

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

January 11, 2013

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

PSF No.:12OD-111

OAHU

Grant of Term, Non-Exclusive Easement to Minatoya Real Estate, LLC for Seawall and Steps Purposes; Assess Administrative Costs of \$200; Kualoa, Koolaupoko, Oahu, Tax Map Key: (I) 4-9-009:seaward of 005.

APPLICANT: (“Applicant”)

Minatoya Real Estate, LLC, a domestic limited liability company.

LEGAL REFERENCE:

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

LOCATION:

Portion of Government land located in Kualoa, Koolaupoko, Oahu, identified by Tax Map Key: (I) 4-9-009:seaward of 005 as shown on the attached map labeled **Exhibit 1**.

AREA:

448 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 steps 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 2**.

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 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 is the owner of the abutting properties identified as tax map key (1) 4-9-009:005 ("Parcel 5"). In 2009, the Applicant intended to sell Parcel 5. During due

diligence, encroachment outside the recorded boundary was found. Subsequently, the Applicant obtained a 55-year, non-exclusive easement (GL 5970) from the Board for 378 square feet comprising seawall and filled land from the Board. The 2009 easement was for the encroachment outside the recorded boundary and the one-time payment of consideration was \$23,000. Staff notes from the map in GL 5970, the portion of seawall and steps under today's request existed within the recorded boundary of Parcel 5 in 2009.

Recently, the Applicant has been in the process of obtaining a current shoreline certification. During the survey process, portions of the seawall and steps were found to be makai of the current shoreline proposed by the Office of Conservation and Coastal Lands ("OCCL"). The portions of the seawall and steps are now considered as encroaching on State lands, i.e. below the highwater mark. Based on the information available in the existing easement document (GL 5970), the subject seawall was in existence prior to 1967. A copy of the current survey map is attached as **Exhibit 3**.

By OCCL's letter dated July 20, 2012 attached as **Exhibit 4**, which made further reference to its prior letter dated May 14, 2008, OCCL does not have any position on the latest request for easement. Meanwhile, OCCL believes the Applicant should be offered an opportunity for the Board to consider its request.

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

The Department will be submitting a bill for the next legislative session asking the Legislature to allow the Board to issue easements at less than fair market value for shoreline encroachments now located seaward of the shoreline but that were authorized and built within the recorded boundary of the property and landward of the shoreline at the time of construction. The easement will include the normal insurance coverage and indemnification language to protect the best interests of the State. To avoid any delay in the disposition process, staff brings the request on today's agenda, with the Recommendation drafted to accommodate any changes in the forthcoming Legislative session as discussed above.

Staff notes that there was no shoreline certification processed for the Parcel 5 in the past years. According to the quitclaim deed recorded on December 10, 2007 (2007-212719) kept in the file, the seaward boundary of Parcel 5 was described as "... along high water mark at seashore ...". Therefore, the encroachment under the subject request was considered as landward of the shoreline according to the recorded boundary.<sup>1</sup>

When the Board considered the easement request (GL 5970) on August 8, 2008, item D-9 (**Exhibit 5**), the Board agreed to "recognize the subject revetment fronting applicants' properties to be authorized structures for the purposes of shoreline certification under Hawaii Administrative Rules, Section 13-221-19." Staff notes the revetment considered by the Board in 2008 was not the same encroachment under the subject request.

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<sup>1</sup> As shown on Exhibit C, the subject encroachment is mauka of the recorded boundary.

Nevertheless, both the 2008 revetment and the subject encroachment are portions of the same structure. Therefore, staff recommends the Board recognize the subject encroachment as authorized for the purpose of the proposed legislation mentioned above, following the analogy of the 2008 Board action.

Regardless of the outcome of the proposed legislation changes, staff plans returning to the Board after the end of the next legislative session for a final determination of the consideration for the requested easement. If the bill is passed, staff will make recommendation following the revised statutes. Alternatively, staff will seek the Board authorization to proceed with the appraisal process (payment of appraisal fee, procurement etc.) in the event the bill is not approved.

In the meantime, staff recommends the Board approve the issuance of the easement with a temporary deferral of the payment of the consideration. If the proposed legislation is not enacted, then Applicant shall be responsible for paying the consideration. Failure to pay the consideration may result in the termination of the easement and subsequent enforcement action.

