

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

December 14, 2012

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

PSF No.:12OD-107

OAHU

Grant of Term, Non-Exclusive Easement to Christine Fuss for Seawall and Step Purposes; Impose Fine of \$500 and Assess Administrative Costs of \$200, Mokuleia, Waialua, Oahu, Tax Map Key: (1) 6-8-004:seaward of 014.

APPLICANT: (“Applicant”)

Christine Fuss, Trustee.

LEGAL REFERENCE:

Section 171-6, 13 and 53, Hawaii Revised Statutes, as amended.

LOCATION:

Portion of Government land located in Mokuleia, Waialua, Oahu, identified by Tax Map Key: (1) 6-8-004:seaward of 014 as shown on the attached map labeled **Exhibit A**.

AREA:

101 square feet, more or less.
Subject to review and approval of the Department of Accounting and General Services, Survey Division.

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 step over, under and across State-owned land.

COMMENCEMENT DATE:

To be determined by the Chairperson.

CONSIDERATION:

Subject to one-time payment of consideration determined by an 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 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 at **Exhibit B**.

DCCA VERIFICATION:

Individual. Not applicable.

APPLICANT REQUIREMENTS:

Applicant shall be required to:

- 1) Pay for an appraisal to determine the one-time payment of consideration;
- 2) Provide survey maps and descriptions according to State DAGS standards and at Applicant's own cost; and
- 3) Obtain concurrent resolution from the Legislature pursuant to 171-53 (c), HRS.

BACKGROUND:

Applicant, who is the owner of the abutting properties identified as tax map key (1) 6-8-004:014 ("Parcel 14'), has been in the process of obtaining a shoreline certification. During the survey process, portion of the seawall and step were found to be makai of the

shoreline (see **Exhibit C**). Applicant intends to resolve the encroachment.

Parcel 14 is described as Lot 12 of Land Court Application 609, Map 1 dated March 3, 1924. The original makai boundary of Lot 14 cited along “high water mark” as shown on Map 1. There was no shoreline certification which might have marked the shoreline other than the original recorded boundary. Therefore, the subject encroachment, which is now located makai of the shoreline, is considered as submerged land for the purpose of this request. Upon approval of today’s request, Applicant is reminded of the requirement for concurrent resolution from both houses of the legislature under Sect.171-53(c), HRS.

By its letter dated July 31, 2012 attached as **Exhibit D**, Office of Conservation and Coastal Lands (OCCL) determined that the encroachment does not appear to be built recently. Staff understands that there was no information regarding whether the subject seawall was built makai of the shoreline at the time of construction. OCCL declined to ask for an after-the-fact conservation district use application or initiate any enforcement action on the subject encroachment.

Department of Health, Board of Water Supply, and Division of Aquatic Resources have no comment/objection to the request. State Historic Preservation Division, Department of Facility Maintenance, Department of Planning and Permitting, and Office of Hawaiian Affairs have not responded as of the suspense date.

Staff cannot locate any approval for the construction of the seawall and step. Pursuant to the Board’s action of June 28, 2002, under agenda item D-17, which established criteria for imposing fines for encroachments, staff is recommending a fine of \$500 as the subject encroachment is over 100 square feet.

In addition, staff recommends the Board assess the administrative costs of \$200 for staff time incurred in resolving this matter, under Section 171-6, HRS.

Governor approval pursuant to Section 171-53 (c), HRS will be pursued by the staff upon approval of today’s request.

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 conditions.

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. Impose a \$500 fine for illegal encroachment and assess administrative costs of \$200, under Section 171-6, HRS.

3. Authorize the subject request to be applicable in the event of a change in the ownership of the abutting parcel described as Tax Map Key (1) 6-8-004:014 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.

4. Subject to the Applicant fulfilling all of the Applicant Requirements listed above, authorize the issuance of a term, non-exclusive easement to Christine Fuss, Trustee covering the subject area for seawall and step 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 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 property described as Tax Map Key (1) 6-8-004:014, 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 Grantor of such transaction in writing, and shall notify Grantee's successors or assigns of the insurance requirement in writing, separate and apart from the easement document;


 - C. Approval by the Governor and concurrence from the Legislature pursuant to 171-53 (c), HRS;

 - D. Review and approval by the Department of the Attorney General;

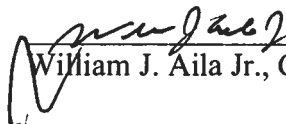
 - E. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State; and

