering	No response.
Department of Health, Clean Water Branch	No response.
Office of Hawaiian Affairs	No response.
County:	
Planning	No comments.
Public Works	No response.
Property Management	No objections.
Water Supply	No objections.

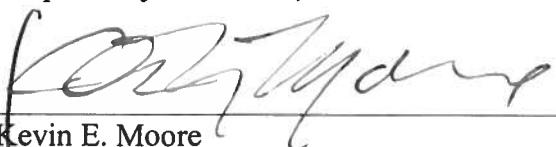
RECOMMENDATION: That the Board:

1. Declare that, after considering the potential effects of the proposed disposition as provided by Chapter 343, HRS, and Chapter 11-200, HAR, this project will probably have minimal or no significant effect on the environment and is therefore exempt from the preparation of an environmental assessment.
2. Authorize the subject requests to be applicable in the event of a change in the ownership of the abutting parcels described as Tax Map Key: (3) 7-5-9:25 & 28, provided the succeeding owner has not had a lease, permit, easement or other disposition of State lands terminated within the last five (5) years due to non-compliance with such terms and conditions.
3. Subject to the Applicant fulfilling all of the Applicant requirements listed above, authorize the issuance of a term non-exclusive easement to LBUBS 2007 – C2 Alii Drive, LLC, covering the subject area for drainage and utility purposes under the terms and conditions cited above, which are by this reference incorporated herein and further subject to the following:

- A. The standard terms and conditions of the most current term easement document form, as may be amended from time to time;
 - B. The easement shall run with the land and shall inure to the benefit of the real property described as Tax Map Key: (3) 7-5-9:25 & 28, provided however: (1) it is specifically understood and agreed that the easement shall immediately cease to run with the land upon the expiration or other termination or abandonment of the easement; and (2) if and when the easement is sold, assigned, conveyed, or otherwise transferred, the Grantee shall notify the Grantee's successors or assigns of the insurance requirement in writing, separate and apart from this easement document;
 - C. Liability insurance in the amount required by the easement instrument shall be maintained with the Lessees under General Lease No. S-5188, as well as the State, named as additional insureds;
 - 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.
4. Grant a right-of-entry to Applicant, its consultants, contractors, and/or persons acting for or on its behalf, onto the subject land under the terms and conditions cited above, which are by this reference incorporated herein and subject further to the following:
- A. The standard terms and conditions of the most current right-of-entry form, as may be amended from time to time;
 - B. The right-of-entry shall be for an initial term of six months. Additional six-months extensions may be granted by the Chairperson for good cause shown; and

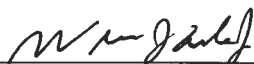
- C. The Department of Land and Natural Resources reserves the right to impose additional terms and conditions at any time if it deems necessary while this right-of-entry is in force.

Respectfully Submitted,



Kevin E. Moore
Assistant Administrator

APPROVED FOR SUBMITTAL:



William J. Aila, Jr., Chairperson

N

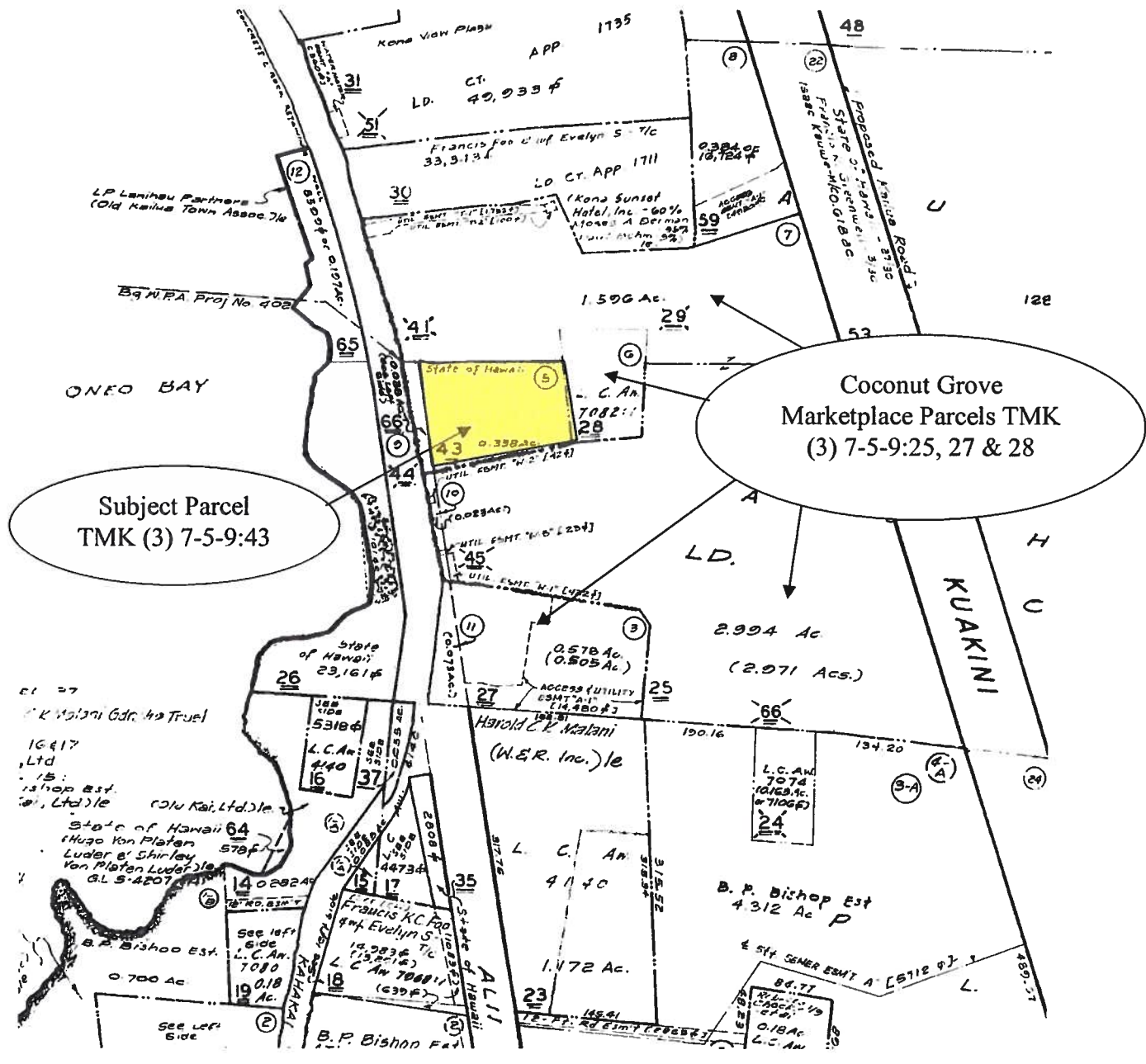
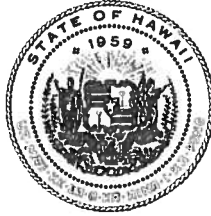


EXHIBIT A

NEIL ABERCROMBIE
GOVERNOR OF HAWAII



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

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

GUY H. KAULUKUKUI
FIRST DEPUTY

WILLIAM M. TAM
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

EXEMPTION NOTIFICATION

From the preparation of an environmental assessment under the authority of Chapter 343, HRS and Chapter 11-200, HAR

Project Title: Grant of After-the-Fact Term, Non-Exclusive Easement to LBUBS 2007 – C2 Alii Drive, LLC, for Drainage and Utility Purposes; Issuance of Right-of-Entry for Survey, Mapping and Maintenance Purposes

Project Number: PSF No. 11HD-191

Project Location: Auhaueake, North Kona, Hawaii, Tax Map Key: (3) 7-5-09:43 pors.

Project Description: Issue term, non-exclusive easement to private property owner for drainage and utility easements covering existing facilities on adjoining State land.

Consulted Parties: County of Hawaii Planning Department; and others

Exemption Class No.: 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 under the following:

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

Description: This exemption is appropriate because the proposed after-the-fact grant of easement will cover existing drainage and utility systems constructed pursuant to a Final Environmental Assessment published in the OEQC Bulletin on November 23, 1988 with a finding of no significant impact. The grant of the easement would not result in an expansion in use of the area. If further actions are taken that result in a material change, applicant LBUBS 2007 – C2 Alii Drive, LLC will be required to be in compliance with Chapter 343.

EXHIBIT B

Recommendation:

The issuance, after-the-fact, of a term, non-exclusive easement for drainage and utilities over a portion the land in itself will probably have minimal or no significant effect on the environment. It is recommended that the Board of Land and Natural Resources find that the action is exempt from the preparation of an environmental assessment. Inasmuch as the Chapter 343 environmental requirements apply to any future use of the lands, applicant shall be responsible for compliance with Chapter 343, HRS, as amended.



William J. Aila, Jr., Chairperson

4/4/12

Date



**DRAINAGE SYSTEM REPLACEMENT REPORT
COCONUT GROVE MARKETPLACE**

I. PURPOSE

The purpose of this report is to prepare an assessment of cost and a scope of work for replacing the drainage system which utilizes the State land within the project. In addition, the costs of the replacement of utilities if this area can no longer be used for drainage purposes will be assessed.

II. PROJECT DESCRIPTION

Coconut Grove Marketplace consists of three fee-simple parcels of land as well as a parcel of State land under lease. Historically, drainage from mauka Kuakini Highway found its way to the ocean through this parcel. The State parcel is surrounded by private property north, south and mauka and Alii Drive on the makai side. It was the understanding at the time of design and construction of the property that no structures could be constructed in this area. However, it could be used for recreational activities and drainage.

It was decided during the course of design to utilize a portion of the area for a volleyball court (beach volleyball). The remaining area was to be open space. Under the volleyball court is a large french drain. Drainage from mauka Kuakini Highway, a portion of the northerly parking lot, the areas around the buildings north and south, and the roofs of the buildings north and south of the volleyball court all drain to this area.

Additionally, a sewer line crosses this area and also a gas line, which line may encroach into this parcel due to its proximity outside and adjacent to the property lines, both of which serve the Outback Restaurant, Oceans, Jack's Dive Locker and the old Hardrock Café soon to reopen as Humpy's Alehouse.

III. METHODOLOGY

In order to determine a cost for replacing the volleyball court as a drainage system, it was necessary to prepare a new drainage report based upon the facilities now in place at final buildout.

This report reflects the changes which have been made as the project proceeded from phase to phase. The methods used are standard Natural Resources Conservation Service

methodology. Since the project has experienced a 25-year storm and worked well under these conditions, a 25-year storm is used to ensure that the project continues to have the same protection if these changes are implemented. The project was divided into sub areas for the purpose of computing runoff. These areas are A through H and the area mauka of Kuakini Highway. The following is a tabulation of the areas with peak quantities from the various areas (see the appendix for a map of the drainage areas).

TABLE 1 RUNOFF CALCULATIONS

<i>Area</i>	<i>Size (Acre)</i>	<i>Hydraulic Length (Feet)</i>	<i>Slope % (S)</i>	<i>Curve Number (CN)</i>	<i>Quantity (Q₂₅)</i>
A	1.06	280	8	95	4.94
B	0.96	300	8	95	4.47
C	0.68	220	10	95	3.17
D	0.26	220	11	95	1.21
E	0.53	260	8	95	2.47
F	0.42	200	8	95	1.96
G	0.54	160	6	95	2.51
H	0.36	150	1	50	0.20
Mauka	20.19	1800	12	72	37.95

The areas are in acres, L is the hydraulic length of each drainage area, S is the approximate slope, CN is the curve number representing the runoff coefficient and Q₂₅ is the peak runoff.

Areas A, D and E do not contribute to the volleyball court drain. They have their own drywells.

The mauka area and Areas B and C contribute through a pipeline from the culvert in Kuakini Highway. Areas F and G contribute to the volleyball court and Area H is where the volleyball court is located.

The total flow to the volleyball court is a peak flow of 45.59 cfs with the mauka area and Area B comprising most of this with 42.42cfs.

The standard method of drainage for this area is the use of drywells and sumps. Drywells are assumed to be able to handle peak flows of 6 cfs and sumps, 2 cfs. In order to effectively

handle the flow from the mauka area and Area B, seven drywells would need to be constructed in Area B. This would theoretically handle 42 cfs with 0.42 overflowing into Area C.

Area C has problems as to where to put runoff. The best location would be at the location of the catch basin which is on the drainline from Area B to the volleyball court. The flow into this drywell would be $0.42 + 3.17$ for 3.59 cfs. This gives a slight safety factor to the system.

In Area F, the flow was computed to be 1.96 cfs. This can be handled by a sump to be constructed in front of the building that was the Hard Rock Café.

In Area G, the flow was computed to be 2.51 cfs. This can be handled by one drywell or two sumps. Since all work in this area would have to be done in very close quarters, it would in all likelihood be better to construct one drywell at a location just outside of Area H and northerly of the sewerline. This will be difficult, if attempted.

In addition, in Area H, a sewer will have to be relocated. This will be difficult work due to other utilities in the area.

It should be understood that all drywells must be permitted by the State Department of Health. There is a filing fee of \$100.00 per drywell. This process is quite lengthy generally taking fifteen to eighteen months. Drywell permit applications are published in local newspapers. If there are any dissenting comments registered with the Department of Health, a public hearing will be held. This could create additional expenses in preparing for a public hearing.

IV. COSTS

Costs for this work were assessed using the latest available costs for the various items—drywells, sumps, sewerline and sewer manholes. The following is a breakdown of these costs.

