Amend Prior Board Action of December 9, 2011, Item D-18, Sale of Remnant to Richard R. Kelley Living Trust by Reducing the Remnant Area, Honolulu, Oahu, Tax Map Key: (1) 3-1-038:042; and

Grant of Term, Non-Exclusive Easement to Richard R. Kelley Living Trust for Seawall and Steps Purposes, Honolulu, Oahu, Tax Map Key: (1) 3-1-038:seaward of 042

APPLICANT:

Richard R. Kelley Living Trust

LEGAL REFERENCE:

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

LOCATION:

Portion of Government lands situated seaward of Honolulu, Oahu, identified by Tax Map Key: (1) 3-1-038:042, as shown on the attached map labeled Exhibit 1.

AREA:

<table>
<thead>
<tr>
<th>Easements</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1</td>
<td>84 sf</td>
</tr>
<tr>
<td></td>
<td>2</td>
<td>3 sf</td>
</tr>
<tr>
<td></td>
<td>3</td>
<td>9 sf</td>
</tr>
<tr>
<td></td>
<td>4</td>
<td>14 sf</td>
</tr>
<tr>
<td></td>
<td>5</td>
<td>6 sf</td>
</tr>
<tr>
<td></td>
<td>6</td>
<td>9 sf</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td><strong>125 sf</strong></td>
</tr>
</tbody>
</table>

ZONING:
State Land Use District: Conservation

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act
DHHL 30% entitlement lands pursuant to the Hawaii State Constitution: No

CURRENT USE STATUS:

Unencumbered with encroachments.

CHARACTER OF USE:

Right, privilege and authority to use, maintain, repair, replace and remove existing seawall and steps over, under and across State-owned land.

CONSIDERATION:

One-time payment to be determined by independent appraiser, subject to review and approval by the Chairperson.

EASEMENT TERM:

Fifty-five (55) years

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

In accordance with Hawaii Administrative Rule Section 11-200-8(a)(1)(4), 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." (See Exhibit 2)

DCCA VERIFICATION:

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

APPLICANT REQUIREMENTS: Applicant shall be required to:

1. Pay for an appraisal to determine the one-time payment of fair market value for the remnant; and

2. Provide survey maps and descriptions according to State DAGS standards and at Applicant's own cost.
REMARKS:

On December 9, 2011, under agenda item D-18, the Board approved the sale of the State remnant identified as tax map key (1) 3-1-038:042 to the applicant. A copy of the 2011 approved submittal is attached as Exhibit 3.

As part of the Applicant Requirement, the applicant has to undergo the consolidation process regarding his private property and the subject State remnant. Such consolidation process triggers a shoreline certification, which determines that about 125 square feet of the portions of the seawall and steps are located makai of the proposed shoreline. The respective locations of the six (6) easement areas are shown on the map attached as Exhibit 4a to 4c.

Staff has discussed the situation with the attorney on behalf of the applicant, and agree that the remnant area be reduced while the applicant would apply for a 55-year non-exclusive easement from the Board at a lump sum payment. By copy of its letter attached Exhibit 5, Office of Conservation and Coastal Lands indicates that it has no objection to a land disposition regarding the encroachments. For the Board’s information, the attorney has inquired the possibility of obtaining an exclusive easement, instead of non-exclusive. Staff believes a non-exclusive easement is more appropriate in view of the law, which mandates public access to the shoreline.

Further, the area of the subject remnant is reduced from 8,696 square feet as approved by the Board in 2011 to 7,513 square feet as shown on Exhibit 4a. Staff recommends the Board amend its prior action by revising the subject remnant area. At the applicant’s request, an appraisal was previously completed based on the previous bigger area. With the latest reduction in the area, staff will seek the Chairperson approval to revise the said appraisal due to the now smaller remnant area.

Staff did not solicit comments from other agencies on the requested easement, except OCCL. There are no other pertinent issues or concerns.

RECOMMENDATION: That the Board amend its prior action of December 9, 2011, D-18 by:

A. Revising the subject remnant area from 8,696 square feet to 7,513 square feet, more or less, further subject to review and approval by the Department of Accounting and General Services, Survey Division.