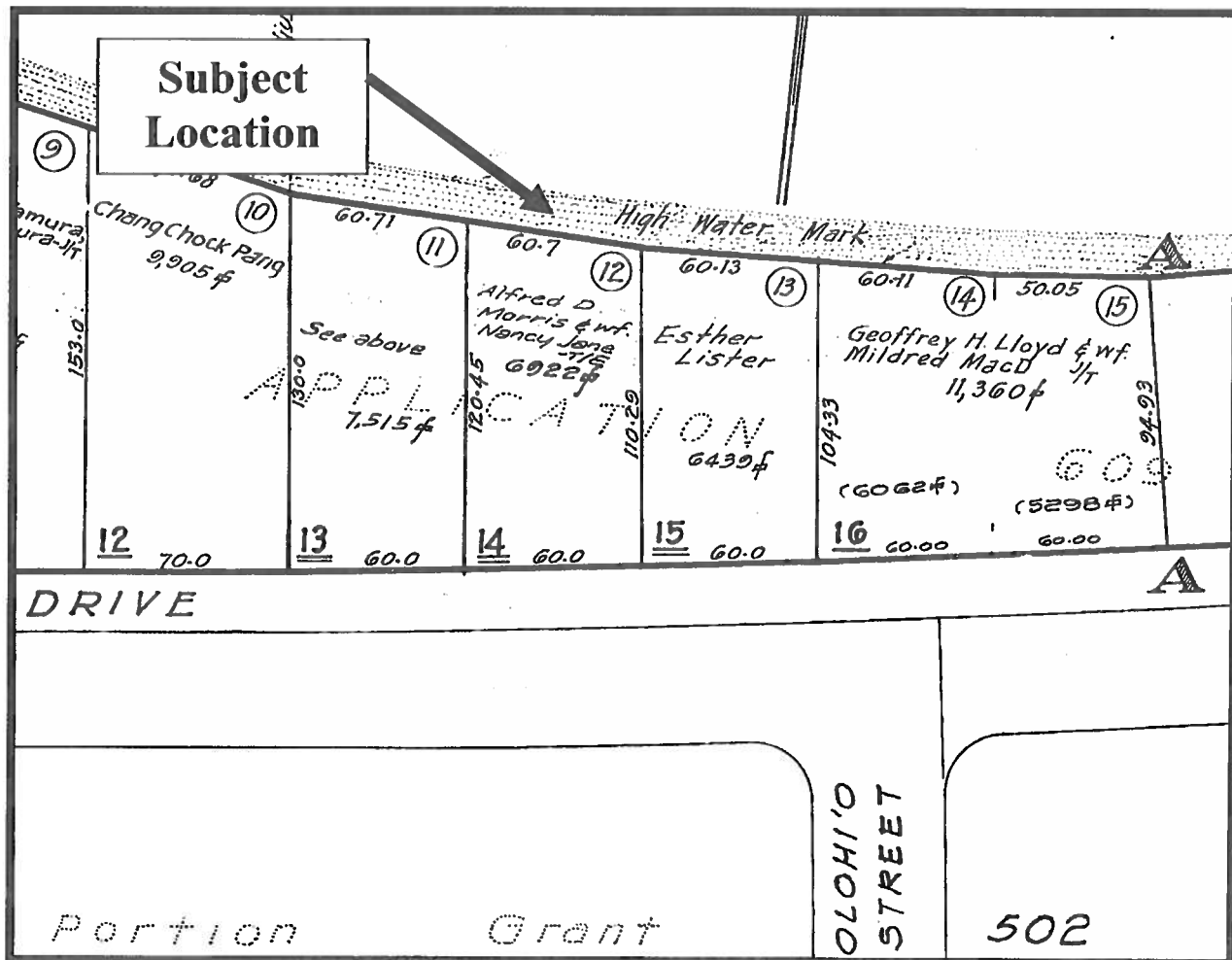
 - F. Any shoreline hardening policy that may be adopted by the Board prior to execution of the grant of easement.

Respectfully Submitted,


Barry Cheung
District Land Agent

APPROVED FOR SUBMITTAL:


William J. Aila Jr., Chairperson



TMK (1) 6-8-004:seaward of 014

EXHIBIT A

EXEMPTION NOTIFICATION

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

Project Title: Term Easement for Seawall, and Step Purposes

Project / Reference No.: PSF 12OD-107

Project Location: Mokuleia, Waialua, Oahu, Tax Map Key: (1) 6-8-004:seaward of 014.