Pursuant to the Board's action of June 28, 2002, under agenda item D-17, which established criteria for imposing fines for encroachments, a fine of \$500 is to be imposed if the encroachment is over 100 square feet. Nevertheless, staff does not recommend any fine for the subject encroachment based on the fact that it was once within the recorded boundary of the private property.

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

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

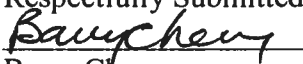
Applicant has not had a lease, permit, easement or other disposition of State lands terminated within the last five years due to non-compliance with such terms and conditions.

**RECOMMENDATION:** That the Board:

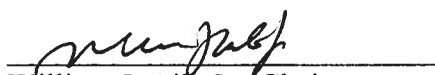
1. Declare that, after considering the potential effects of the proposed disposition as provided by Chapter 343, HRS, and Chapter 11-200, HAR, this project will probably have minimal or no significant effect on the environment and is therefore exempt from the preparation of an environmental assessment.
2. 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) 4-9-009:005

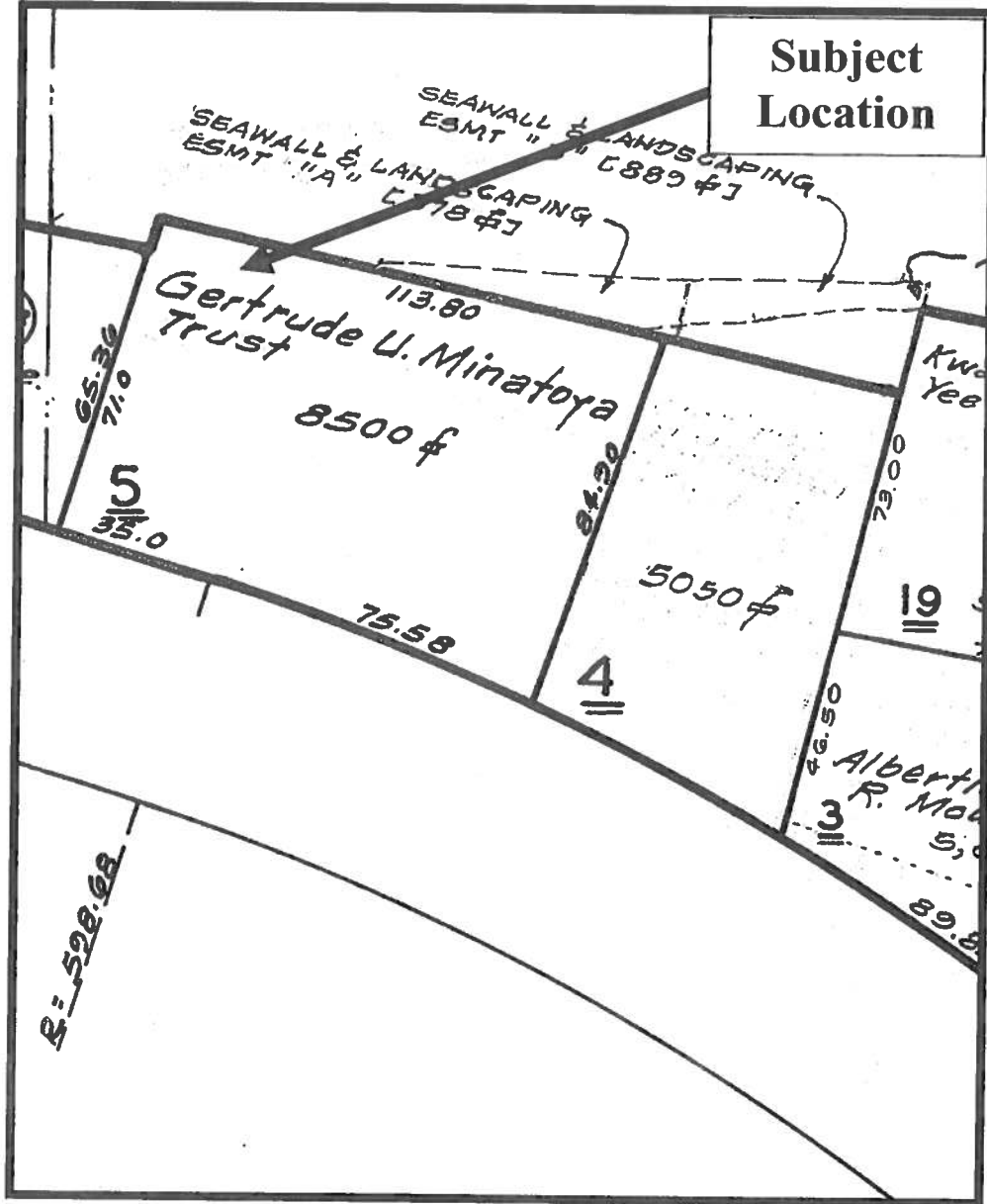
provided the succeeding owner has not had a lease, permit, easement or other disposition of State lands terminated within the last five (5) years due to non-compliance with such terms and conditions.