B. Adding the following Recommendation 7 to the Recommendation Section:

“7. A. The standard terms and conditions of the most current term shoreline encroachment easement document form, as may be amended from time to time;

B. The easement shall run with the land and shall inure to the benefit of
the real property described as Tax Map Key: (1) 3-1-038:024, 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. Review and approval by the Department of the Attorney General; and

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

E. Any shoreline hardening policy that may be adopted by the Board prior to execution of the grant of easement.”

Respectfully Submitted,

Barry Cheung
District Land Agent

APPROVED FOR SUBMITTAL:

William J. Aila, Jr., Chairperson
TMK (1) 3-1-038: seaward of 042

EXHIBIT 1
EXEMPTION NOTIFICATION

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

Project Title: Term, Non-Exclusive Easement for Seawall and Steps Purposes

Project / Reference No.: PSF 110D-077

Project Location: Honolulu, Oahu, TMK:(1) 3-1-038:seawad of 042

Project Description: Land disposition to resolve encroachment on State lands

Chap. 343 Trigger(s): Use of State Land

Exemption Class No.: In accordance with Hawaii Administrative Rule Section 11-200-8(a)(1)(4), 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."

According to the findings of the Office of Conservation and Coastal Lands, the subject encroachments existed around 1959. The subject request is to resolve the encroachment by issuing a land disposition. Staff understands the applicant does not plan to alter the conditions of land, water and vegetation at the subject location. As such staff believes that the proposed event would involve negligible or no expansion or change in use of the subject area beyond that previously existing.

Consulted Parties: Office of Conservation and Coastal Land

Recommendation: It is recommended that the Board find that 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 I. Aila Jr., Chairperson

Date 7/2/12

EXHIBIT 2
STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Land Division  
Honolulu, Hawaii 96813  

December 9, 2011  

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

PSF No.: 11od-077  
OAHU  

Sale of Remnant to Richard R. Kelley Living Trust, Honolulu, Oahu, Tax Map  
Key: (1) 3-1-038:042  

APPLICANT:  
Richard R. Kelley Living Trust  

LEGAL REFERENCE:  
Section 171-52, Hawaii Revised Statutes, as amended.  

LOCATION:  
Portion of Government lands situated at Honolulu, Oahu, identified by Tax Map Key: (1) 3-1-038:042, as shown on the attached map labeled Exhibit A1.  

AREA:  
8,696 square feet, more or less.  

ZONING:  
State Land Use District: Urban  
City and County of Honolulu LUO: R-7.5  

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:  
Vacant and unencumbered.
CONSIDERATION:

One-time lump sum payment of fair market value to be determined by independent or staff appraiser, subject to review and approval by the Chairperson.

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

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." See Exemption Notification attached as Exhibit A2.

DCCA VERIFICATION:

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

APPLICANT REQUIREMENTS:

Applicant shall be required to:

1) Pay for an appraisal to determine the one-time payment of fair market value for the remnant;
2) Consolidate the remnant with the Applicant’s abutting property through the County subdivision process; and
3) Provide survey maps and descriptions according to State DAGS standards and at Applicant’s own cost.

REMARKS:

The subject parcel is a portion of the Old Diamond Head Road. When the private property mauka of the subject road was subdivided into seven (7) lots and conveyed in 1885, the makai boundary of these seven (7) lots were specified as “along the road”. In 1959, under two separate Land Court Application (#1767 & 1768), owners (including the subject applicant) of the abutting properties claimed the ownership of the subject road. The Court ruled the abutting owners possessed the subject road. The State appealed the decision pertaining to the subject portion of the road, but not the other portions.

Subsequently, the Hawaii Supreme Court ruled that the State owns the subject portion of
the road.

For Board's information, abutting owners of other portions of the subject road succeeded in obtaining different declaratory judgments which entered in favor of the owners. The areas are shown orange on the map attached as Exhibit B. However, these portions of the road are not pertaining to the subject request.

The Applicant, the owner of the abutting private property identified as tax map key (1) 3-1-038:024, requests the Board authorize the sale of the subject parcel [the green area as shown on Exhibit B] as remnant pursuant to the statutes. The Applicant also owns the private parcel on both sides of the subject remnant. Photos showing the requested remnant area are attached as Exhibit C, with the mauka boundary of the remnant marked by the yellow tape on the photos. The requested remnant is the area between the yellow tape and the hedges on the makai side.

Pursuant to section 171-52, HRS, a remnant is defined as "a parcel of land economically or physically unsuitable or undesirable for development or utilization as a separate unit by reason of location, size, shape, or other characteristics." The subject parcel has been determined to be a remnant because there is no legal access connecting the subject parcel to any public roads. In addition, the 40-feet minimum shoreline setback requirement by the county, Section 23-1.4(a), ROH, makes the subject parcel unbuildable. The subject remnant has a depth of about 48 feet.