Table 2 Engineer's Opinion of Probable Cost

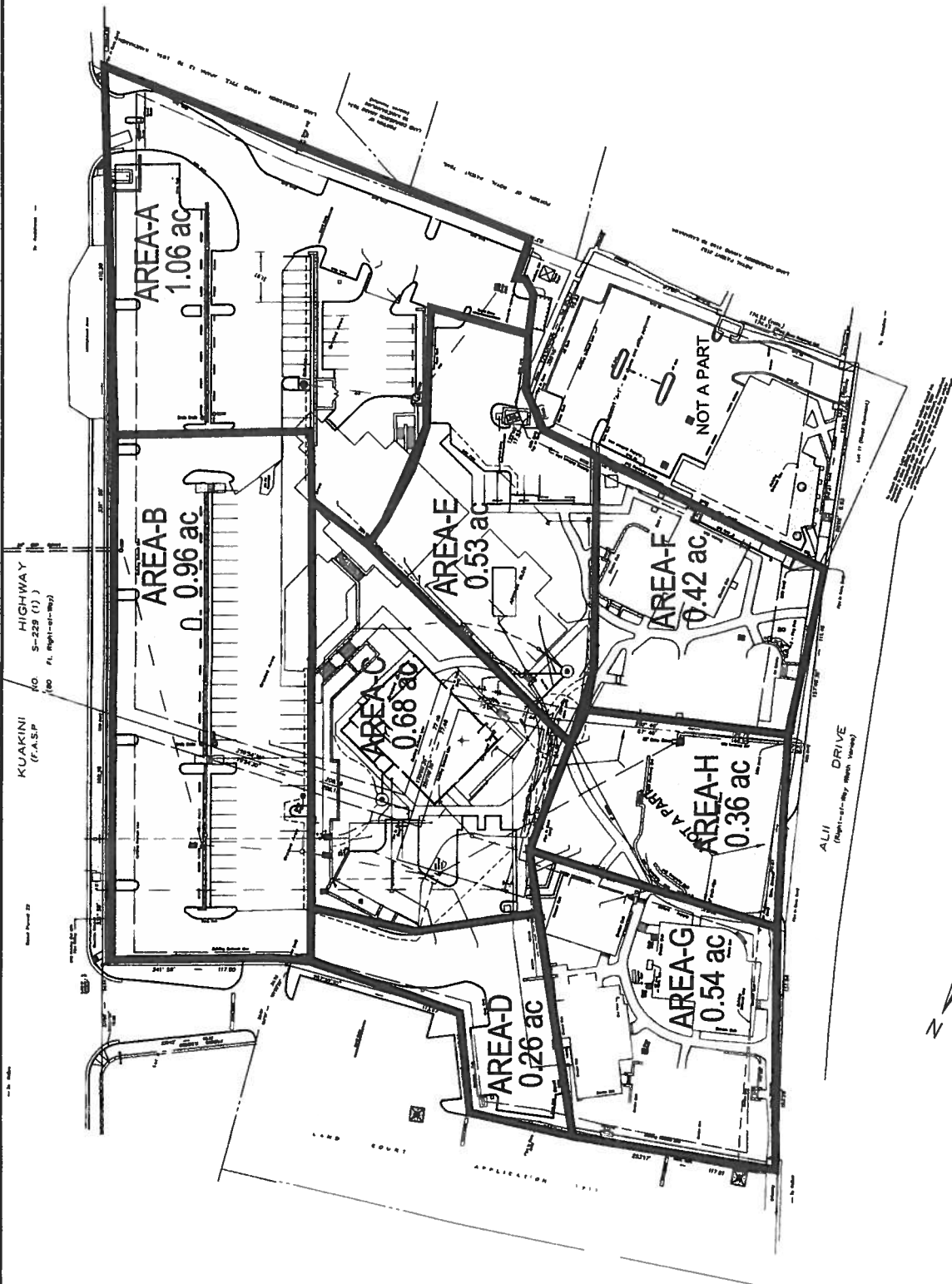
<i>Item</i>	<i>Quantity</i>	<i>Cost per Item</i>	<i>Amount</i>
Mobilization	Lump Sum		\$10,000.00
Drywell	9	\$61,954.00	\$557,586.00
Sump	1	\$24,780.00	\$24,780.00
Sewer line	110 LF	\$145/LF	\$15,950.00

Sewer Manhole	2	\$10,200.00	\$20,400.00
Removal of Portion Existing Sewer	110 LF	\$35.00	\$3,850.00
Removal of Por Existing Storm Drain	70 LF	\$45.00	\$3,150.00
Drywell Permitting & Testing	Lump Sum		\$10,000.00
Repair & Replace Sidewalks	400 ft ²	\$30.00	\$12,000.00
		Sub Total	\$657,716.00
		Contingency 10%	\$65,772.00
		Total	\$723,488.00
		GET	\$30,097.00
		Grand Total	\$753,585.00
Move Gas Line, if necessary		Allowance	\$10,000.00
Grand Total with Allowance			\$763,585.00

V. CONCLUSION

If the existing drainage system is to be replaced, the costs will be very high. These costs do not take into consideration the loss of business and disruption to the complex that will occur. Not only could there be significant business loss, but also tenant loss.

It is our considered opinion that this drainage replacement should only be considered as a last resort. As stated above, there is a considerable amount of time before any construction can take place. If a speedy solution is anticipated, the alternative drainage system is not the answer.



SHEET
DR-1
1 OF 2
DATE: 11/24/2020

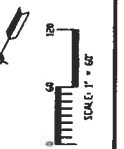
COCONUT GROVE
DRAINAGE REPORT PLAN

NO.	REVISIONS	DATE

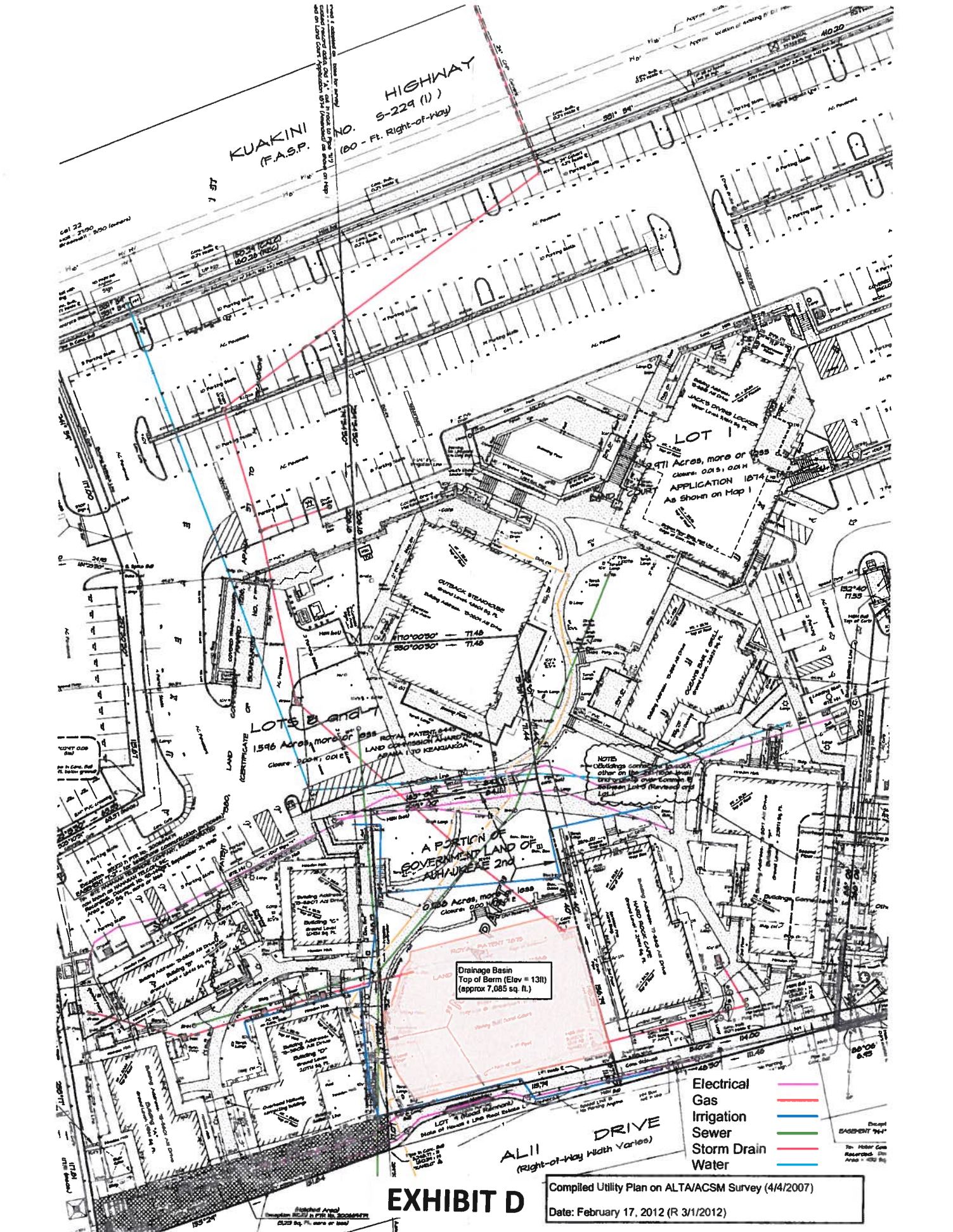
WITCHER ENGINEERING LLP
Consulting Civil Engineers
Construction Managers



P.O. Box 348
Honolulu, Hawaii 96725
(808) 334-0322



DATE: 11/24/2020
PROJECT: COCONUT GROVE DRAINAGE REPORT PLAN
DRAWN BY: [Name]
CHECKED BY: [Name]
SCALE: 1" = 60'



KUAKINI
(F.A.S.P.)
NO. S-229 (11)
100 - Ft. Right-of-Way

LOT 1
0.971 Acres, more or less
Close: 0.01 S, 0.01 H
APPLICATION 1874
As Shown on Map 1

LOTS 2 and 3
1.546 Acres, more or less
Close: 0.00 H, 0.01 E

A PORTION OF
GOVERNMENT LAND OF
AHAHIKIKE 2nd

0.180 Acres, more or less
Close: 0.00 H, 0.01 E

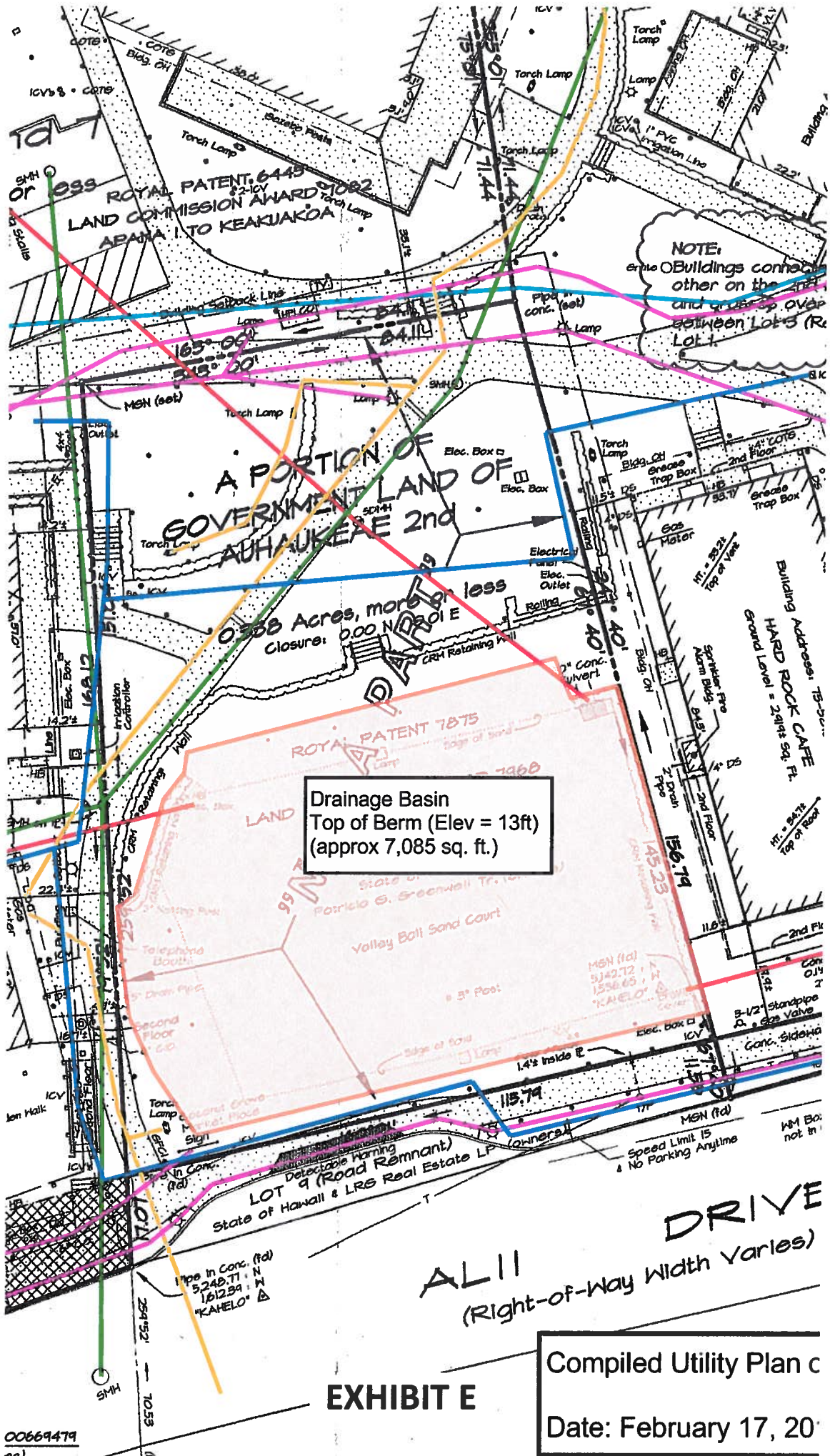
Drainage Basin
Top of Berm (Elev = 131)
(approx 7,085 sq. ft.)

ALII DRIVE
(Right-of-Way Width Varies)

- Electrical
- Gas
- Irrigation
- Sewer
- Storm Drain
- Water

EXHIBIT D

Compiled Utility Plan on ALTA/ACSM Survey (4/4/2007)
Date: February 17, 2012 (R 3/1/2012)



Drainage Basin
 Top of Berm (Elev = 13ft)
 (approx 7,085 sq. ft.)