4. Subject to the Applicant fulfilling all of the Applicant Requirements listed above, authorize the issuance of a term, non-exclusive easement to Minatoya Real Estate LLC, covering the subject area for seawall and steps 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) 4-9-009:005, 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. Approve the execution of the easement with a temporary deferral of payment of the easement consideration under the terms and conditions as described above;
  - F. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State; and
  - G. 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) 4-9-009:seaward of 005

**EXHIBIT 1**

## 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 Purposes

Project / Reference No.: PSF 120D-111

Project Location: Kualoa, Koolaupoko, Oahu, Tax Map Key: (1) 4-9-009:seaward of 005.

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

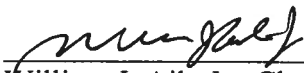
Chap. 343 Trigger(s): Use of State Land

Exemption Class No.: In accordance with Hawaii Administrative Rule Section 11-200-8(a)(1) 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 seawall was in existence prior to 1967. 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 12/12/12

**EXHIBIT 2**

**EASEMENT C**  
**448 Sq. Ft.**  
 FOR SEAWALL AND STEP  
 PURPOSES

**TRUE NORTH**  
 SCALE : 1 IN. = 10 FT.

49-555 KAM HIGHWAY

**8,500 Sq. Ft.**  
**7,888 Sq. Ft.(NET)**

**S E A**

**K A I**

PROPOSED SHORELINE  
 BY OCCL, DLNR

EXISTING EASEMENT A  
 (CSF 24,696)

15,840.40 N  
 4,589.09 E  
 "PUU KAUAI" Δ

**INSET**

SCALE : 1 IN. = 10 FT.

05169109.dwg/j/09211

TAX MAP KEY : 4 - 9 - 09 : 05

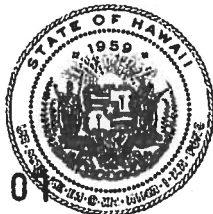
**EXHIBIT " 3 "**



NEIL ABERCROMBIE  
GOVERNOR OF HAWAII



RECEIVED  
LAND DIVISION



2012 JUL 24 A 10: 01

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  
KAIHOLAWE ISLAND RESERVE COMMISSION  
LAND  
STATE PARKS

FILE: OA-13-1

MEMORANDUM:

JUL 20 2012

TO: Barry Cheung  
Land Division

FROM: Sam Lemmo, Administrator  
Office of Conservation and Coastal Lands

Subject: Shoreline Encroachment at Kualoa, Koolaupoko Oahu, TMK: (1) 4-9-009:005

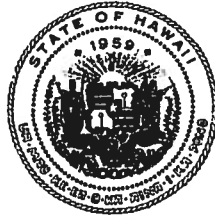
Thank you for your July 19, 2012 letter seeking our opinion whether the Board of Land and Natural Resources (BLNR) should issue a term easement for the subject encroachment. I have attached a copy of a letter that was issued in regards to a request for a prior easement on the same property. As noted in our prior letter, we believe that the landowner should be afforded an opportunity to have the BLNR consider their request.

Should you have any questions, contact our Office of Conservation and Coastal Lands at 808-587-0377.

