

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

May 25, 2012

PSF No.: 12HD-052
PSF No.: 12HD-053

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

HAWAII

Grant of Perpetual, Non-Exclusive Easement to Henk Brouwer Rogers and Akemi Matsumoto Rogers for Primary Access Purposes, Hale Piula, Puuwaawaa, North Kona, Hawaii, Tax Map Key: (3) 7-1-001: portions of 006 & 007.

Grant of Term, Non-Exclusive Easement to Henk Brouwer Rogers and Akemi Matsumoto Rogers for Secondary Access Purposes, Hale Piula, Puuwaawaa, North Kona, Hawaii, Tax Map Key: (3) 7-1-001: portions of 006 & 007.

APPLICANT:

Henk Brouwer Rogers and Akemi Matsumoto Rogers, husband and wife, Tenants by the Entirety.

LEGAL REFERENCE:

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

LOCATION:

Portions of Government lands of Puu Waawaa Forest Reserve and Puu Waawaa Forest Bird Sanctuary (Hale Piula), situated at Puuwaawaa, North Kona, Hawaii, identified by Tax Map Key: (3) 7-1-001: 006 & 007, as shown on the attached map labeled **Exhibit A**.

AREA:

Easement 1: 8.00 acres, more or less, for primary (easement by necessity) access at perpetuity.

Easement 2: 20.00 acres, more or less, for secondary access at term.

Final easement alignment/location, which will be over existing ranch roadways, will be at the discretion of the Division of Forestry and Wildlife, and surveyed by a qualified licensed surveyor, at Applicant's expense.

ZONING:

State Land Use District: Agriculture/ Conservation (Resource Subzone)
County of Hawaii CZO: Agriculture

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act

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

CURRENT USE STATUS:

TAX MAP KEY	ZONING		ENCUMBRANCE	AREA (Acres)
	SLU	CZO		
3 rd / 7-1-001: 006	Ag	Ag	Governor's Executive Order No. 3917 to Division of Forestry and Wildlife	3,806.775
3 rd / 7-1-001: 007	Ag	Ag	Governor's Executive Order No. 4203 to Division of Forestry and Wildlife	13,046.100
			Land Office Deed No. S-27612; Napuu Water Inc	(3.148)
			Land Office Deed No. S-27712; HELCO	(5.415)
			Land Office Deed No. S-28493; Puuwaawaa Property Owners Assoc.	(9.049)
			Land Office Deed No. S-28568; Hawaiian Telcom Inc	(10.133)
			Grant of Easement No. S-5974; Henk & Akemi Rogers	(4.776)

CHARACTER OF USE:

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

COMMENCEMENT DATE:

To be determined by the Chairperson.

CONSIDERATION:

Easement 1: Not applicable. Easement shall be issued at gratis.

Easement 2: In advance, for the term easement as determined by independent or staff appraisal establishing fair market value, at Applicant's expense, subject to

review and approval by the Chairperson.

EASEMENT TERM:

Easement 1: Not applicable. Easement will be perpetual.

Easement 2: For a term of thirty (30) years.

ANNUAL RENT:

Easement 1: Not applicable, easement will be perpetual at gratis.

Easement 2: Not applicable, easement will be for a one-time payment in advance.

RENTAL REOPENINGS:

Easement 1: Not applicable, easement will be perpetual at gratis.

Easement 2: Not applicable, rent will be for a one-time payment in advance.

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

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

In accordance with Hawaii Administrative Rule Sections 11-200-8(a)(1) & (4) and the Exemption List for the Department of Land and Natural Resources approved by the Environmental Council and dated December 4, 1991, the subject request is exempt from the preparation of an environmental assessment pursuant to Exemption Class No. 1, that states "Operations, repairs or maintenance of existing structures, facilities, equipment, or topographical features, involving negligible or no expansion or change of use beyond that previously existing" and Class No. 4, that states "Minor alteration in the conditions of land, water, or vegetation."

In accordance with the "Division of Land Management's Environmental Impact Statement Exemption List", approved by the Environmental Council and dated April 28, 1986, the subject request is exempt from the preparation of an environmental assessment pursuant to Exemption Class No. 1, that states "Operations, repairs or maintenance of existing structures, facilities, equipment or topographical features, involving negligible or no expansion or change of use beyond that previously existing." Should Applicant propose any future use of the land that triggers Hawaii Revised Statutes (HRS) Chapter 343 review, Applicant shall be responsible for compliance with HRS Chapter 343, as amended.