ALII DRIVE
 (Right-of-Way Width Varies)

EXHIBIT E

Compiled Utility Plan c
 Date: February 17, 20



FW: Response / Information to Mr. Russell Tsuji DLNR with ATTACHMENTS
andy anderson to: Russell.Y.Tsuji, Kevin.E.Moore, Heit Gordon 03/05/2012 03:35 PM
Cc: "Cord Anderson", "Brad Anderson"

[attachment "SALES DISCLAIMER AND AGREEMENT REQUIRED BY RECEIVER.pdf" deleted by Kevin E Moore/DLNR/StateHiUS]
[attachment "KURREN ORDER.pdf" deleted by Kevin E Moore/DLNR/StateHiUS]
[attachment "RECEIVER REPLY MEMO FILED 1-7-10.pdf" deleted by Kevin E Moore/DLNR/StateHiUS]
[attachment "LBUBS LETTER DATED 11-2-11 TO COUNTY.pdf" deleted by Kevin E Moore/DLNR/StateHiUS]
[attachment "11-9-11 ANDERSON LETTER TO COUNTY.pdf" deleted by Kevin E Moore/DLNR/StateHiUS]
March 5, 2012

D. G. Anderson

Honolulu, Hawaii

96816

Russell,

Thank you for your March 4, 2012 e-mail concerning the draft Staff Recommendation. First, let me thank you and your staff for the work you have done on this matter, and I apologize for your having to respond on a weekend. However, as you can well imagine, this matter is of prime importance to me, and my grandsons.

Second, I do not believe I have said nor done anything which would not withstand public scrutiny. In other words, the positions I have taken in the past are fully disclosed to, and are part of the records of, both the State and the County of Hawai'i ("County"), as well as LBUBS and its attorneys. Thus, while I appreciate your concern regarding the potential of litigation, I am more concerned about making certain that you and your staff has all of the facts before making a recommendation to the Board (which I understand has the final "say" in this matter).

EXHIBIT F

Third, I would appreciate you and Mr. Moore taking into account the following:

1. Attached is my letter dated November 9, 2011 (without exhibits) sent to the County in response to LBUBS's letter dated November 2, 2011 letter (copy attached) explaining to the County why I felt LBUBS's position regarding the State Parcel (Parcel 43) was baseless.

As you can see in LBUBS's November 2 letter, it took the same position it is taking with regarding to its request for the grant of an after the fact easement to allow it to continue to use the State Parcel -- the State Parcel was developed as an integral part of the Coconut Grove Marketplace ("CGMP Center"), and therefore, it has a right to continue the its use its use for the benefit of the CGMP Center. The County, by approving our request, essentially ignored the position taken by LBUBS, and recognized that LBUBS had no right to use the State Parcel.

In addition, as noted in my November 9 letter, LBUBS and the Receiver of the CGMP Center took the same position in Federal Court as part of the Foreclosure Action. See, the Receiver's Reply Memorandum filed on January 7, 2010 (the Receiver's law firm is the same law firm retained by LBUBS in this matter) at Pp. 4 to 6. A copy of the Reply Memorandum is attached. In his written decision, Magistrate Judge Kurren specifically found that the Receiver "has not interest in the Greenwell Trust's leasehold interest in the State Parcel." Order Denying Receiver's Motion to Enforce Order Granting Plaintiff's Ex Parte Motion for Appointment of a Receiver Entered on March 20, 2009 and to Hold Certain Parties in Contempt filed on January 15, 2010 ("Kurren Order") at Pp. 2-3. A copy of the Kurren Order is attached. Thus, the issue of whether the "common" ownership or development of the State Parcel as part of the CGMP Center gives LBUBS any right to the State Parcel has actually been litigated, and Magistrate Judge Kurren ruled that the Receiver (and consequently, LBUBS) has no interest in the State Parcel for any purpose.

More importantly, in selling the CGMP Center, the Receiver, in his capacity as the Commissioner, in marketing the CGMP Center, issued an Agreement Regarding Confidentiality, Disclaimer of Warranties and TMK (3) 7-5-009-043 ("Disclaimer"). A copy of the Disclaimer I received is attached. In Paragraph 6, after outlining our ongoing disputes regarding the use of the State Parcel (and referring to the Kurren Order), the Commissioner specifically states that:

"Interested Party hereby acknowledges that the Property to be sold at the foreclosure will NOT include any rights, title or interest in or relating to Parcel 43."

In other words, all potential buyers, including LBUBS acknowledged that the foreclosure sale did not include any interest in the State Parcel, and each was advised that there were issues regarding the use of the State Parcel in conjunction with the CGMP Center. Therefore, LBUBS has no basis to apply for an after the fact easement since it agreed that the property rights it acquired from the Commissioner did not include any interest (legal or equitable) in the State Parcel.

Thus, based on the foregoing, (1) LBUBS acquired no rights in and to the State Parcel (including any right to use the existing facilities located on the State Parcel), (2) LBUBS agreed that the foreclosure sale did not include any such rights and (3) the issue of incorporation of the State Parcel as part of the CGMP Center was actually litigated in front of Magistrate Judge Kurren, and the Receiver and LBUBS lost. As a result, LBUBS has no legal right to use the State Parcel for any purpose, including flood control.

2. As a result of the foregoing, in spite of LBUBS having no right to use the State Parcel, it is now seeking the grant of an easement to allow it to keep using the drainage and other facilities located on the State Parcel based on, again, the "common" development of the CGMP Center. The central conclusion reached by Staff was that "the re-design of the drainage system to remove it from [the State Parcel] is not the preferred solution." Draft Recommendation at P. 6. However, I strongly believe that the Staff's determination that the re-design of the drainage system to remove it from the State Parcel is not the "preferred solution" fails to take into account the following:

a. LBUBS's agreement at the time it acquired the CGMP Center that it was not acquiring any rights to the State Parcel. This was an essential term of the sale of the CGMP Center as noted above.

b. LBUBS knew that it could not use the State Parcel without the agreement

of the current owners of the lease. In fact, the Receiver and LBUBS objected to the assignment of the State Parcel lease to my grandsons and me, and they lost since Magistrate Kurren determined that the Receiver had no interest in the State Parcel.

c. More importantly, by granting an after the fact easements to LBUBS, the State is hampering our ability to develop the State Parcel so that it can be used for its intended purpose -- commercial uses generating revenues for us, and taxes for the County and the State. By having the easements located in the middle of the State Parcel, the State would have rendered the State Parcel useless to us.

d. Finally, and most importantly, by granting easements at this time, the State is creating an encumbrance on our property -- the lease. In other words, we cannot use the State Parcel for its intended commercial purposes, and we cannot develop any improvements (subject to consent by the State, and compliance with the zoning and other County ordinances). In effect, we will not have quiet enjoyment of the State Parcel, and the State is, in effect, (i) countermanding the Kurren Order, and giving LBUBS something that the Federal Court would not, i.e., rights in and to the State Parcel, (ii) ignoring the position taken by the County, (iii) resolving what is a private dispute (which has already been litigated) between LBUBS and me and (iv) creating an after the fact encumbrance on my leasehold rights without proper compensation to me (which could, among other things, be construed to be a "taking"). Thus, I do not believe that the State should be involved in determining what a "preferred solution" to a private dispute should be. If LBUBS has no rights in and to the State Parcel (as determined by Magistrate Judge Kurren, and as it agreed to in buying the CGMP Center from the Commissioner/Receiver), the State should not create such rights in order to solve what is essentially a private dispute, whether or not such a solution is "preferred."

I apologize for the length of this e-mail, but I wanted to thoroughly explain to both you and Mr. Moore why I believe that the Draft Recommendation does not take into account factual issues which are pertinent to this matter. I hope you will reconsider, or at the very least, provide this e-mail and attachments to the Board as part of the documentation that it must consider in reaching its decision. If you wish further information or documents, I will be glad to provide them to you.

Thank you for your consideration of the foregoing. We would appreciate being notified as to when this will be before the DLNR Board?

D.G. "Andy" Anderson

From: Russell.Y.Tsuji@hawaii.gov [mailto:Russell.Y.Tsuji@hawaii.gov]
Sent: Sunday, March 04, 2012 10:15 AM
To: andy anderson
Cc: 'Heit Gordon'; Kevin.E.Moore@hawaii.gov; Paul H. Sato
Subject: RE: Coconut Grove Market Place
Importance: High

Mr. Anderson:

As you are fully aware, staff presents request such as these (such as your requests a few months ago) to the Land Board, explaining the application or request together with an explanation of the facts as known by staff, and an analysis and recommendation. The Land Board expects and wants staff to present its own analysis and recommendation. The Land Board is also fully aware that such presentation is merely that, staff's presentation or view of the application. As such, the Land Board also allows the applicant and any counsel to make its presentation or case, as well as hearing from anyone else wishing to testify, such as any other interested party or member of the public. As such, I suggest you or your lawyer present your arguments to the Land Board which will be asked to decide this matter in an open meeting before the public.

And as you are aware, In order for any Land Board action to take place, a minimum of four votes in the affirmative or negative is necessary.

Further, as we provided you with a courtesy review of our draft submittal on your past requests before the Land Board, the shopping center owners were also presented that same courtesy. We at the Land Division strive to treat all parties equally and with respect, and by providing them an opportunity to review a draft submittal of their respective request (in situations as contentious as this) is just one way we try to achieve that goal.

Finally, you and the shopping center owners have already been at odds in the past before the Land Board. Based on my observing that and my experience with litigating disputes, I believe this matter is ripe for litigation in the event either you or the shopping center is unsuccessful before the Land Board on its respective requests. As such, any nonprivileged communications and documents in the past and in the future will be open for discovery in the event of such litigation.

Should you still wish to discuss this further, you may contact Mr. Moore.

Very truly yours,

Russell Y. Tsuji

LBUBS 2007-C2 Alii Drive, LLC vs. Anekona, LLC et al.
Civil No. 09-00114 SOM-BMK (U.S. Dist. Ct. HI) (the "Lawsuit")

**AGREEMENT REGARDING CONFIDENTIALITY,
DISCLAIMER OF WARRANTIES AND TMK (3) 7-5-009-043**

The undersigned ("Interested Party") is evaluating the possible purchase of those certain fee simple and/or leasehold interests in the property commonly referred to as the Coconut Grove Marketplace (the "Property") located at 95-5815 Ali'i Drive, Kailua-Kona, Hawai'i, which are the subject of that certain foreclosure lawsuit filed in the United States District Court for the District of Hawai'i, entitled LBUBS 2007-C2 Alii Drive, LLC vs. Anekona, LLC et al., Civil No. 09-00114 SOM-BMK. Interested Party desires to receive certain documents and information relating to the Property (the "Property Information") from the Commissioner appointed by the United States District Court to conduct to foreclosure sale of the Property pursuant to the Findings of Facts; Conclusions of Law; and Order Granting Plaintiff's Motion for Default Judgment, Summary Judgment and Interlocutory Decree of Foreclosure, Filed January 7, 2010, filed on February 26, 2010. The Commissioner is prepared to furnish the Property Information to Interested Party on the terms and conditions set forth below. In consideration for the receipt of said information, Interested Party hereby agrees as follows:

1. The Property Information shall not be used by Interested Party for any purpose other than evaluating a possible purchase of the Property by Interested Party.
2. Interested Party acknowledges and agrees that the Property Information provided by the Commissioner that is marked as "Confidential" (the "Confidential Property Information") shall be maintained as strictly confidential. Unless the prior written consent of the Commissioner is obtained, which consent may be withheld for any or no reason whatsoever, Interested Party shall not distribute, disclose, reveal, reproduce, summarize, quote, reproduce from memory or retain any Confidential Property Information. Notwithstanding the foregoing, the Confidential Property Information may be disclosed to directors, officers and employees of Interested Party and to Interested Party's lenders, legal counsel and other consultants, agents and advisors (all of whom are collectively referred to as "Related Persons") who: (i) need to know such information for the purpose of evaluating the contemplated purchase of the Property by Interested Party, (ii) have first been directed in writing to keep all such information in the strictest confidence and to use such information only for the purpose of evaluating the contemplated purchase of the Property by Interested Party, and (iii) have agreed in writing to comply with and be bound by this Agreement to the same extent as the Interested Party as if he or she were a party hereto.
3. Upon the conclusion of Interested Party's review of the Property Information, and in no event later than the date of the foreclosure sale of the Property, Interested Party shall, at its own expense, immediately delete and destroy all Property Information received from the Commissioner, including any and all permitted saved files, copies, reproductions, summaries, analyses or extracts thereof in the possession of Interested Party and any Related Persons. Interested Party and Related Persons shall continue to be bound by their obligations of confidentiality and other obligations hereunder.

4. Interested Party acknowledges that any breach of this Agreement will cause irreparable and immediate harm to the Property and such harm could not be made whole by monetary damages alone. Accordingly, it is agreed that, in addition to any other remedy to which the Commissioner may be entitled in law or equity, the Commissioner shall be entitled to an injunction (without the posting of any bond nor proof of actual damages) to prevent breaches or threatened breaches of this Agreement and/or to compel specific performance of this Agreement, and that neither Interested Party nor any Related Person will oppose the granting of such relief. In any action brought to enforce this Agreement, the Commissioner shall be entitled to recover from Interested Party all reasonable costs and expenses incurred by it in connection with such action, including, without limitation, attorneys' fees.

5. Interested Party understands, acknowledges and agrees that neither the Commissioner nor any of his representatives makes any representation or warranty as to the truth, currency, accuracy, correctness or completeness of the Property Information. Interested Party further acknowledges and agrees that the Commissioner, on behalf of himself and his representatives, hereby expressly disclaims any and all warranties of any kind whatsoever, expressed or implied, direct or indirect, relating to the Property Information and the Property, including, without limitation, any warranties of merchantability or fitness for any purpose, or as to the condition of title, the condition of the land, improvements, soil, plumbing, electrical and mechanical system or zoning, and any warranties as to the truth, currency, accuracy, correctness or completeness of the Property Information. Interested Party, on its behalf and on behalf of its Related Persons, hereby agrees to waive any and all claims against the Commissioner and his representatives relating in any way to the Property Information and the Property.