Office of Conservation and Coastal Lands, Department of Health, Department of Parks and Recreation, and Department of Facility Maintenance have no objection or comment to the request.

Division of Aquatic Resources (DAR) would rather keep the subject parcel public because of its proximity to the adjacent public shoreline recreation fishing area. Nevertheless, DAR also realizes that "keeping the subject property public will likely not significantly improve public access" (Exhibit D). According to the photos in the site assessment report prepared by the applicant's consultant and now attached as Exhibit E1 to E2, the public access is available over the beach areas as shown on the photos.

Board of Water Supply has no objections to the request but alerts the staff that there is an existing waterline. Staff notes that the waterline will be depicted on the survey map of the subject parcel.

State Historic Preservation Division, Commission on Water Resource Management, Department of Planning and Permitting, and Office of Hawaiian Affairs have not responded as of the suspense date.

Applicant has not had a lease, permit, easement or other disposition of State lands terminated within the last five years due to non-compliance with such terms and
Staff understands the applicant was occupying the subject remnant for a period of time, possibly starting from the Land Court proceedings mentioned above. For other shoreline encroachment cases, the Board generally imposed a fine for illegal encroachment, notwithstanding the date of the original construction/placing of the encroachment. Staff notes that the subject remnant was involved in litigation, including a current lawsuit seeking back rent. Staff does not know if the issue of back rent will have any impact on the lawsuit. Therefore, staff recommends the Board approve waiver of back rent, subject to approval by the Attorney General. Waiver of back rent and sale of the property to be subject to resolution of the lawsuit.

There are no other pertinent issues or concerns. Staff does not have any objection to the request.

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. Find that the subject lands are economically or physically unsuitable or undesirable for development or utilization as a separate unit by reason of location, size, shape, or other characteristics and, therefore, by definition is a remnant pursuant to Chapter 171, HRS.

3. Approve waiver of any back rent for the occupation over the subject remnant by the Applicant, further subject to review and approval by the Department of the Attorney General.

4. Authorize the subject requests to be applicable in the event of a change in the ownership of the abutting parcel described as Tax Map Key: (1) 3-1-038:024, 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.

5. Authorize the subdivision and consolidation of the subject remnant by the Applicant.

6. Subject to the Applicant fulfilling all of the Applicant Requirements listed above, authorize the sale of the subject remnant to Richard R. Kelley Living Trust.
covering the subject area 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 deed or grant (remnant) form, as may be amended from time to time;

b. Review and approval by the Department of the Attorney General; and

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

Respectfully Submitted,

[Signature]
Barry Cheung
District Land Agent

APPROVED FOR SUBMITTAL:

[Signature]
William J. Aila, Jr., Chairperson
Subject Location

TMK (1) 3-1-038:042

EXHIBIT A1
EXEMPTION NOTIFICATION
regarding the preparation of an environmental assessment pursuant to Chapter 343, HRS and Chapter 11-200, HAR

Project Title: Sale of Remnant

Project / Reference No.: PSF 11od-077

Project Location: Honolulu, Oahu, Tax Map Key: (1) 3-1-038:042

Project Description: Sale of Remnant

Chap. 343 Trigger(s): Use of State Land

Exemption Class No.: 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."

Staff understands the subject remnant has been used by the abutting owner before 1968 and the applicant is not planning to change the use of the subject remnant. Therefore it is recommended that the subject request be exempted from an environment assessment.

Consulted Parties Not applicable

Exemption Item Description from Agency Exemption List: Not applicable

Recommendation: It is recommended that the Board declare that 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

11/25/11

Date

EXHIBIT A2
In all of the following photos, the mauka (north) boundary, if shown, of the remnant is marked by yellow CAUTION tape.

1. View of the west portion of the remnant. The overturned canoe is just beyond the west boundary of the remnant.

2. View of the middle and east portion of the remnant.
3. View from the west side of the remnant facing east.

4. View of the east side of the remnant, the northeast corner being an extension of the yellow tape just beyond the photo on the left side, and the east boundary coinciding with the panax hedge and extending seaward.
7. View near the northwest corner facing east.

8. View near the northeast corner facing west.
September 6, 2011

TO: Robert T. Nishimoto, Ph.D., Program Manager
FROM: Alton Miyasaka, Aquatic Biologist
SUBJECT: Comments on Sale of Remnant State Lands
Requested by: Barry Cheung, District Land Agent, DNLR Land Division
Date of Request: September 1, 2011 Date Received: August 30, 2011

Summary of Project:

Title: Sale of Remnant State Lands
Project by: Richard R. Kelley Living Trust
Location: Diamond Head, Oahu, Hawaii

Brief Description: The applicant is proposing to purchase about 8,700 square feet of shoreline property adjacent to the Waikiki-Diamond Head Shoreline Fisheries Management Area, Oahu.