DCCA VERIFICATION:

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

APPLICANT REQUIREMENTS:

Applicant shall be required to:

Easement 1 :

- 1) Provide survey maps and descriptions according to State DAGS standards and at Applicant's own cost;
- 2) Consult with the Division of Forestry and Wildlife in determining the final alignment for Easement 1; and
- 3) Obtain a title report to ascertain ownership, where necessary, at Applicant's own cost and subject to review and approval by the Department.

Easement 2 :

1. Pay for an appraisal to determine the initial fair market value of the term easement;
2. Provide survey maps and descriptions according to State DAGS standards and at Applicant's own cost;
3. Consult with the Division of Forestry and Wildlife in determining the final alignment for Easement 2; 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:

Pursuant to Executive Order No. 4203 for the Puu Waawaa Forest Reserve and Executive Order No. 3937 for the Puu Waawaa Forest Bird Sanctuary, the subject lands are under the jurisdiction and control of the Division of Forestry and Wildlife.

The Applicant:

- 1) Claims ownership of TMKs: (3) 7-1-001:002, 003 & 008 (Parcel 1, Parcel 2, Parcel 3 & Parcel 8, respectively).
- 2) Holds Grant of Non-Exclusive Easement described in Land Office Deed

No. 28,493, a perpetual easement dated July 19, 2002, providing access from State Highway 190 to private properties identified as TMK: (3) 7-1-001:002 and 008 (Parcel 2 and Parcel 8).

- 3) Holds a Grant of Non-Exclusive Easement S-5974, a 15-year term easement dated October 19, 2009, for encroaching structures and weed/vegetation control buffer for the Applicant's adjacent lands.
- 4) Holds CDUP HA-3514 for Native Forest and Bird Habitat Restoration and Research Facility located at Puu Waawaa, North Kona, Hawaii, TMK: (3) 7-1-001:003 (Parcel 3). Page 13, Condition No. 3 of CDUP HA-3514, states:

"3. Access to the subject property will be through only one entrance to the Puu Waawaa Forest Bird Sanctuary (PWWFBS). The applicant shall obtain a disposition from the State to utilize this access road. The applicant shall install a raised ungulate proof 18-foot cattle gate to protect against the gate being left open unintentionally and compromising future ungulate free status of PWWFBS. In addition, any repairs/maintenance to this road by the applicant will require prior State review and approval."

The Applicant has requested an easement over the subject State lands between Parcel 2 and Parcel 3 for access purposes.

Hale Piula (Parcel 3), was created via subdivision, removed from State ownership and conveyed as part of a land exchange to Mr. Robert Hind in 1940 for water tank site in support of Mr. Hind's grazing operation, as he held a pasture lease over the subject State lands at that time. It is unclear why no access easement exists for this land-locked parcel, which is completely surrounded by State lands. The State Abstractor has confirmed that Parcel 3 is not a landlocked "kuleana" parcel. The Department of the Attorney General advised staff that the Applicant is entitled to an "easement by necessity" from the State for Parcel 3. The "easement by necessity" was created at the time of the 1940 land exchange. Accordingly, the Department of the Attorney General further advises that issuance of an express easement on the implied easement should be at gratis.

Although the Applicant currently owns both Parcel 2 and Parcel 3, it is possible that different private entities may one day own one or both of these two parcels in the future. The disposition of an easement by necessity leaves the choice of easement alignment to the State of Hawaii, as the landowner of record. If these two private parcels were to have different owners, staff would prefer and propose that any easement for Parcel 3 extend in the most direct makai route along existing unimproved roads to intersect State Highway 190, in the vicinity of mile marker 25 and not passing through or near Parcel 2. For this reason, and to best protect the long-term interest of the State, Staff recommends that Easement 1, the primary easement for Parcel 3 be a perpetual, non-exclusive easement

extending in a northerly direction from Parcel 3 (Point C) and intersecting State Highway 190 (Point D) in the vicinity of mile marker 25. **(Exhibit B)**

The Applicant prefers an easement route that would effectively connect Parcel 3 (Point C) with Parcel 2 (Point B), primarily for their own convenience. Because the Applicant has been a cooperative neighbor with the Department, staff proposes that a secondary term, non-exclusive easement be granted to the applicant for their convenience, extending in a northeasterly direction across existing ranch roads, and connecting with Parcel 2 on its western boundary at the fence line, and then continuing northward parallel to Parcel 2 to connect with and running over the existing access perpetual easement granted by the State under Grant of Non-Exclusive Easement described in Land Office Deed No. 28,493, to Highway 190 (Point A). **(Exhibit B)**

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

Various governmental agencies and interest groups were solicited for comments on this project.