6. TMK (3) 7-5-009-043. To the best of the Commissioner's knowledge, the Coconut Grove Marketplace was originally developed to include a 0.338-acre parcel of land owned by the State of Hawai'i, TMK (3) 7-5-009-043 ("Parcel 43"), which is bounded on one side by Alii Drive, and on the other sides by TMKs (3) 7-5-009-025 and -028. The State originally leased Parcel 43 to Lanihau Partners, L.P. by General Lease No. S-5188 dated April 8, 1990, for a term of fifty (50) years ("Parcel 43 Lease"). To the best of the Commissioner's knowledge, the lessee's interest in Parcel 43 Lease is currently held by Patricia G. Greenwell, as Trustee under the Patricia G. Greenwell Revocable Living Trust Agreement dated May 5, 1983 (the "Greenwell Trust"), although this information may not be current or accurate. Historically, Parcel 43 has served, among other things, as a recreational facility (as a lighted volleyball court), as the exit point for the Coconut Grove Marketplace's storm water drainage system, as an open view corridor for upslope tenants of the Coconut Grove Marketplace, and for pedestrian access to the Marketplace from Alii Drive. On January 15, 2010, the U. S. District Court Magistrate Judge in the Lawsuit entered an Order determining, among other things, that the Greenwell Trust's leasehold interest in Parcel 43 is not part of the Property that is the subject of the Lawsuit. Since that time, disputes have arisen with the Greenwell Trust over the Coconut Grove Marketplace's continuing use of Parcel 43.

Interested Party hereby acknowledges that the Property to be sold at the foreclosure will NOT include any rights, title or interest in or relating to Parcel 43. Interested Party shall conduct its own investigation into the title to and impact of the separate ownership of Parcel 43 and specifically, the pending dispute on usage, on the ownership, operation and

Confidentiality, Disclaimer of Warranties and Parcel 43/080110

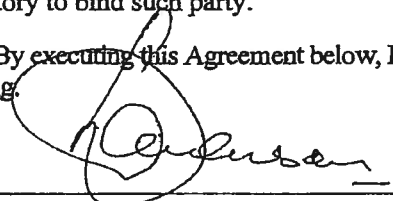
development of the Property. The Commissioner makes no representations or warranties of any kind relating in any way to Parcel 43, hereby disclaims any warranty or warranty concerning the correctness, accuracy, currency, truth or completeness of any information that he or his representatives may provide in response to inquiries. In consideration of the receipt of such information and the Property Information, Interested Party hereby agrees to waive and release all claims against the Commissioner and his representatives with respect to said information and, without limiting the foregoing, any and all matters relating to Parcel 43.

7. This Agreement is binding upon the Interested Party and its officers, directors, managers, employees, agents, representatives, heirs, personal representatives, trustees, successors and assigns.

8. The laws of the State of Hawai'i shall govern this Agreement. Interested Party agrees that any action or proceeding arising out of or related in any way to this Agreement shall be brought solely in a court of competent jurisdiction in the State of Hawai'i. Interested Party and Related Persons hereby irrevocably and unconditionally consent to the jurisdiction of any such court and hereby irrevocably and unconditionally waives any defense of an inconvenient forum to the maintenance of any action or proceeding in any such court, any objection in venue with respect to any such action or proceeding any right of jurisdiction on account of the place of residence or domicile of any party thereto.

9. This Agreement may be signed in counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same instrument. In addition, the parties agree that the receipt of a signature page of this Agreement bearing the signature of a party that is transmitted via facsimile or electronic transmission shall be satisfactory to bind such party.

By executing this Agreement below, I, Interested Party, hereby unconditionally agree to the foregoing.



Signature _____

Print Name: D. G. ANDERSON

Company: BASIN PROJECT INC -

Street Address: _____

City: HONOLULU State: HI Zip Code: 96813

Phone no.: _____ Fax no. _____ E-mail: _____

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

LBUBS 2007-C2 ALII DRIVE, LLC,)	Civ. No. 09-00114 SOM-BMK
a Hawaii Limited Liability Company,)	
)	
Plaintiff,)	ORDER DENYING RECEIVER'S
)	MOTION TO ENFORCE ORDER
vs.)	GRANTING PLAINTIFF'S <i>EX</i>
)	<i>PARTE</i> MOTION FOR
ANEKONA, LLC, et al.,)	APPOINTMENT OF A RECEIVER
)	ENTERED ON MARCH 20, 2009
Defendants.)	AND TO HOLD CERTAIN
)	PARTIES IN CONTEMPT

ORDER DENYING RECEIVER'S MOTION TO ENFORCE ORDER GRANTING PLAINTIFF'S *EX PARTE* MOTION FOR APPOINTMENT OF A RECEIVER ENTERED ON MARCH 20, 2009 AND TO HOLD CERTAIN PARTIES IN CONTEMPT

Before the Court is Receiver's Motion to Enforce Order Granting Plaintiff's *Ex Parte* Motion for Appointment of a Receiver Entered on March 20, 2009 and to Hold Certain Parties in Contempt. (Doc. # 94.) The Court heard the motion on January 8, 2010. After careful consideration of the motion, the supporting and opposing memoranda, and the arguments of counsel, Receiver's motion is DENIED.

Receiver filed his motion on December 23, 2009. (Mot. at 3.) In his motion, Receiver requests the Court to issue an order (1) requiring Defendant LRG ("LRG") to immediately cease and desist from selling, transferring, or otherwise

disposing of its fee simple interest in parcels of land underlying the Coconut Grove Marketplace (the “Marketplace”); (2) requiring Patricia G. Greenwell, Trustee under the Patricia G. Greenwell Revocable Living Trust Agreement dated May 5, 1983 (the “Greenwell Trust”), to immediately cease and desist from transferring its leasehold interest in a parcel of land owned in fee by the State of Hawaii that adjoins the Marketplace (the “State Parcel”); (3) holding LRG and the Greenwell Trust, among others, in contempt of this Court’s Order Granting Plaintiff’s *Ex Parte* Motion For Appointment of a Receiver (the “Receiver Order”); and (4) awarding Receiver attorneys’ fees and costs for bringing the instant motion. (Mot. at 2-3.) Receiver’s requests are denied for the following reasons.

As to Receiver’s first request, LRG maintains, and its counsel has confirmed, that it is not in the process of selling, transferring, or otherwise disposing of its fee simple interest in the parcels of land underlying the Marketplace. (Opp. at 2, 5; Opp. Ex. 5 at 2; Kawachika Decl. ¶¶ 3, 5.)

As to Receiver’s second request, Receiver has no interest in the Greenwell Trust’s leasehold interest in the State Parcel. Pursuant to the Receiver Order, “Receiver is directed and authorized to take immediate possession and control of the Estate Property and the rights thereunder, to the exclusion of Anekona, LRG and other Defendants.” (Receiver Order at 7.) The Estate Property is collectively defined as “all of the real, personal, tangible and intangible personal

property held by Anekona and LRG against which Lender [Plaintiff LBUBS 2007-C2 Alii Drive¹] holds a lien . . . and/or which constitutes security under the loan documents made by Anekona in favor of Lender” (Id. at 4.) The Estate Property includes, but is not limited to, “all of the rights, title and interests of Anekona and LRG in and to the . . . leasehold interests in the property under the [Marketplace]” (Id.) Under the foregoing, the Greenwell Trust’s leasehold interest in the State Parcel is not part of the Estate Property and therefore, not within the Receiver’s possession or control. Receiver concedes such. (Mem. in Supp. of Mot. at 3 (acknowledging that the “[State] [P]arcel is not part of the Estate Property and therefore technically not within the Receiver’s possession or control”); see also id. at 17 (noting that the “State Parcel[is] part of the Marketplace although not technically part of the Receivership Estate”).) Accordingly, the Court is without the power to enjoin the Greenwell Trust from alienating its interest in the State Parcel.

Given the foregoing, Receiver’s requests for holding LRG and the Greenwell Trust, among others, in contempt of the Receiver Order, and for an award of attorneys’ fees and costs in bringing the instant motion are denied.

¹ The Receiver Order defines “Lender” as Plaintiff LBUBS 2007-C2 Alii Drive. (Id. at 2.)

For the reasons stated above, Receiver's Motion to Enforce Order Granting Plaintiff's *Ex Parte* Motion for Appointment of a Receiver Entered on March 20, 2009 and to Hold Certain Parties in Contempt is DENIED.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, January 15, 2010



/s/ Barry M. Kurren
Barry M. Kurren
United States Magistrate Judge

LBUBS 2007-C2 Alii Drive, LLC v. Anekona, LLC, et al., CV. NO. 09-00114 SOM-BMK;
ORDER DENYING RECEIVER'S MOTION TO ENFORCE ORDER GRANTING
PLAINTIFF'S *EX PARTE* MOTION FOR APPOINTMENT OF A RECEIVER ENTERED ON
MARCH 20, 2009 AND TO HOLD CERTAIN PARTIES IN CONTEMPT.

Of Counsel:
PAUL JOHNSON PARK & NILES
Attorneys At Law
A Law Corporation

SHERYL L. NICHOLSON 2998-0
snicholson@pjpn.com

JASON C. ZHAO 7545-0
jzhao@pjpn.com

1001 Bishop Street, Suite 1300
Honolulu, Hawai'i 96813
Telephone: (808) 524-1212
Facsimile: (808) 528-1654

Attorneys for Receiver
GUIDO GIACOMETTI

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI'I

LBUBS 2007-C2 ALII DRIVE, LLC, a
Hawai'i Limited Liability Company,

Plaintiffs

vs.

ANEKONA, LLC; BRIAN A.
ANDERSON; LRG REAL ESTATE
LP; EUGENE E. GREGORY;
CENTRAL PACIFIC BANK; JOHN
DOES 1-10,

Defendants.

) CIVIL NO. 09-00114 SOM-BMK
) (Foreclosure)
)
) RECEIVER'S REPLY TO
) DEFENDANT LRG REAL ESTATE
) LP'S MEMORANDUM IN
) OPPOSITION TO RECEIVER'S
) MOTION TO ENFORCE ORDER
) GRANTING PLAINTIFF'S *EX PARTE*
) MOTION FOR APPOINTMENT OF A
) RECEIVER ENTERED ON MARCH
) 20, 2009 AND TO HOLD CERTAIN
) PARTIES IN CONTEMPT, FILED
) HEREIN ON DECEMBER 23, 2009,
) FILED ON JANUARY 5, 2010;
) SUPPLEMENTAL DECLARATION
) OF GREGORY G. OGIN; EXHIBITS
) "T-1" – "T-5"; SUPPLEMENTAL
) (continued on next page)

) DECLARATION OF GUIDO
) GIACOMETTI; DECLARATION OF
) JASON C. ZHAO; EXHIBIT "U";
) CERTIFICATE OF SERVICE
)
) HEARING:
) DATE: January 8, 2010
) TIME: 1:30 p.m.
) JUDGE: Barry M. Kurren
)

RECEIVER'S REPLY TO DEFENDANT LRG REAL ESTATE LP'S
MEMORANDUM IN OPPOSITION TO RECEIVER'S MOTION TO
ENFORCE ORDER GRANTING PLAINTIFF'S *EX PARTE* MOTION
FOR APPOINTMENT OF A RECEIVER ENTERED ON MARCH 20,
2009 AND TO HOLD CERTAIN PARTIES IN CONTEMPT, FILED
HEREIN ON DECEMBER 23, 2009, FILED ON JANUARY 5, 2010

I. INTRODUCTION

It is undisputed that the State Parcel has "significant value" to the owner of the Coconut Grove Marketplace, currently Anekona, LLC, and that the loss of the attributes of the Parcel that have made it integral to the Marketplace's operations since its development will interfere with the Receiver's operation of the Marketplace.¹ LRG has expressly admitted the foregoing, but argues that the Receiver does not have legal or equitable title to the Parcel, and therefore

¹ Attached as Exhibits "T-1" through "T-5" to the attached Supplemental Declaration of Gregory G. Ogin are photographs taken by Mr. Ogin depicting the State Parcel within the Marketplace, looking mauka from Ali'i Drive and makai from the Outback Steakhouse restaurant.

(speaking for Mrs. Greenwell)² that Mrs. Greenwell is free to do what she wishes with the Parcel.

The fact that the Receiver does not have legal title to the State Parcel does not prevent him from seeking to prevent actions with that Parcel that will interfere with the receivership and with the Receiver's obligation to preserve and protect the Estate Property. Moreover, Anekona has been in continuous possession of the State Parcel with Mrs. Greenwell's and the individual Andersons' blessing ever since it took over ownership of the Marketplace, whether pursuant to the 1997 Sublease in the individual names of Brian and Joan Anderson or pursuant to some other agreement. Although it appears to be the case that Mrs. Greenwell's leasehold interest in the State Parcel itself may not be part of the Receivership Estate, the right that Anekona had to possess and use the State Parcel, whether under the 1997 Sublease and/or any separate agreement between Mrs. Greenwell and/or the Andersons and Anekona, appears to be part of the Lender's collateral and therefore part of the Receivership Estate.