CC: Chairperson  
City and County of Honolulu  
Dept. of Planning & Permitting

Attachment

LINDA LINGLE  
GOVERNOR OF HAWAII



**STATE OF HAWAII**  
**DEPARTMENT OF LAND AND NATURAL RESOURCES**  
**Office of Conservation and Coastal Lands**

POST OFFICE BOX 621  
HONOLULU, HAWAII 96809

LAURA H. THIELEN  
CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE MANAGEMENT

RUSSELL Y. TSUJI  
FIRST DEPUTY

KEN C. KAWAHARA  
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

DLNR:OCCL:CC

File Number Encroachment: OA-07-006

MAY 14 2008

Mr. Burt T. Lau  
Kobayashi, Sugita & Goda  
999 Bishop Street, Suite 2600  
Honolulu, Hawaii 96813-4430

Dear Mr. Lau,

**SUBJECT:** Request to Resolve State Land Encroachment at  
Oahu (TMK: 4-9-009:004 & 005) Minatoya

The Department of Land and Natural Resources' (DLNR) Office of Conservation and Coastal Lands (OCCL) has received your letter from May 9, 2008. Your letter details recent events associated with your client's, the Minatoya family, attempts to resolve the encroachment at TMK (1) 4-9-009:004 & 005, and your own opinions of the current situation and potential outcomes of OCCL's recommended resolution for the encroachment.

The OCCL is directed in its actions and policies by a mandate to protect and preserve the natural resources of the state for the present and future generations. These directives are articulated in statutes, rules, policies, and an office ethic of healthy natural resource stewardship. Though we are not supportive of granting an easement from the perspective of beach conservation, we do understand the hardship that has evolved during your client's attempts to resolve the encroachment and the history of the wall that has affected neighboring properties. As such, the OCCL believes that your client should be afforded and opportunity to present their request for an easement to the Board of Land and Natural Resources (BLNR) considering the circumstances.

Should you have any questions regarding this letter, please contact the Office of Conservation and Coastal Lands at 587-0377.

Sincerely,

A large, stylized handwritten signature in black ink, appearing to read "Samuel J. Lemmo".

SAMUEL J. LEMMO, Administrator  
Office of Conservation and Coastal Lands

CC: Chairperson  
Oahu Board Member  
Land Division  
City and County of Honolulu  
Department of Planning and Permitting

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

August 8, 2008

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

PSF No.:07od-054

OAHU

Request for Grant of Two Term, Non-Exclusive Easement to Minatoya Real Estate LLC for Seawall and Landscaping Purposes, Kualoa, Koolaupoko, Oahu, Tax Map Key: (1) 4-9-009:004 & 005 seaward.

APPLICANT:

Minatoya Real Estate LLC, a domestic limited liability company, whose mailing address is 5355 Poola Street, Honolulu, Hawaii 96821.

LEGAL REFERENCE:

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

LOCATION:

Portion of Government land located seaward of Kualoa, Koolaupoko, Oahu, identified by Tax Map Key: (1) 4-9-009:004 & 005, as shown on the attached map labeled Exhibit A.

AREA:

Parcel A - 273 square feet, more or less, fronting (1) 4-9-009:005  
Parcel B - 808 square feet, more or less, fronting (1) 4-9-009:004

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

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

August 8, 2008

D-9

EXHIBIT "5"

CURRENT USE STATUS:

Unencumbered with encroachments.

CHARACTER OF USE:

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

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:

Fifty-five (55) years

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

Applicant provided aerial photo indicating the subject encroachment was in existence prior to 1967, prior to the enactment of the EIS law in 1974 and this action is therefore exempt from Ch. 343.

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

REMARKS:

Pursuant to a survey map (Exhibit B) prepared by the applicant's surveyor, the encroachments consisting of seawall and filled land were found. Staff understands the applicant is considering selling the subject properties. According to the applicant, the properties were purchased by the family around the time of World War II. As noted from the family photos submitted by the applicant, the wall was in existence in the 1960s. A request for purchase of the encroaching area was submitted. [Note: Upon discussion with the applicant's surveyor, this later became an easement request.]

Upon review of the original application, Office of Conservation and Coastal Lands (OCCL) does not consider the encroachment a Conservation District violation. However, OCCL did not support the issuance of an easement based on the determination that public access may be enhanced by removal of the encroachment and development of a small pocket beach. Further, OCCL did not see an immediate threat to any inhabitable structures. A copy of OCCL's letter dated May 23, 2007 is attached as Exhibit C.