AGENCIES	COMMENTS
County of Hawai'i	
Fire Department	No response
Parks & Recreation	No response
Planning Department	No comments
Police Department	No response
Public Works	No response
Water Supply	No response
State of Hawai'i	
DOH-Wastewater Branch	** See comments
DOH-Clean Water Branch	** See comments
DLNR-CWRM	No comments
DLNR-Forestry & Wildlife	No objections
DLNR-OCCL	No comments
DOT-Highways Division	** See comments
Other Agencies	
Office of Hawaiian Affairs	** See comments

The Department of Health, Wastewater Branch, had no objections to the request and offered the following comments. The DOH believes the project associated with CDUP HA-3514 will not generate wastewater, but that in case that wastewater is generated, reserves the right to review appropriate plans for conformance to applicable rules.

The DOH Clean Water Branch stipulated that any project and its potential impacts to State waters are subject to requirements or must meet various criteria pursuant to HAR Section 11-54; a National Pollutant Discharge Elimination System permit relating to construction, and: potential permits relating to wastewater. Staff notes that the proposed easements would be routed over existing ranch roads, and as a result use of these easements would include basic maintenance. The DOH Clean Water Branch comments appear to be geared toward potential construction work by the applicant relating to CDUP HA-3514, and the applicant would be responsible for conforming to the issues.

The State DOT requests that DLNR ensure the CDUP HA-3514, Condition No. 3 stipulate that the applicant should not only install, but also maintain a cattle guard at the specified location. Staff believes DOT may have mistaken the location of said cattle guard, which is not at the interface of State Highway 190, but rather at the interface of Puu Waawaa Forest Reserve and Puu Waawaa Forest Bird Sanctuary – more than three miles from the State Highway. DOT also commented that the applicant's proposed project under CDUP HA-3514 would not likely result in additional surface water runoff onto the State Highway, or result in a significant increase in Highway traffic or utilization of heavy trucks.

OHA commented that it believes that the applicant and the Department should share costs of maintaining the easement area, and further that the easement should be granted for a term rather than in perpetuity.

State Abstractor has confirmed that Hale Piula, identified as TMK: (3) 7-1-001:003, although landlocked, it is not a formal or legal "kuleana" parcel.

The alignment for the perpetual (primary) "easement by necessity," shall be the most direct route between Hale Piula (Parcel 3) and Highway 190, utilizing existing ranch roadways between Points C and D. The alternate or secondary route shall be at term, and utilizing existing ranch roadways between Points A to B and B to C, as depicted in the attached map (Exhibit A). Both easement alignments shall be at the sole discretion of the State. **(Exhibit B)**

Staff is of the opinion that this project qualifies for an exemption from preparation of an environmental assessment because the project will consist of, 1) only minor alteration in the condition of land, water, and vegetation, and 2) 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. That such use is presumed to result in no known significant impacts, whether immediate or cumulative, to the natural, environmental and/or cultural resources in the area.

The Division of Forestry and Wildlife, the holder of the Executive Order over the subject area has no objections to the request. Governor's concurrence is forthcoming.