Accordingly, the Receiver respectfully requests that his Motion to Enforce be granted with respect to the relief sought for the cancellation of the Sublease by Mrs. Greenwell and the Andersons, and Mrs. Greenwell's impending

² The State Parcel issues do not concern LRG. It appears to be responding on Mrs. Greenwell's behalf.

sale of the State Parcel leasehold interest.³

II. CANCELLATION OF THE SUBLEASE VIOLATED THE RECEIVER ORDER

LRG defends the post-receivership act by Mrs. Greenwell, Brian and Joan Anderson of cancelling the 1997 Sublease for the State Parcel by arguing that Anekona had no legal or equitable interest in the State Parcel and is not the alter ego of Brian and Joan Anderson, the sublessees. See LRG's Mem. Opp. at 4-5. This argument does not dispose of the Receiver's position for several reasons. It is undisputed that Anekona has been in continuous possession of the State Parcel and actively using it as part of the Marketplace, despite the fact that the 1997 Sublease

³ The Receiver, through counsel, learned for the first time on December 28, 2009, after he filed the instant motion, that contrary to the information Mr. Hom provided to the Receiver, LRG was not selling its fee simple interest in its parcels beneath the Marketplace. See Supplemental Declaration of Guido Giacometti attached hereto ("Giacometti Supp. Dec.") ¶ 8, at 3. Further, the Receiver learned for the first time on January 4, 2010 that instead the partnership interests in LRG were being transferred to Brian Anderson's sons, Brad and Cord. See *id.* ¶ 9, at 4. Notably, Mr. Hom does not deny that he informed the Receiver that LRG was selling its fee simple interests in the LRG Parcels in the Declaration he signed that is attached to LRG's memorandum, and that neither the Receiver nor his counsel were informed to the contrary until well after the Receiver's Motion to Enforce was filed. LRG has also not revealed to the Court whether it in fact had a sale of the LRG fee simple interests pending, as Mr. Hom related to the Receiver, but changed its course after receiving the Receiver's Motion to Enforce. In any event, LRG's statement that the Receiver "proceed[ed]" with a motion that he knew to be based on false information (LRG's Mem. Opp. at 5) is simply false.

is in the names of Brian and Joan Anderson, individually.⁴ It also appears, from Mrs. Greenwell's August, 2009 letters to the Receiver (Exs. Q and R to the Receiver's Motion), that she understood the May 2009 cancellation of the Sublease to have removed the State Parcel from Anekona's possession. Her and the Andersons' action underscores what is apparent from these many years of Anekona incorporating the State Parcel into its Marketplace operations – that Mrs. Greenwell and/or the Andersons had, until May 2009, granted the right to Anekona to use the State Parcel as part of the Marketplace,⁵ and that by cancelling

⁴ Pertinent lease documents show that Mrs. Greenwell, the Andersons and Anekona disregarded any distinction between the Andersons and Anekona with respect to right to use the State Parcel as a part of the Marketplace. In 1997, prior to the initial buildout of the Marketplace, Mrs. Greenwell, as Trustee, appears to have held both the leasehold interest in the State Parcel as well as the fee interest in the LRG Parcels. *See* Exs. "B" and "H" to the Receiver's Motion. Her leasehold interest in the State Parcel was also originally included as part of the premises leased to Brian Anderson and Melvin Shapiro under the July 16, 1996 LRG Lease. *See* Ex. "B". Mrs. Greenwell and the Andersons entered into the Sublease for the State Parcel in December 1997, at the same time that the Andersons became the Lessee of the LRG Parcels under the LRG Lease. *See* Ex. "C". Notably, although the Sublease was dated December 22, 1997, it was made effective July 16, 1996, the same date as the date of the LRG Lease. *See* Ex. "H". Anekona apparently was not formed until July 2002 (*see* Ex. "U" to the Declaration of Jason C. Zhao), well after the initial buildout of the Marketplace. Almost immediately after Anekona was formed, the LRG Lease was assigned to Anekona. *See* Ex. "E". Apparently the parties neglected to similarly transfer the Andersons' Sublease to the State Parcel to Anekona, but it appears that the formality was entirely disregarded by the parties, as Anekona possessed and used the State Parcel as a part of the Marketplace through the commencement of the Receivership.

⁵ LRG's various statements that there is no evidence that Mrs. Greenwell ever assented to Anekona using the State Parcel as part of the Marketplace or as a

the Sublease after the Receiver was appointed, they were purporting to unilaterally terminate that right.

Upon further review of the Mortgage in light of LRG's argument, it appears to the Receiver that this right granted to Anekona, as well as the Sublease itself pursuant to which Anekona was apparently exercising this right, are part of the collateral in which Plaintiff has a lien. Section 1.1 of the Mortgage (Ex. D to the Complaint) defines the Mortgaged Property to include LRG's fee simple interest in the LRG Parcels and Anekona's leasehold interests in the LRG and Gregory Parcels, as well as:

- "all leases and other agreements affecting the use, enjoyment or occupancy of the [LRG and Gregory Parcels] and the Improvements" (Ex. D § 1.1(g), at 2);

passive park are untrue. *See* LRG's Mem. Opp. at 10-11. Exhibit "L" to the Receiver's Motion is a 1998 Application for Planned Unit Development made by Brian Anderson, as Applicant. The Application contains Mr. Anderson's statements that "[t]he Marketplace consists of several buildings on four contiguous parcels of land"; that "included within the Coconut Grove marketplace complex is a 0.338-acre passive park area utilized as a sand volleyball court"; and that "[t]he Marketplace is identified by the following tax map parcels" . . . 4. TMK: 7-5-9-43 Site of sand volleyball court". *Id.* Patricia Greenwell is listed as the Owner for purposes of the Application (*see id.* at 1), and she signed the required Authorization authorizing the application to proceed. *See id.*, second page. More importantly, LRG did not go further to actually dispute that Mrs. Greenwell agreed to allow Anekona to use the State Parcel as part of the Marketplace all these years, and offered no statements by Mrs. Greenwell herself to that effect.

- “all agreements” and “licenses” and “all rights therein and thereto respecting or pertaining to the use, occupation, construction, management or operation of the [LRG and Gregory Parcels]” and “any Improvements or respective any business or activity conducted on the [LRG and Gregory Parcels]” (*id.* § 1.1(o), at 2);
- “all easements, rights-of-way or use, rights . . . sewer rights, water courses, water rights and powers, . . . development rights, and all . . interests, privileges, liberties, servitudes, tenements, hereditaments and appurtenances of any nature whatsoever . . . relating or pertaining to the [LRG and Gregory Parcels] and the Improvements” (*id.* § 1.1(e), at 2);
- all “rights of curtesy, property, possession, claim and demand whatsoever, both in law and in equity, of Mortgagor⁶ of, in and to the Land and the Improvements and every part and parcel thereof, with the appurtenances thereto” (*id.*); and
- “any and all other rights of Borrower in and to the items set forth in Subsections (a) through (s) above.” *Id.* § 1.1(t), at 2.⁷

⁶ The Mortgage defines the “Mortgagor” as Anekona, LLC and LRG Real Estate LP. Ex. D. to Complaint, at 1.

⁷ See also § 1.3 (“Security Agreement”), by which the Anekona agrees that the Mortgage is both a real property mortgage and security agreement.

Whether Anekona was occupying and using the State Parcel pursuant to the Sublease or a separate agreement with the Andersons and Mrs. Greenwell, the Sublease, agreement and the rights of Anekona to possess and use the State Parcel as part of the Marketplace undeniably “affected” and “pertained to” the use, occupancy, enjoyment, management and operation of the Marketplace. LRG itself has admitted that the removal of the State Parcel from the Marketplace’s operations will be problematic for the Receiver and Marketplace’s owner, operator and purchaser. *See* LRG’s Mem. Opp at 11-12. It therefore appears that Anekona had pledged its right to use the State Parcel to Plaintiff as collateral for the Mortgage, and therefore that this right is part of the Receivership Estate.

In any event, even if the Sublease and Anekona’s right to use and occupy the State Parcel are not deemed to be secured by Plaintiff’s Mortgage, nevertheless as the Receiver demonstrated in his Motion, the Receiver has the right to prevent interference with the operation and maintenance of the Marketplace properties, and the Court has the jurisdiction to enforce the Receiver Order, even if the offending activities pertain to property that is not technically within the jurisdiction of the Receiver or the Court. *See* Receiver’s Mem. Supp. at 17, *citing Strain v. Superior Court of Los Angeles County*, 168 Cal. 216, 218-22, 142 P.62, 63-65 (1914). Neither LRG nor any of the other individuals and parties affected by the Motion to Enforce have disputed this proposition.

Mrs. Greenwell and her daughter and son-in-law clearly intended to prohibit the Receiver's continued use of the State Parcel by cancelling the Sublease. LRG/Mrs. Greenwell's response indicates an acute awareness of the "significant value" of the State Parcel to the Marketplace and of the problems the Receiver now faces without the Parcel. Its attitude is one of "too bad" for the Lender. The Receiver's interest, however, is not identical to that of the Lender. The Receiver is charged with operating, maintaining, preserving and protecting the Estate Property, and to the extent these parties' actions have, by LRG/Mrs. Greenwell's own admission, caused a "problem" for the Receiver by depriving the Receiver of the use of the valuable view plane, access, drainage and other attributes of the State Parcel (*see* Exs. "T-1" to "T-5" to Ogin Suppl. Decl.), these parties violated the Receiver Order by terminating Anekona's right to occupy and use the Parcel.

III. A SALE OF MRS. GREENWELL'S LEASEHOLD INTEREST WILL FURTHER VIOLATE THE RECEIVER ORDER

On January 4, 2010, the Receiver, through counsel, learned for the first time that Mrs. Greenwell's sale of her leasehold interest in the State Parcel will be to her grandsons, Brad and Cord Anderson (sons of Brian Anderson), and to their grandfather, Andy Anderson (Brian Anderson's father). *See* Supp. Giacometti Decl. ¶ 10, at 4. The Receiver also learned at that time that the sale

terms do not restrict the purchasers from using the parcel in any manner they please. *See id.*

The information underscores the need for enforcement of the restraining language of the Receiver Order against Mrs. Greenwell to prohibit her from selling her leasehold interest in the State Parcel to her other family members. Selling that interest will perpetuate the wrong perpetrated by Mrs. Greenwell and the Andersons in terminating Anekona's right to use the State Parcel, which right appears to be part of the Receivership Estate. It will interfere with the Receiver's duties and obligations with regard to the Estate Property by depriving the Receiver of needed use of the Parcel, for all of the reasons previously described by the Receiver and not disputed by LRG/Mrs. Greenwell.

Accordingly, the Receiver respectfully requests that his Motion to Enforce be granted with respect to the relief sought with regard to the State Parcel.⁸

⁸ At 10:13 a.m. today, the Receiver's counsel received an e-mail from Brian Anderson attaching an unfile-marked Declaration of Brian A. Anderson with two exhibits. Mr. Anderson states in his declaration that "Anekona LLC was never a sub lessee on this state sublease and at no time had control or any legal rights to this state parcel." *Id.* ¶ 6, at 3. Mr. Anderson does not deny, however, that Anekona has had the continuous possession and use of the State Parcel as an integral part of the Marketplace since Anekona's inception and that it has been relied on by Anekona to provide view planes, access, drainage and recreational/business opportunities important to the operation of the Marketplace.

DATED: Honolulu, Hawai'i, January 7, 2010.

/s/ Jason C. Zhao

SHERYL L. NICHOLSON

JASON C. ZHAO

Attorneys for Receiver

GUIDO GIACOMETTI



November 2, 2011

Bobby-Jean Leithead-Todd
Planning Director
County of Hawaii
101 Pauahi Street, Suite 3
Hilo, HI 96720

Re: Application for Design Review (TMK (3) 7-5-09:43)

Dear Ms. Leithead-Todd:

This letter is written on behalf of LBUBS-C2 Alii Drive, LLC, a Hawai'i limited liability company ("LBUBS") (by its Manager, LNR Partners, LLC), the current owner of the Coconut Grove Marketplace in Kailua-Kona, Hawai'i ("the Marketplace"), in response to the Application for Design Review by Cord Anderson dated October 12, 2011 (the "Application") for proposed construction of a temporary chain link fence around certain portions of TMK (3) 7-5-09:43 ("Parcel 43").

For the reasons explained below, LBUBS opposes the temporary fence because:

- It is entirely useless for its intended purpose and serves no other legitimate function.
- It will be an unsightly visual blight within the Marketplace and on Alii Drive.
- It will hurt the business of the Marketplace tenants by blocking access by visitors and service providers to the tenants' spaces and obstructing the view planes and needed visibility.
- Fundamentally, Parcel 43 was developed and permitted at the County level to be part of one single retail/commercial project, and a fence that blocks access to the Marketplace

Bobby-Jean Leithead-Todd
Planning Director
November 2, 2011
Page 2

components violates both the current SMA Permit for the Marketplace, as amended, and the development concept of maintaining open space within the Marketplace approved by the County.

For these and other reasons, all efforts by the Andersons to obtain County-level approvals to build the temporary fence should be rejected.

BACKGROUND

Parcel 43 is owned by the State of Hawai'i and was originally leased in 1989 to Lanikai Partners, L.P., which took the lease intending to develop Parcel 43 together with surrounding lands into a retail/commercial complex. State General Lease No. S-5188 ("State Lease") was specifically tailored to embody this development concept by, among other things, requiring that the lessee keep at least 50% of the premises in open space, and by prohibiting parking, loading and unloading on the Parcel, while simultaneously requiring that the lessee use the premises for commercial purposes.¹ On January 9, 1989, the Hawaii County Planning Commission issued SMA Permit No. 277 allowing the construction of the Marketplace improvements to proceed. Among the permit conditions placed on the developer was the installation of a drainage system in accordance with the requirements of the Dept. of Public Works. On October 10, 1990, the SMA Permit was amended to specifically add Parcel 43 to the Marketplace project as a passive park "in the center of the existing commercial complex". The Planning Commission determined, among other things, that the provision of the park area within the commercial development "will improve the quality of coastal scenic and open space resources and will not inhibit coastal recreational opportunities."

Based on this approval, the Marketplace developer group, including Brian Anderson, proceeded to fully integrate Parcel 43 into the Marketplace complex. For the 10+ years that ensued until Mr. Anderson's loan defaults caused the foreclosure auction of the Marketplace, the Marketplace owner paid all of the rents owed under the State Lease and bore all of the costs and responsibility of maintaining the Parcel. In addition, in conjunction with the original construction of the Marketplace, the developers, including Mr. Anderson, physically incorporated the Parcel into the Marketplace by: (a) constructing sidewalks within and across the Parcel to allow visitors and other invitees lateral and ADA access across the open space to the opposite side of the Marketplace, (b) constructing the storm water drainage system required by the original SMA Permit beneath the Parcel to service not only the Marketplace,

¹ On September 16, 2011, the DLNR issued a Notice of Default to the Andersons for their failure to use Parcel 43 for commercial purposes in accordance with Section 12 of the State Lease.