Comments: The Division of Aquatic Resources (DAR) of the Department of Land and Natural Resources has the following comments:

The subject property is the last piece of public land along the shoreline in this area of Diamond Head, the other adjacent lands along the shoreline already are under private ownership. There is no public access to the shoreline in the immediate area through these properties and the only public access is provided along the shoreline. The property is shoreward of the Waikiki-Diamond Head Shoreline Fisheries Management Area, Oahu, established through Chapter 13-48, Hawaii Administrative Rules, primarily for public shoreline recreational fishing.

While we recognize that other properties along this shoreline are already in private ownership, in concept, we would rather that this piece of public land be kept public, as the access along this stretch of shoreline is relatively narrow, eroding over time, and will likely be eventually lost. We also realize that keeping the subject property public will likely not significantly improve public access.
View looking West near end of old government road.

View looking East along portion of rocky shoreline.

Figure 4: Existing Shoreline Photos
DIAMOND HEAD REMNANT PARCEL - KELLEY PROPERTY
Island of O'ahu, Hawaii

EXHIBIT "E1"
View looking West from beach in front of remnant parcel.

View looking East from beach in front of remnant parcel.
INSET 1
SCALE: 1 IN. = 10 FT.

INSET 2
SCALE: 1 IN. = 10 FT.

INSET 3
SCALE: 1 IN. = 10 FT.
Mr. Richard R. Kelley  
c/o Walter P. Thompson, Inc.  
Attn: James R. Thompson  
Honolulu, Hawaii 96801  

Dear Mr. Kelley,

SUBJECT: Request to Resolve State Land Encroachment at Honolulu, Oahu, Tax Map Key (1) 3-1-038:042.  
Owner: Richard R. Kelley.

This is in response to your June 2012 request to resolve the shoreline encroachments at Tax Map Key (1) 3-1-038:042.

According to information and maps contained with your request, you have identified approximately 125 square feet of encroachment (6 individual encroachments: portions of a seawall and steps) makai of the subject property onto State land.

A copy of a Territory of Hawaii Land Court Map provided by the applicant dated January 9, 1959 identifies a rubble masonry wall fronting the subject property. As a consequence, DLNR will not be asking for an after-the-fact Conservation District Use Application to cure this matter. Should the OCCL find that either the seawall was built without permits, within the Conservation District after 1964, the OCCL may reconsider this finding.

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

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

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

Surrounding Land Uses:
The surrounding coastal uses along the coastline are primarily residential, with a concrete reinforced drainage culvert through a county easement along the west side of the property. The adjacent properties are fronted by similar seawalls and revetments.

Beach Resources:
There are beach resources fronting the encroachment. The beach is seasonally variable with fossil reef rock and beachrock intermittently exposed along the shoreline.

Public Access:
This section of coast has fair access at low-tide, fronting this seawall and others. There are public accesses in the immediate area, a few hundred yards to the east and west.

Effect of Removing the Encroachment on:
Beach Resources: OCCL staff has determined that removal of the encroaching portions of the seawall and steps will not improve beach resources because the encroachments are negligible and don’t intrude substantially in the beach area.

Public Access: OCCL staff has determined that no improvement would be gained by removing either the encroaching portion of seawall or steps.

Affect on Adjacent Properties: Removal of the encroaching portion of seawall and steps would not impact any adjacent properties. Removal of the encroaching portion of the seawall on the western side of the property might destabilize the seawall and lawn, especially adjacent to the drainage culvert, but it will not impact an inhabited dwelling. Removal of the steps would have minor, if any, impact to the seawall.

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

Upon review and careful consideration of the information gathered on this case, staff has determined that the requirements stated in HRS § 205A, HRS § 183C, and in the OCCL’s evaluation criteria would support a disposition request being processed for the seawall and steps. The OCCL suggests that any disposition require the land uses remain unimproved.
Please feel free to contact Sea Grant Extension Agent Brad Romine, at the Office of Conservation and Coastal Lands at Bradley.M.Romine@hawaii.gov.

Sincerely,

Samuel J. Lemmo, ADMINISTRATOR
Office of Conservation and Coastal Lands

cc: Land Division, Attn: Barry Cheung