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. Subject to the Applicant fulfilling all of the Applicant requirements listed above, authorize the issuance of a perpetual, non-exclusive easement to Henk Brouwer Rogers and Akemi Matsumoto Rogers covering the subject area for “primary” access 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 perpetual easement document form, as may be amended from time to time;
 - B. Authorize the subject request for Easement 1 (Perpetual/Primary) to be applicable in the event of a change in the ownership of the abutting parcel described as Tax Map Keys: (3) 7-1-001:002 & 003, provided the succeeding owner has not had a lease, permit, easement or other disposition of State lands terminated within the last five (5) years due to non-compliance with such terms and conditions.
 - C. Grantee shall be in compliance with all terms and conditions as provided under Conservation District Use Permit HA-3514, and consult with the Division of Forestry and Wildlife in the development of the management plan required by HA-3514;
 - D. Easement 1, the “Easement by Necessity,” shall be issued at gratis;
 - E. The easement shall not be used for any commercial activities;
 - F. Grantee shall be required to conduct periodic road maintenance and install cattle guards under the terms and conditions, and at locations, negotiated with the Division of Forestry and Wildlife, respectively;
 - G. The subject easement may be subject to closures in times of extreme fire hazardous conditions, during fire suppression activities, and/or other management considerations as determined by the Division of Forestry and Wildlife;
 - H. Grantee shall not stray off the designated easement area when traversing the State property;

- I. Grantee shall yield to and be mindful of the grazing operations in the area;
 - J. Review and approval by the Department of the Attorney General; and
 - K. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.
3. Subject to the Applicant fulfilling all of the Applicant requirements listed above, authorize the issuance of a 30-year term, non-exclusive easement to Henk Brouwer Rogers and Akemi Matsumoto Rogers covering the subject area for "secondary" access 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. Authorize the subject request for Easement 2 (Term/Secondary), shall be automatically terminated in the event of a change in the ownership for either of the abutting parcels described as Tax Map Keys: (3) 7-1-001:002 & 003, or after abandonment of the term easement by the Applicant for a period exceeding one (1) year;
 - C. Grantee shall be in compliance with all terms and conditions as provided under Conservation District Use Permit HA-3514, and consult with the Division of Forestry and Wildlife in the development of the management plan required by HA-3514;
 - D. The easement shall not be used for any commercial activities;
 - E. Grantee shall be required to conduct periodic road maintenance and install cattle guards under the terms and conditions, and at locations, negotiated with the Division of Forestry and Wildlife, respectively;
 - F. The subject easement may be subject to closures in times of extreme fire hazardous conditions, during fire suppression activities, and/or other management considerations as determined by the Division of Forestry and Wildlife;
 - G. Grantee shall not stray off the designated easement area when traversing the State property;
 - H. Grantee shall yield to and be mindful of the grazing operations in the area;
 - I. Review and approval by the Department of the Attorney General; and

- J. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

Respectfully Submitted,


Wesley T. Matsunaga
Land Agent

APPROVED FOR SUBMITTAL:


William J. Aila, Jr., Chairperson





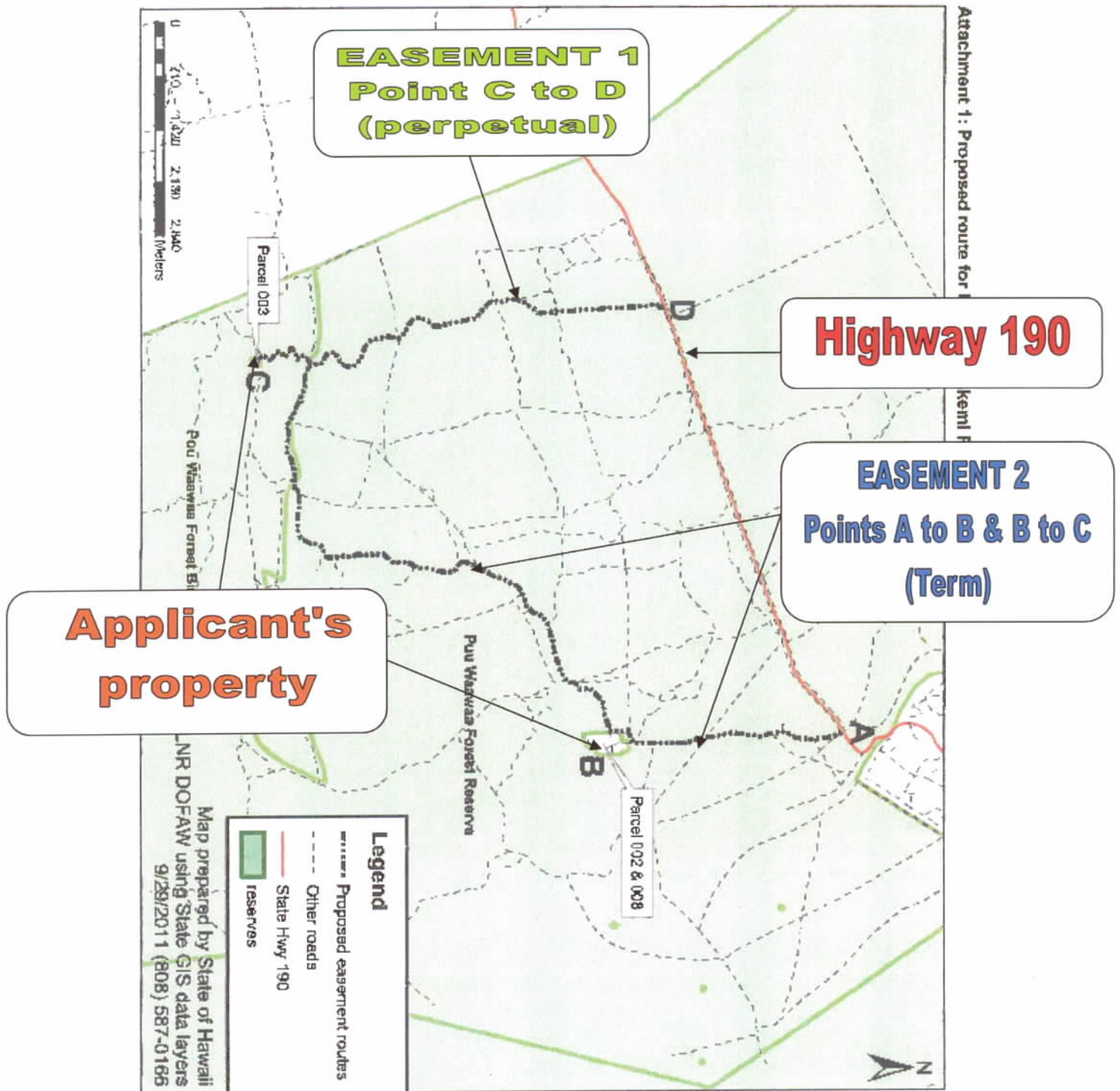


EXHIBIT B



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

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

Project Title: Grant of Perpetual, Non-Exclusive Easement to Henk Brouwer Rogers and Akemi Matsumoto Rogers for Primary Access Purposes, Hale Piula, Puuwaawaa, North Kona, Hawaii, Tax Map Key: (3) 7-1-01: portions of 6 & 7.

Grant of Term, Non-Exclusive Easement to Henk Brouwer Rogers and Akemi Matsumoto Rogers for Secondary Access Purposes, Hale Piula, Puuwaawaa, North Kona, Hawaii, Tax Map Key: (3) 7-1-01: portions of 6 & 7.

Project / Reference No.: PSF No.: 12HD-052 (Perpetual)
PSF No.: 12HD-053 (Term)
Project Location: Hale Piula, Puuwaawaa, North Kona, Hawaii, Tax Map Key: (3) 7-1-01: portions of 6 & 7.
Project Description: Grant of Perpetual, Non-Exclusive Access Easement.
Grant of Term, Non-Exclusive Easement
Chap. 343 Trigger(s): Use of State land.

Exemption Class No. and Description: In accordance with Hawaii Administrative Rule Sections 11-200-8(a)(1) & (4) and the Exemption List for the Department of Land and Natural Resources approved by the Environmental Council and dated December 4, 1991, the subject request is exempt from the preparation of an environmental assessment pursuant to **Exemption Class No. 1**, that states "Operations, repairs or maintenance of existing structures, facilities, equipment, or topographical features, involving negligible or no expansion or change of use beyond that previously existing" and **Class No. 4**, that states "Minor alteration in the conditions of land, water, or vegetation."

EXHIBIT C

May 25, 2012

Exemption Item Description from Agency Exemption List:	Operations, repairs or maintenance of existing structures, facilities, equipment or topographical features, involving negligible or no expansion or change of use beyond that previously existing.
Consulted Parties:	Office of Conservation and Coastal Lands.
Recommendation:	It is anticipated this project will probably have minimal or no significant effect on the environment and is presumed to be exempt from the preparation of an environmental assessment.



William J. Aila, Jr., Chairperson



Date

EXHIBIT C