Bobby-Jean Leithead-Todd
Planning Director
November 2, 2011
Page 3

but also the lands mauka of Kuakini Highway above the Marketplace; (c) constructing utility lines, landscaping and other improvements within the Parcel to provide night lighting and pleasant open areas for visitors; and (d) constructing a volleyball court on the parcel to provide recreational opportunities for the community, which in turn increased patron traffic in the Marketplace as a whole to the benefit of the tenants. Situated below grade from Ali'i Drive and sloping mauka, the Parcel afforded commercial tenants situated mauka an unobstructed view plane to the ocean, and pedestrian access to their premises that is critical both for the enjoyment of their patrons, as well as for needed visibility and access from Ali'i Drive. So critical was the open view plane that Brian Anderson, as Landlord, promised at least one major Marketplace tenant that the tenant's view plane across Parcel 43 would not be infringed, and to that end, that no improvements would be constructed in the Parcel 43 area without the tenant's written approval which the tenant could withhold if it believed that the change would adversely affect its business.

In 2007, due to Anekona LLC's failure to pay its debts, the Marketplace went into foreclosure and receivership. In June 2011, LBUBS acquired the fee simple interests in the Marketplace lands previously owned by the Greenwell interests and Anekona's interests in the Marketplace, but not Brian Anderson's interest in the State Lease covering Parcel 43 as that interest was not originally mortgaged to LBUBS. In 2010, in anticipation of losing the Marketplace properties, Brian Anderson's father and two sons took over the State Lease, and with it the obligations of the lessee thereunder, including the obligation to pay annual rent in excess of \$31,000.00, to keep the property insured, to maintain the property and the like. Parcel 43, standing alone, generates no revenue as it was never designed or intended to provide any function other than those that served the Marketplace. The Andersons have publicly conceded that their purpose in acquiring Parcel 43 and now to erect the temporary fence was to gain leverage with which to negotiate a purchase of the Marketplace properties from, or a sale of Parcel 43 to, LBUBS.

THE TEMPORARY, PARTIAL FENCE SHOULD NOT BE ALLOWED

A. The Partial Fence Will Be Completely Useless To Keep Visitors Out Of Parcel 43 And Otherwise Serves No Legitimate Function

The temporary, partial fence proposed by the Andersons would be 4' in height, made of chain link material, and cover less than 50% of the perimeter of Parcel 43. As depicted in the Fencing Plan attached to the Application, the entire boundary of Parcel 43 fronting Alii Drive, and more than half of the northern and southern boundaries of the Parcel, would be completely exposed to pedestrian traffic. In particular, the boundaries surrounding the sand volleyball court, the specific area that tends to attract children and others from the sidewalk, would remain completely open and unobstructed. Even at the mauka end of the parcel, where

Bobby-Jean Leithead-Todd
Planning Director
November 2, 2011
Page 4

most of the fence would be installed, the fence would not be one continuous structure at the top and around the sides, but instead breaks at the top of the northern boundary with a segment continuing for a short distance down that side. And at 4' tall, the fence would be no impediment to any adult or child who wanted to climb over it.

There is, in fact, a very legitimate safety concern existing on Parcel 43, consisting of the Andersons' failure to maintain the sand level in the volleyball court that takes up roughly half of the Parcel's surface. The Andersons have readily acknowledged that the sand depletion has created a dangerous condition on the Parcel that has subsisted during the entire period they have held the State Lease, and yet they have done nothing to cure it, creating the risk that people will trip, fall and injure themselves, and also exposing the permeable artificial surface to being worn down and damaged, which would impair its function of allowing surface runoff to percolate below. Compounding the safety issue, they have instructed the Marketplace to turn off the lights in the area at night, which only increases the risk of accidents, injury and damage. The temporary fence the Andersons now propose building, however, is not in the location of the volleyball court, and would leave that area, including its frontage on Alii Drive, entirely open to pedestrian traffic.

In short, to the extent the temporary fence is intended to keep visitors out of Parcel 43, it will be completely ineffective. If it is not to keep visitors out of Parcel 43, the low, segmented fence has no plausible purpose. The only real safety hazard on the Parcel would be left completely unbounded, the clearest demonstration that this fence is not being built to serve any legitimate function.

B. The Partial Fence Will Be An Unsightly Blight In The Marketplace

The Andersons' partial fence would be built with chain link material. A metal chain link fence, built in segments around the mauka end of Parcel 43, would be patently incompatible with the wood structures, rock walls and vegetation and landscaping of the Marketplace. More fundamentally, a segmented fence structure, particularly one with no apparent or real function except to obstruct traffic within the Marketplace, would be an unsightly blight that would significantly detract from the overall appearance of the retail complex; it would stand out, and not in a good way. It will be visually disruptive to patrons and tenants of the Marketplace alike, and visible to vehicle occupants and pedestrians travelling on Alii Drive.

C. The Fence Will Hurt The Tenants Of The Marketplace

Bobby-Jean Leithead-Todd
Planning Director
November 2, 2011
Page 5

The only other real impact this fence will have is to obstruct the flow of traffic at the mauka portion of Parcel 43, where the fence would cut off the sidewalk which connects the mauka parking lot with the upper buildings and buildings to the south side of the Marketplace, including the Outback and Humpy's restaurants. Patrons currently need this sidewalk in order to cross the Marketplace without having to go back up into the upper parking lot, or down to Alii Drive, to cross over. Suppliers and employees use the sidewalks to carry heavy loads of inventory or trash to and from the Outback and Humpy's Restaurants and the mauka parking lot and nearby facilities.

The unsightly fence will also cut off visibility of and access to certain tenant spaces that will be behind the fence segments; it will especially mar the view planes of the tenants mauka of the Parcel, including the major tenant whom Brian Anderson promised, in writing, that Parcel 43 would be left in its open condition. Enclosed with this letter to you are letters that many Marketplace tenants recently wrote to the State Board of Land & Natural Resources, expressing their deep concern about how the fence, even temporary, will damage their livelihood.

D. The Fence Will Destroy The Development Concept, Embedded In The Current SMA Permit For The Marketplace, Of Parcel 43 Being Part Of The Marketplace Complex

The sidewalk and pedestrian access ways, walls, landscaping, drainage improvements, utilities and other uses and improvements on Parcel 43 were created by Brian Anderson to serve the Marketplace. Brian Anderson acquired the rights under the State lease for Parcel 43 (as a sublessee) for this purpose – to use the parcel as part of the Marketplace, and for no other purpose. He designed the improvements on Parcel 43 to integrate seamlessly with the landscaping and improvements on the rest of the shopping center property. For this reason, if the temporary fence is built, there is no question that it damage sidewalks, walls and landscaping belonging to the Marketplace; it may well also damage the utilities, pipes and other improvements that Brian Anderson designed and built within Parcel 43 and which, in the case of the drainage improvements, also service other nearby properties.² There is also no question that in the disruption of the overall design concept for the Marketplace, tenants will be hurt.

² LBUBS recently submitted a formal request to the Board of Land & Natural Resources for an easement covering these improvements.

Bobby-Jean Leithead-Todd
Planning Director
November 2, 2011
Page 6

Fundamentally, Parcel 43 should not be separated from the rest of the Marketplace in this manner, through a partial, temporary fence that will entirely ineffective to serve any legitimate function, which will only cause harm to the Marketplace and its tenants, and which will create a visual eyesore on Alii Drive. If, in the future, the Andersons wish to construct a fence that will actually serve a legitimate purpose, and is otherwise consistent with the terms and conditions of the State Lease and applicable state and county law and regulations, at a minimum it should not in any way obstruct or damage the pedestrian access, utilities and other improvements previously installed on the Parcel when it was under common ownership with the other Marketplace properties.

We appreciate your consideration of the foregoing, and strongly urge that approvals not be given to permit the requested construction to proceed. As the new owner of the Marketplace, LBUBS strives to be a good member of the Kailua-Kona community and will work hard to maintain the integrity of its property.

Very truly yours,



Kevin Hansen
Vice-President

cc: Bennett Mark (bmark@co.hawaii.hi.us)
April Surprenant (asurprenant@co.hawaii.hi.us)
Gregory G. Ogin
Sidney Fuke

October 24, 2011

Members of the Board of Land & Natural Resources
State of Hawaii
1151 Punchbowl Street, Room 130
Honolulu, HI 96813

Re: October 28, 2011 BLNR Meeting: Item D-20

Dear Land Board Member,

We are a tenant at the Coconut Grove Marketplace in Kailua-Kona, Hawai'i ("Marketplace"). We submit this letter in strong opposition to the request, by Brad, Cord and D.G. Anderson, to build an open chain-link fence on three sides of the former volleyball court parcel in the center of the Marketplace.

There is absolutely no question that the fence is going to damage our business, which has been struggling enough in the last several years because of the economy. The fence is designed to cut off sidewalk access to visitors who wish to cross the Marketplace to patronize our business. We rely very heavily on that traffic for our business. Although we understand it will only be 4' tall when you are standing in front of it, because of the slopes in the complex, the fence will still block visibility of our business to visitors from Alii Drive and from opposite portions of the Marketplace. Made out of chain link material, it will be an unsightly blight in the Marketplace complex and detract from the visitor experience that the Marketplace was designed to create.

If there was some legitimate reason for the fence, we might understand why the State of Hawai'i would even consider approving it. We understand, however, that the Andersons claim that they need it for liability reasons. If that were truly the case, the Andersons would be asking for a tall fence surrounding all sides. Instead, they want to fence off only those areas that will do the most damage to us and keep the rest of their land fully open to pedestrians from Alii Drive.

This is not about fixing a liability problem. This is about doing serious damage to the tenants and the Marketplace overall. The State should not be allowing the Andersons to build a partial fence on State land that has no legitimate purpose and will only do harm to business owners that are doing their best to survive in this tough economic climate. It is bad for business, bad for tourism in Kailua-Kona, and bad policy for the State of Hawai'i.

Sincerely,

Tenant Name: Brad Leslie
By: KONA GEAR

Contact Tel. No: 708 217 8992 Email Address: Info@KonaGear.com

October 24, 2011

Members of the Board of Land & Natural Resources
State of Hawaii
1151 Punchbowl Street, Room 130
Honolulu, HI 96813

Re: October 28, 2011 BLNR Meeting; Item D-20

Dear Land Board Member,

We are a tenant at the Coconut Grove Marketplace in Kailua-Kona, Hawai'i ("Marketplace"). We submit this letter in strong opposition to the request, by Brad, Cord and D.G. Anderson, to build an open chain-link fence on three sides of the former volleyball court parcel in the center of the Marketplace.

There is absolutely no question that the fence is going to damage our business, which has been struggling enough in the last several years because of the economy. The fence is designed to cut off sidewalk access to visitors who wish to cross the Marketplace to patronize our business. We rely very heavily on that traffic for our business. Although we understand it will only be 4' tall when you are standing in front of it, because of the slopes in the complex, the fence will still block visibility of our business to visitors from Alii Drive and from opposite portions of the Marketplace. Made out of chain link material, it will be an unsightly blight in the Marketplace complex and detract from the visitor experience that the Marketplace was designed to create.

If there was some legitimate reason for the fence, we might understand why the State of Hawai'i would even consider approving it. We understand, however, that the Andersons claim that they need it for liability reasons. If that were truly the case, the Andersons would be asking for a tall fence surrounding all sides. Instead, they want to fence off only those areas that will do the most damage to us and keep the rest of their land fully open to pedestrians from Alii Drive.

This is not about fixing a liability problem. This is about doing serious damage to the tenants and the Marketplace overall. The State should not be allowing the Andersons to build a partial fence on State land that has no legitimate purpose and will only do harm to business owners that are doing their best to survive in this tough economic climate. It is bad for business, bad for tourism in Kailua-Kona, and bad policy for the State of Hawai'i.

Sincerely,

Tenant Name:


Steve Huntlow - Creations by Claudio

By: _____

Contact Tel. No: 971-235-6892 Email Address: Huntlow.SAC@cal.com

October 24, 2011

Members of the Board of Land & Natural Resources
State of Hawaii
1151 Punchbowl Street, Room 130
Honolulu, HI 96813

Re: October 28, 2011 BLNR Meeting; Item D-20

Dear Land Board Member,

We are a tenant at the Coconut Grove Marketplace in Kailua-Kona, Hawai'i ("Marketplace"). We submit this letter in strong opposition to the request, by Brad, Cord and D.G. Anderson, to build an open chain-link fence on three sides of the former volleyball court parcel in the center of the Marketplace.

There is absolutely no question that the fence is going to damage our business, which has been struggling enough in the last several years because of the economy. The fence is designed to cut off sidewalk access to visitors who wish to cross the Marketplace to patronize our business. We rely very heavily on that traffic for our business. Although we understand it will only be 4' tall when you are standing in front of it, because of the slopes in the complex, the fence will still block visibility of our business to visitors from Alii Drive and from opposite portions of the Marketplace. Made out of chain link material, it will be an unsightly blight in the Marketplace complex and detract from the visitor experience that the Marketplace was designed to create.

If there was some legitimate reason for the fence, we might understand why the State of Hawai'i would even consider approving it. We understand, however, that the Andersons claim that they need it for liability reasons. If that were truly the case, the Andersons would be asking for a tall fence surrounding all sides. Instead, they want to fence off only those areas that will do the most damage to us and keep the rest of their land fully open to pedestrians from Alii Drive.

This is not about fixing a liability problem. This is about doing serious damage to the tenants and the Marketplace overall. The State should not be allowing the Andersons to build a partial fence on State land that has no legitimate purpose and will only do harm to business owners that are doing their best to survive in this tough economic climate. It is bad for business, bad for tourism in Kailua-Kona, and bad policy for the State of Hawai'i.

Sincerely,

Tenant Name: BONZO BEN'S

By:  BENTON LITTLE

Contact Tel. No: 936-6185 Email Address: benton.little@ynho.com

October 24, 2011

Members of the Board of Land & Natural Resources
State of Hawaii
1151 Punchbowl Street, Room 130
Honolulu, HI 96813

Re: October 28, 2011 BLNR Meeting: Item D-20

Dear Land Board Member,

We are a tenant at the Coconut Grove Marketplace in Kailua-Kona, Hawai'i ("Marketplace"). We submit this letter in strong opposition to the request, by Brad, Cord and D.G. Anderson, to build an open chain-link fence on three sides of the former volleyball court parcel in the center of the Marketplace.