Project Description: Easement to legalize the encroachments on State lands.

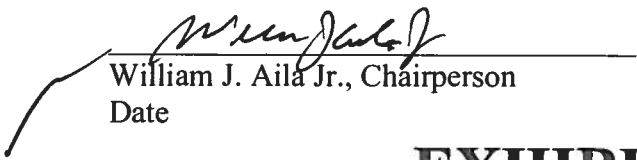
Chap. 343 Trigger(s): Use of State Land

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

The subject encroachment was not built recently. According to an affidavit and photos provided by the residents of the subject property in the 1960s', the encroachment existed at that time. The applicant is not planning on conducting major change to the existing topographical and vegetation condition of the property. As such, staff believes that the request 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 Lands

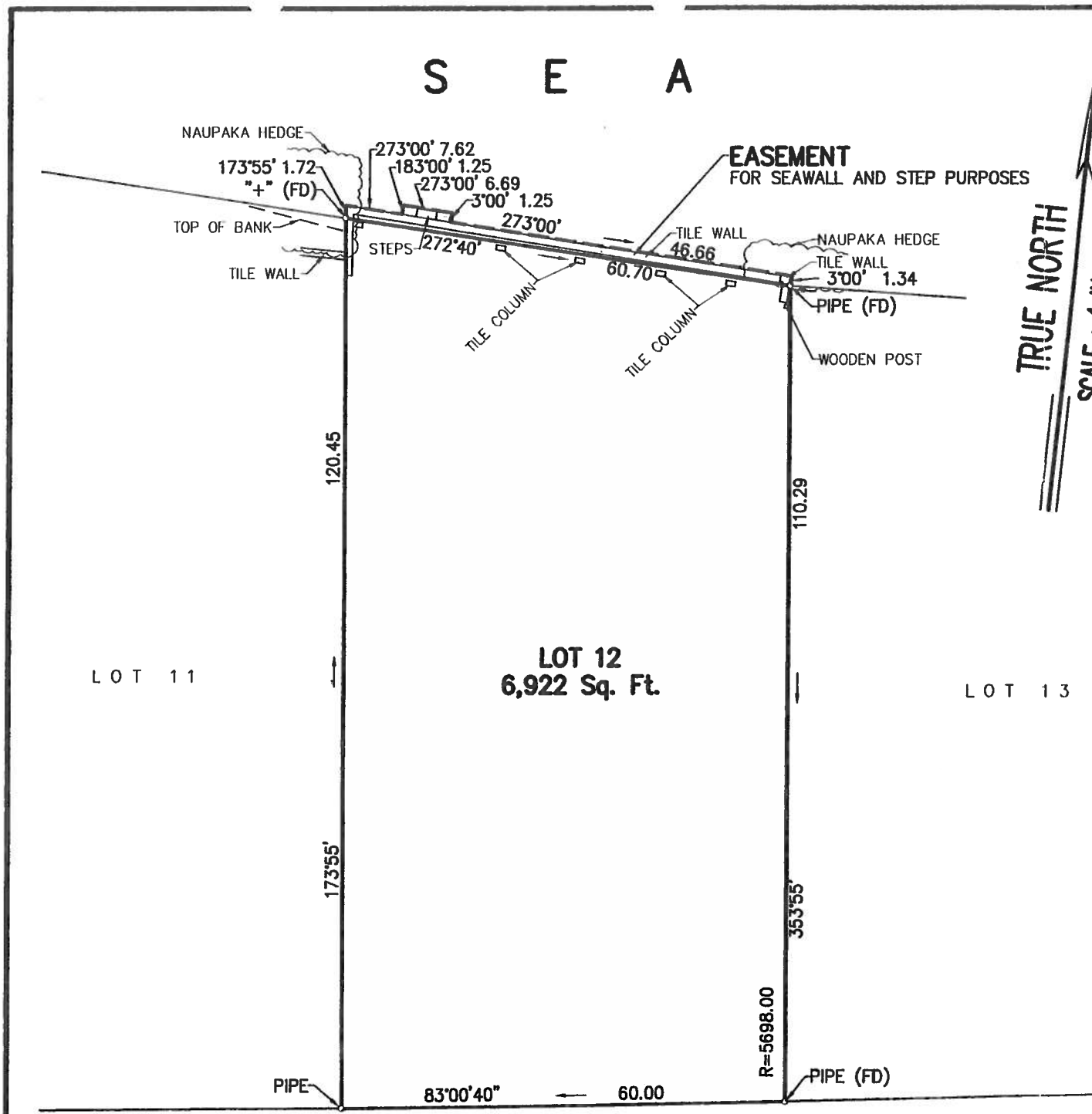
Recommendation: That the Board find this project will probably have minimal or no significant effect on the environment and is presumed to be exempt from the preparation of an environmental assessment.