There is absolutely no question that the fence is going to damage our business, which has been struggling enough in the last several years because of the economy. The fence is designed to cut off sidewalk access to visitors who wish to cross the Marketplace to patronize our business. We rely very heavily on that traffic for our business. Although we understand it will only be 4' tall when you are standing in front of it, because of the slopes in the complex, the fence will still block visibility of our business to visitors from Alii Drive and from opposite portions of the Marketplace. Made out of chain link material, it will be an unsightly blight in the Marketplace complex and detract from the visitor experience that the Marketplace was designed to create.

If there was some legitimate reason for the fence, we might understand why the State of Hawai'i would even consider approving it. We understand, however, that the Andersons claim that they need it for liability reasons. If that were truly the case, the Andersons would be asking for a tall fence surrounding all sides. Instead, they want to fence off only those areas that will do the most damage to us and keep the rest of their land fully open to pedestrians from Alii Drive.

This is not about fixing a liability problem. This is about doing serious damage to the tenants and the Marketplace overall. The State should not be allowing the Andersons to build a partial fence on State land that has no legitimate purpose and will only do harm to business owners that are doing their best to survive in this tough economic climate. It is bad for business, bad for tourism in Kailua-Kona, and bad policy for the State of Hawai'i.

Sincerely,

Tenant Name: COLORS OF PARADISE GALLERY

By: 

Contact Tel. No: 939-1730 Email Address: ROBERT THOMAS ART @AOL.COM

October 24, 2011

Members of the Board of Land & Natural Resources
State of Hawaii
1151 Punchbowl Street, Room 130
Honolulu, HI 96813

Re: October 28, 2011 BLNR Meeting: Item D-20

Dear Land Board Member,

We are a tenant at the Coconut Grove Marketplace in Kailua-Kona, Hawai'i ("Marketplace"). We submit this letter in strong opposition to the request, by Brad, Cord and D.G. Anderson, to build an open chain-link fence on three sides of the former volleyball court parcel in the center of the Marketplace.

There is absolutely no question that the fence is going to damage our business, which has been struggling enough in the last several years because of the economy. The fence is designed to cut off sidewalk access to visitors who wish to cross the Marketplace to patronize our business. We rely very heavily on that traffic for our business. Although we understand it will only be 4' tall when you are standing in front of it, because of the slopes in the complex, the fence will still block visibility of our business to visitors from Alii Drive and from opposite portions of the Marketplace. Made out of chain link material, it will be an unsightly blight in the Marketplace complex and detract from the visitor experience that the Marketplace was designed to create.

If there was some legitimate reason for the fence, we might understand why the State of Hawai'i would even consider approving it. We understand, however, that the Andersons claim that they need it for liability reasons. If that were truly the case, the Andersons would be asking for a tall fence surrounding all sides. Instead, they want to fence off only those areas that will do the most damage to us and keep the rest of their land fully open to pedestrians from Alii Drive.

This is not about fixing a liability problem. This is about doing serious damage to the tenants and the Marketplace overall. The State should not be allowing the Andersons to build a partial fence on State land that has no legitimate purpose and will only do harm to business owners that are doing their best to survive in this tough economic climate. It is bad for business, bad for tourism in Kailua-Kona, and bad policy for the State of Hawai'i.

Sincerely,

Tenant Name:

SLON GALLERIES

By:

Contact Tel. No:

808-989-3878

Email Address:

CLINT@SLONGALLERIES.COM

October 24, 2011

Members of the Board of Land & Natural Resources
State of Hawaii
1151 Punchbowl Street, Room 130
Honolulu, HI 96813

Re: October 28, 2011 BLNR Meeting: Item D-20

Dear Land Board Member,

We are a tenant at the Coconut Grove Marketplace in Kailua-Kona, Hawai'i ("Marketplace"). We submit this letter in strong opposition to the request, by Brad, Cord and D.G. Anderson, to build an open chain-link fence on three sides of the former volleyball court parcel in the center of the Marketplace.

There is absolutely no question that the fence is going to damage our business, which has been struggling enough in the last several years because of the economy. The fence is designed to cut off sidewalk access to visitors who wish to cross the Marketplace to patronize our business. We rely very heavily on that traffic for our business. Although we understand it will only be 4' tall when you are standing in front of it, because of the slopes in the complex, the fence will still block visibility of our business to visitors from Alii Drive and from opposite portions of the Marketplace. Made out of chain link material, it will be an unsightly blight in the Marketplace complex and detract from the visitor experience that the Marketplace was designed to create.

If there was some legitimate reason for the fence, we might understand why the State of Hawai'i would even consider approving it. We understand, however, that the Andersons claim that they need it for liability reasons. If that were truly the case, the Andersons would be asking for a tall fence surrounding all sides. Instead, they want to fence off only those areas that will do the most damage to us and keep the rest of their land fully open to pedestrians from Alii Drive.

This is not about fixing a liability problem. This is about doing serious damage to the tenants and the Marketplace overall. The State should not be allowing the Andersons to build a partial fence on State land that has no legitimate purpose and will only do harm to business owners that are doing their best to survive in this tough economic climate. It is bad for business, bad for tourism in Kailua-Kona, and bad policy for the State of Hawai'i.

Sincerely,

Tenant Name: ABC STORES

By: [Signature] PAUL KOSASA, Pres, CEO

Contact Tel. No: 808-571-2550 Email Address: pkosasa@abcstores.com

October 24, 2011

Members of the Board of Land & Natural Resources
State of Hawaii
1151 Punchbowl Street, Room 130
Honolulu, HI 96813

Re: October 28, 2011 BLNR Meeting; Item D-20

Dear Land Board Member,

We are a tenant at the Coconut Grove Marketplace in Kailua-Kona, Hawai'i ("Marketplace"). We submit this letter in strong opposition to the request, by Brad, Cord and D.G. Anderson, to build an open chain-link fence on three sides of the former volleyball court parcel in the center of the Marketplace.

There is absolutely no question that the fence is going to damage our business, which has been struggling enough in the last several years because of the economy. The fence is designed to cut off sidewalk access to visitors who wish to cross the Marketplace to patronize our business. We rely very heavily on that traffic for our business. Although we understand it will only be 4' tall when you are standing in front of it, because of the slopes in the complex, the fence will still block visibility of our business to visitors from Alii Drive and from opposite portions of the Marketplace. Made out of chain link material, it will be an unsightly blight in the Marketplace complex and detract from the visitor experience that the Marketplace was designed to create.

If there was some legitimate reason for the fence, we might understand why the State of Hawai'i would even consider approving it. We understand, however, that the Andersons claim that they need it for liability reasons. If that were truly the case, the Andersons would be asking for a tall fence surrounding all sides. Instead, they want to fence off only those areas that will do the most damage to us and keep the rest of their land fully open to pedestrians from Alii Drive.

This is not about fixing a liability problem. This is about doing serious damage to the tenants and the Marketplace overall. The State should not be allowing the Andersons to build a partial fence on State land that has no legitimate purpose and will only do harm to business owners that are doing their best to survive in this tough economic climate. It is bad for business, bad for tourism in Kailua-Kona, and bad policy for the State of Hawai'i.

Sincerely,

Tenant Name: Lara Ashiro
By: the look

Contact Tel. No: 808-334-1377 Email Address: thelookhawaii@yahoo.com

October 24, 2011

Members of the Board of Land & Natural Resources
State of Hawaii
1151 Punchbowl Street, Room 130
Honolulu, HI 96813

Re: October 28, 2011 BLNR Meeting: Item D-20

Dear Land Board Member,

We are a tenant at the Coconut Grove Marketplace in Kailua-Kona, Hawai'i ("Marketplace"). We submit this letter in strong opposition to the request, by Brad, Cord and D.G. Anderson, to build an open chain-link fence on three sides of the former volleyball court parcel in the center of the Marketplace.

There is absolutely no question that the fence is going to damage our business, which has been struggling enough in the last several years because of the economy. The fence is designed to cut off sidewalk access to visitors who wish to cross the Marketplace to patronize our business. We rely very heavily on that traffic for our business. Although we understand it will only be 4' tall when you are standing in front of it, because of the slopes in the complex, the fence will still block visibility of our business to visitors from Alii Drive and from opposite portions of the Marketplace. Made out of chain link material, it will be an unsightly blight in the Marketplace complex and detract from the visitor experience that the Marketplace was designed to create.

If there was some legitimate reason for the fence, we might understand why the State of Hawai'i would even consider approving it. We understand, however, that the Andersons claim that they need it for liability reasons. If that were truly the case, the Andersons would be asking for a tall fence surrounding all sides. Instead, they want to fence off only those areas that will do the most damage to us and keep the rest of their land fully open to pedestrians from Alii Drive.

This is not about fixing a liability problem. This is about doing serious damage to the tenants and the Marketplace overall. The State should not be allowing the Andersons to build a partial fence on State land that has no legitimate purpose and will only do harm to business owners that are doing their best to survive in this tough economic climate. It is bad for business, bad for tourism in Kailua-Kona, and bad policy for the State of Hawai'i.

Sincerely,

Tenant Name: ANH NGUYEN - TROPICAL FROZEN YOGURTS

By: 

Contact Tel. No: (808) 327-4839 Email Address: anh.nguyen2@yahoo.com

October 24, 2011

Members of the Board of Land & Natural Resources
State of Hawaii
1151 Punchbowl Street, Room 130
Honolulu, HI 96813

Re: October 28, 2011 BLNR Meeting; Item D-20

Dear Land Board Member,

We are a tenant at the Coconut Grove Marketplace in Kailua-Kona, Hawai'i ("Marketplace"). We submit this letter in strong opposition to the request, by Brad, Cord and D.G. Anderson, to build an open chain-link fence on three sides of the former volleyball court parcel in the center of the Marketplace.

There is absolutely no question that the fence is going to damage our business, which has been struggling enough in the last several years because of the economy. The fence is designed to cut off sidewalk access to visitors who wish to cross the Marketplace to patronize our business. We rely very heavily on that traffic for our business. Although we understand it will only be 4' tall when you are standing in front of it, because of the slopes in the complex, the fence will still block visibility of our business to visitors from Alii Drive and from opposite portions of the Marketplace. Made out of chain link material, it will be an unsightly blight in the Marketplace complex and detract from the visitor experience that the Marketplace was designed to create.

If there was some legitimate reason for the fence, we might understand why the State of Hawai'i would even consider approving it. We understand, however, that the Andersons claim that they need it for liability reasons. If that were truly the case, the Andersons would be asking for a tall fence surrounding all sides. Instead, they want to fence off only those areas that will do the most damage to us and keep the rest of their land fully open to pedestrians from Alii Drive.

This is not about fixing a liability problem. This is about doing serious damage to the tenants and the Marketplace overall. The State should not be allowing the Andersons to build a partial fence on State land that has no legitimate purpose and will only do harm to business owners that are doing their best to survive in this tough economic climate. It is bad for business, bad for tourism in Kailua-Kona, and bad policy for the State of Hawai'i.

Sincerely,

Tenant Name: L3L, LLC

By: [Signature]

Contact Tel. No: 808 329 7585 Email Address: ter@jacksdrivinglocker.com

October 24, 2011

Members of the Board of Land & Natural Resources
State of Hawaii
1151 Punchbowl Street, Room 130
Honolulu, HI 96813

Re: October 28, 2011 BLNR Meeting; Item D-20

Dear Land Board Member,

We are a tenant at the Coconut Grove Marketplace in Kailua-Kona, Hawai'i ("Marketplace"). We submit this letter in strong opposition to the request, by Brad, Cord and D.G. Anderson, to build an open chain-link fence on three sides of the former volleyball court parcel in the center of the Marketplace.

There is absolutely no question that the fence is going to damage our business, which has been struggling enough in the last several years because of the economy. The fence is designed to cut off sidewalk access to visitors who wish to cross the Marketplace to patronize our business. We rely very heavily on that traffic for our business. Although we understand it will only be 4' tall when you are standing in front of it, because of the slopes in the complex, the fence will still block visibility of our business to visitors from Alii Drive and from opposite portions of the Marketplace. Made out of chain link material, it will be an unsightly blight in the Marketplace complex and detract from the visitor experience that the Marketplace was designed to create.

If there was some legitimate reason for the fence, we might understand why the State of Hawai'i would even consider approving it. We understand, however, that the Andersons claim that they need it for liability reasons. If that were truly the case, the Andersons would be asking for a tall fence surrounding all sides. Instead, they want to fence off only those areas that will do the most damage to us and keep the rest of their land fully open to pedestrians from Alii Drive.

This is not about fixing a liability problem. This is about doing serious damage to the tenants and the Marketplace overall. The State should not be allowing the Andersons to build a partial fence on State land that has no legitimate purpose and will only do harm to business owners that are doing their best to survive in this tough economic climate. It is bad for business, bad for tourism in Kailua-Kona, and bad policy for the State of Hawai'i.

Sincerely,

Tenant Name: JACK'S DIVING LOCKER

By: [Signature]

Contact Tel. No: 808-329-7585 Email Address: ten@jacksdivinglocker.com

October 24, 2011

Members of the Board of Land & Natural Resources
State of Hawaii
1151 Punchbowl Street, Room 130
Honolulu, HI 96813

Re: October 28, 2011 BLNR Meeting: Item D-20

Dear Land Board Member,

We are a tenant at the Coconut Grove Marketplace in Kailua-Kona, Hawai'i ("Marketplace"). We submit this letter in strong opposition to the request, by Brad, Cord and D.G. Anderson, to build an open chain-link fence on three sides of the former volleyball court parcel in the center of the Marketplace.