William J. Aila Jr., Chairperson

Date

EXHIBIT B

S E A



CROZIER DRIVE

NOTE:

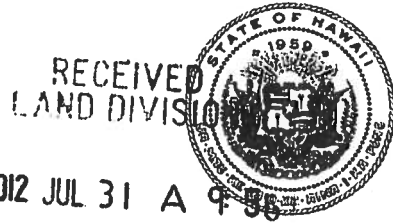
AREA OF EASEMENT = 101 SQ. FT. IN FAVOR OF LOT 12

EXHIBIT "C"

12076t01.dwg/1604.14/fdjc/062012

TAX MAP KEY : 6 - 8 - 04: 14

NEIL ABERCROMBIE
GOVERNOR OF HAWAII



2012 JUL 31 A 9 36

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
OFFICE OF CONSERVATION AND COASTAL LANDS
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

REF:DLNR:SL

File Number Encroachment: OA-13-5

JUL 31 2012

MEMORANDUM:

TO: Barry Cheung, Oahu District Land Agent
Land Division

FROM: Samuel J. Lemmo, Administrator
Office of Conservation and Coastal Lands

SUBJECT: Request to Resolve State Land Encroachment at Mokuleia, Oahu
TMK: (1) 6-8-004:014 Seaward

This is in response to your July 10, 2012 request to resolve the shoreline encroachment seaward of Tax Map Key (1) 6-8-004:014.

According to information and maps contained in the Shoreline Encroachment Information Sheet approximately 101 square feet of encroachment has been identified seaward of the subject property onto State land. The surveyor for the applicant states that the date of the encroachment is prior to 1964. Old photographs have been submitted along with an Affidavit attesting to the age of the photographs and the wall. In general, it has been the practice of the Office of Conservation and Coastal Lands (OCCL) to require a dated aerial photograph, government record, or other definitive evidence to substantiate nonconforming status. This is not to say that we discount Affidavits or testimony. We prefer to consider them in combination with more definitive evidence such as an aerial photograph. Without conclusive evidence, we cannot definitively confirm that the structure is nonconforming, nor can we show that it is illegal. We have no way of knowing when it was built or whether it was built in the Conservation District, although it does not appear that the structure was built recently, so we do not suspect a violation.

OCCL will not be asking for an after-the-fact Conservation District Use Application to cure this matter, nor do we wish to initiate any enforcement action in this matter for the reasons stated above. Should the OCCL find that the improvements were 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. The lots along this stretch of shoreline vary in depth from shallow to deep. Crozier Drive runs parallel to the shoreline, which pinches all of the lots between Crozier Drive and the beach. Some of the properties along this stretch of shoreline are armored while many remain in a natural condition. It appears that the properties that surround this lot remain unarmored.

Beach Resources:

Beach resources fronting the encroachment are good to excellent.

Public Access:

There is public access in the immediate area from Crozier Drive approximately 850 feet to the west of the subject property.

Effect of Removing the Encroachment on:

Beach Resources: OCCL staff has determined that removal of the encroachment would not substantially improve beach resources or public access. Removal of the wall might result in some sand released onto the beach (assuming the material in the yard is sand).

Public Access: OCCL staff has determined that only marginal improvement would be gained by removing the wall.

Affect on Adjacent Properties: Removal of the encroachments would not have any negative impact the adjoining properties, and would more likely benefit them.

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.

The OCCL is directed in its actions and polices by a mandate to protect and preserve the natural resources of the state for present and future generations. This directive is articulated in government statutes, rules, polices, and a general office ethic of healthy natural resource

stewardship. Hawaii's beaches are one of our many valued natural resources. As with many fragile resources of the state, beaches are at risk of damage from a number of threats, including shoreline armoring. The OCCL does not generally support the granting of easements that abut good or excellent sandy beaches where we see no imminent threat to an abutting habitable structure or facility. That being said, we believe that applicant should be afforded an opportunity to present their request for an easement to the Board of Land and Natural Resources (BLNR) to consider the matter.

Please feel free to contact us at the Office of Conservation and Coastal Lands at 587-0377 should you have any questions on this matter.

C: Chairperson