There is absolutely no question that the fence is going to damage our business, which has been struggling enough in the last several years because of the economy. The fence is designed to cut off sidewalk access to visitors who wish to cross the Marketplace to patronize our business. We rely very heavily on that traffic for our business. Although we understand it will only be 4' tall when you are standing in front of it, because of the slopes in the complex, the fence will still block visibility of our business to visitors from Alii Drive and from opposite portions of the Marketplace. Made out of chain link material, it will be an unsightly blight in the Marketplace complex and detract from the visitor experience that the Marketplace was designed to create.

If there was some legitimate reason for the fence, we might understand why the State of Hawai'i would even consider approving it. We understand, however, that the Andersons claim that they need it for liability reasons. If that were truly the case, the Andersons would be asking for a tall fence surrounding all sides. Instead, they want to fence off only those areas that will do the most damage to us and keep the rest of their land fully open to pedestrians from Alii Drive.

This is not about fixing a liability problem. This is about doing serious damage to the tenants and the Marketplace overall. The State should not be allowing the Andersons to build a partial fence on State land that has no legitimate purpose and will only do harm to business owners that are doing their best to survive in this tough economic climate. It is bad for business, bad for tourism in Kailua-Kona, and bad policy for the State of Hawai'i.

Sincerely,

Tenant Name: Kilikii Italian Ice

By: Margaret Knox

Contact Tel. No: 856-316-9332 Email Address: mimikno@comcast.net

D.G. "ANDY" ANDERSON

HONOLULU, HAWAII 96816

November 9, 2011

Ms. Bobby-Jean Leithead-Todd
Planning Director
County of Hawai'i
101 Pauahi Street, Suite 3
Hilo, Hawai'i 96720

Re: Application for Design Review (TMK (3) 7-5-09:43)

Dear Ms. Leithead-todd:

Review of the November 2, 2011 letter ("**LBUBS Submission**") submitted by LBUBS-C2 Alii Drive, LLC (acting through its manager, LNR Partners, LLC) ("**LBUBS**"), the current owner of the Coconut Grove Marketplace ("**Marketplace**"), reveals that LBUBS opposes D.G. "Andy" Anderson, Brad Anderson and Cord Anderson's ("**Andersons**") application for design review (four foot high fence) to preserve its, and its tenants', alleged right to use and access TMK (3) 7-5-09:43 ("**Parcel 43**")¹ for (a) ingress and egress to and from the Marketplace and (b) its drainage system. LBUBS's only basis for asserting such rights is the argument that "Parcel 43 was developed and permitted at the County level to be part of one single retail/commercial project, and a fence that blocks access to the Marketplace components violates both the current SMA Permit for the Marketplace, as amended, and the development concept of maintaining open space within the Marketplace approved by the County."²

This is the same position taken by LBUBS in its October 27, 2011 application submitted to the Department of Land and Natural Resources ("**DLNR**") to obtain an easement over Parcel 43 for drainage and other purposes ("**LBUBS Easement Application**").³ In the LBUBS Application, LBUBS stated:

¹ Parcel 43 is owned in fee by the State of Hawai'i ("**State**"), and which was leased by the State to Lanihau Partners, L.P. pursuant to State General Lease No. S-5188 ("**State Lease**"). The State Lease was eventually assigned (with the consent of the State) to the Patricia Greenwell Revocable Living Trust ("**Trust**"), and the Trust assigned its interest in the State Lease (with State consent) to the Andersons.

² Pp. 1 - 2, LBUBS Submission.

³ A copy of the LBUBS Easement Application is attached hereto as **Exhibit "1"**.

Ms. Bobby-Jean Leithead-todd
Planning Director
County of Hawai'i
November 9, 2011
Page 2

[W]hen the Marketplace complex and the lease to that Parcel were effectively under common ownership and **received governmental approvals and permits, and was developed as a single project**, Applicant [LBUBS] believes its acquisition of the Marketplace parcels was **accompanied with an implied easement and/or easement by necessity over Parcel 43 for the existing utility and drainage infrastructure**. P. 2, Attachment to LBUBS Application, emphasis and ellipses added.

However, LBUBS failed to advise:

1. LBUBS Acquired No Rights to Parcel 43 in the Foreclosure Lawsuit Sale. LBUBS was aware of the disputes between LBUBS's predecessor (Guido Giacometti ["**Giacometti**"], as commissioner) and the Andersons regarding the right of the Marketplace owner to use Parcel 43 without, among other things, undertaking any obligation to either maintain Parcel 43 or to compensate the Andersons for its use.⁴ LBUBS filed the Foreclosure Lawsuit to foreclose on the Marketplace, and Giacometti was appointed by the Federal Court (i) as the receiver to gather and manage all of the property of the borrower, and (ii) subsequently as the commissioner for the sale of the borrower's property. Prior to the foreclosure sale, LBUBS and all other interested persons were advised by Giacometti, and each confirmed, that:

Interested Party hereby acknowledges that the Property to be sold at the foreclosure will NOT include any rights, title or interest in or relating to Parcel 43. Interested Party shall conduct its own investigation into the title to and impact of the separate ownership of Parcel 43 and specifically, the pending dispute on usage, on the ownership, operation and the development of the Property.⁵

⁴ See, D.G. "Andy" Anderson's (1) February 26, 2010 letter to Giacometti, a copy of which is attached as **Exhibit "2"**, and (2) July 30, 2010 letter to Giacometti, a copy of which is attached as **Exhibit "3"**. Giacometti was the receiver/commissioner appointed in *LBUBS 2007-C2 Alii Drive, LLC v. Anekona, LLC et al.*, Civ. No. 09-00114 SOM-BMK, U.S. District Court for the District of Hawaii ("**Foreclosure Lawsuit**").

⁵ See, ¶ 6, Giacometti's Agreement Regarding Confidentiality, Disclaimer of Warranties and TMK (3) 7-5-009-043 ("**Giacometti Agreement**"), a copy of which is attached hereto as **Exhibit "4"**, emphasis in original.

Ms. Bobby-Jean Leithead-todd
Planning Director
County of Hawai'i
November 9, 2011
Page 3

The property interests held by Giacometti, as receiver and commissioner, included all of the property rights and interest (including general intangibles) of the borrowers, which included Brian Anderson ("**Brian**") and his various companies.⁶ However, Giacometti recognized, and required each potential purchaser to confirm, that he, as commissioner, did not have, and could not convey, "any rights, title or interest in or relating to Parcel 43." Therefore, LBUBS did not obtain any rights in and to Parcel 43 which may have been held by Brian, his companies or any other borrower simply because Giacometti did not have any such rights. As a result, LBUBS cannot now argue that it, as the buyer of the Marketplace in the Foreclosure Lawsuit, has any right based on, among other things, the "common" ownership and development of the Marketplace and Parcel 43. LBUBS simply did not acquire such rights.

2. Federal Court Order Confirms Giacometti, and Now, LBUBS Have No Rights In Parcel 43. Giacometti, when the Andersons were in the process of acquiring Parcel 43 and with the knowledge that the Andersons intended to build a perimeter fence, filed on December 23, 2009 the Receiver's Motion to Enforce Order Granting Plaintiff's *Ex Parte* Motion for Appointment of a Receiver Entered on March 20, 2009 and to Hold Certain Parties in Contempt ("**Motion to Enforce**"). In support of the Motion to Enforce, Giacometti argued, among other things, that:

Whether Anekona was occupying and using the State Parcel [Parcel 43] pursuant to the Sublease or a separate agreement with the Andersons [in this case, Brian and his wife, Joan] and Mrs. Greenwell, the Sublease, agreement and the rights of Anekona to possess and use the State Parcel as part of the Marketplace undeniably "affected" and "pertained to" the use, occupancy, enjoyment, management and operation of the Marketplace. LRG itself has admitted that ***the removal of the State Parcel from the Marketplace's operations will be problematic for the Receiver and Marketplace's owner, operator and purchaser.***⁷

⁶ See, ¶ 4, Order Granting Plaintiff's [LBUBS] *Ex Parte* Motion for Appointment of a Receiver filed in the Foreclosure Lawsuit on March 20, 2009 ("**Appointment Order**"), a copy of which is attached hereto as ***Exhibit "5"***.

⁷ See, P.8, Receiver's Reply to Defendant LRG Real Estate LP's Memorandum in Opposition to Motion to Enforce Order Granting Plaintiff's *Ex Parte* Motion for Appointment of a Receiver Entered on March 20, 2009 and to Hold Certain Parties in Contempt, Filed Herein on December 23, 2009, Filed on January 5, 2010, filed January 7, 2010 in th Foreclosure Lawsuit ("**Receiver Reply**"), emphasis and ellipses added. A copy of the Receiver Reply is attached hereto as ***Exhibit "6"***. In addition, the

Ms. Bobby-Jean Leithead-todd
Planning Director
County of Hawai'i
November 9, 2011
Page 4

In effect, the Receiver (as was known by LBUBS, which was a party to the Foreclosure Lawsuit) made the same arguments in the Foreclosure Lawsuit that LBUBS is making here -- Parcel 43 is part of the Marketplace, and the fencing of Parcel 43 will remove it from the Marketplace and "will be problematic for the Receiver and the Marketplace's owner, operator and purchaser."

In spite of these and other arguments made by the Receiver, the Federal Court found and ordered in its Order Denying Motion to Enforce Order Granting Plaintiff's *Ex Parte* Motion for Appointment of a Receiver Entered on March 20, 2009 and to Hold Certain Parties in Contempt filed on January 15, 2010 ("**Order**")⁸ that (i) the "Receiver has no interest in the Greenwell Trust's leasehold interest in the State Parcel" (P. 2, Order) and (ii) "[u]nder the foregoing, the Greenwell Trust's leasehold interest in the State Parcel is not part of the Estate Property and therefore, not within the Receiver's possession or control ... [t]he Receiver concedes as much" (P. 3, Order).

Conceding that he (and the lender, LBUBS) did not have legal title to Parcel 43, Giacometti argued that he had some other right (whether equitable or otherwise) to Parcel 43 as a result of the common ownership or control of Parcel 43 and the Marketplace. This is the same argument LBUBS is making here to establish that it has a right (whether as an implied easement, easement by necessity or otherwise) to

Receiver argued at P. 3 of the Receiver Reply that:

The fact that the Receiver does not have legal title to the State Parcel does not prevent him from seeking to prevent actions with that Parcel that will interfere with the receivership and with the Receiver's obligation to preserve and protect the Estate Property. ***Moreover, Anekona has been in continuous possession of the State Parcel with Mrs. Greenwell's and the individual Andersons' blessing ever since it took over ownership of the Marketplace, whether pursuant to the 1997 Sublease in the individual names of Brian and Joan Anderson or pursuant to some other agreement. Although it appears to be the case the Mrs. Greenwell's leasehold interest in the State Parcel itself may not be part of the Receivership Estate, the right that Anekona had to possess and use the State Parcel, whether under the 1997 Sublease and/or any separate agreement between Mrs. Greenwell and/or the Andersons and Anekona, appears to be part of the Lender's collateral and therefore part of the Receivership Estate.*** (Emphasis added.)

8

A copy of the Order is attached hereto as ***Exhibit "7"***.

Ms. Bobby-Jean Leithead-todd
Planning Director
County of Hawai'i
November 9, 2011
Page 5

use Parcel 43, and prevent the Andersons from securing Parcel 43.⁹ However, LBUBS is foreclosed by the Order (which no one appealed) from asserting such a right simply because (i) a Court of competent jurisdiction ruled to the contrary and it is bound by such a determination and/or (ii) it knew that Giacometti had no interest in Parcel 43, and took title to the Marketplace knowing, and agreeing, that neither Giacometti nor the lender (which was LBUBS) had a right to use Parcel 43. In either circumstance, LBUBS cannot argue that it has any interest in, or any right to use, Parcel 43.

3. LBUBS Has an Obligation to Amend the SMA Permit. LBUBS argues that the Andersons are in violation of the SMA Permit for the Marketplace. However, the Andersons are not the permittee nor do they own the Marketplace. Thus, to the extent the SMA Permit requires the use of the Parcel 43 as part of the drainage for the Marketplace, since LBUBS has no interest in Parcel 43, it is the party in violation of the SMA Permit, and it must correct the same. If the correction of LBUBS's violation requires an amendment to the existing SMA Permit, then LBUBS has the obligation to do so, and not the Andersons.

To the extent that Parcel 43 is subject to any requirements regarding open space or park use, there is nothing to indicate that the erection of a fence along a portion of the perimeter of Parcel 43 violates the SMA Permit. The purpose of the fence is to secure the use of portions of Parcel 43 which are not in park use. The portion of Parcel 43 which is in park use will not be fenced in by the Anderson except in accordance with applicable law.

Given the foregoing, the Andersons' submit that LBUBS's opposition to the perimeter fence is solely to allow its tenants to use Parcel 43 for commercial purposes, without reaching agreement with the Andersons on the terms of such use. As was noted above, LBUBS, when it purchased the Marketplace, was aware of, and agreed, that Giacometti had no interest in, and no right to use, Parcel 43 for any purpose. The Federal Court, in issuing the Order, ruled that Giacometti had no right or interest in Parcel 43. LBUBS, now, seeks to have the County of Hawai'i, by denying the Anderson's application to erect a short perimeter fence around the area not used as a park, "rule" otherwise -- in effect, LBUBS has a right to use Parcel 43.

⁹ The Andersons need to secure Parcel 43 because, among other things, potential liability to third parties, and more importantly, the Trust's insurance agent/broker advised that "the area be fenced off and made inaccessible to prevent any possibility of injury or damage." Letter dated April 30, 2010, from Peter Nottage, Jr. (Aloha Insurance Services, Inc.) to LRG Real Estate LP (a copy of which is attached hereto as **Exhibit "8"**).

Ms. Bobby-Jean Leithead-todd
Planning Director
County of Hawai'i
November 9, 2011
Page 6

As such, the Andersons submit that the County of Hawai'i should not consider LBUBS's opposition, and the Andersons should be allowed to erect its perimeter fence to protect their interests, and to, in part, alleviate any concerns regarding the maintenance of the volleyball court by controlling access to the same.

Very truly yours,

D.G. "ANDY" ANDERSON