After receiving OCCL's position on the encroachment, applicants hired an ocean engineering consultant to review OCCL's comments. The ocean engineer did not agree to OCCL's determination and provided his written response at Exhibit D.

To resolve an encroachment issue, an owner generally has two options: obtain a disposition (normally in the form of an easement) from the Board or remove the encroachment. Applicant plans to remove the seawall and build a new seawall entirely on its lands. The construction of the new wall requires access to the neighbor's property and physical connection to the neighbor's existing seawall. At the time of writing this submittal, the neighbor has not agreed to the proposal by the applicant, due to their concerns on possible loss of beach fronting their property, increased maintenance cost, and decrease in the property value. All these concerns virtually place the applicant's project in limbo. For the Board's information, a 55-year non-exclusive seawall easement (GL 5729) was issued to the neighbor in 2005.

Attorney representing the applicant has apprised OCCL of the unique situation faced by the applicant. By a letter dated May 14, 2008, OCCL reiterated its non-supportive position on the request. However, OCCL believes the applicant has tried in good faith to resolve the issue, but the applicant is restricted in its capacity to rectify the encroachment through removal, by the long history of the structure and its impact on neighboring development. OCCL suggests the applicant be given an opportunity before the Board for a decision. A copy of OCCL letter is attached as Exhibit E.

Staff understands the dilemma faced by the applicants and OCCL's position on the issue. Based on the fact that precedent is set for a seawall easement (GL 5729) on the adjacent property, staff is inclined to support the issuance of an easement.

Department of Hawaiian Home Lands, Department of Parks and Recreation, Department of Facility Maintenance, and Commission on Water Resources Management have no objections/comments on the request.

Office of Hawaiian Affairs agrees with OCCL and urges the Board to follow OCCL's advice.

Department of Health, Division of Aquatic Resources, State Historic Preservation Division, Department of Planning and Permitting, and Board of Water Supply have not responded as of the suspense date.

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 \$1,000 (\$500 for each parcel) as each of the encroachments is over 100 square feet.

Further, staff is recommending that the Board authorize the acceptance of a deposit from the Applicant. This will allow the Applicant to process the shoreline certification, which is needed for the Applicants to facilitate the proposed sale of the subject properties. As standard practice, staff does not allow a shoreline certification to be processed until all encroachments have been resolved through the full execution of legal documents or removal of the encroachments. In the past, shoreline certifications or other approvals were released prior to full document execution and staff found it difficult to compel the Applicant to execute the documents and make a payment. Therefore, staff offers this alternative method of collecting a deposit to enable the Applicant to pursue permits and approvals with less risk that the Applicant will not execute the documents. While such a deposit does not completely ensure that the documents will be executed, it does show a strong commitment by the Applicant to enter into an agreement with the State.

The Appraisal Section has cursorily estimated the easement consideration to be \$236,000. With fees, the total estimated deposit amount is \$236,110. The actual consideration will be determined by a full appraisal. Upon execution of the legal documents, this deposit will be applied towards the consideration amount and other applicable charges. If the deposit amount is more than the total, then the Applicant shall be reimbursed any difference (and vice versa). If the Applicant does not execute the document, the Applicant shall be required to remove the encroachments to the satisfaction of the Department or to forfeit the deposit in full, which shall be used to remove the encroachment.

Applicants have 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.

Applicants, through their attorney, requests the Board adding a condition in the easement document which state that the subject seawall and filled area shall be recognized as an

authorized structure for the purpose of shoreline certification under Hawaii administrative Rules, Section 13-222-19. The applicant does not want any confusion during the 55-term of the easement about the encroachment. Staff understands that any improvements covered by an easement will not be considered as an unauthorized structure that will prohibit the Chairperson from certifying the shoreline under the existing rules. Staff has no objections to recommend the Board declare the subject encroachment, upon the consummation of the subject easements, will not be considered as unauthorized structures under the rules for shoreline certification.

RECOMMENDATION: That the Board:

1. Impose a \$1,000 fine (\$500 for each parcel) for illegal encroachment, under Section 171-6(12).
2. 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) 4-9-009:004 & 005, 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 two (2) term, non-exclusive easements to the applicant mentioned above covering the respective subject area for seawall and landscaping area 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 two easements shall run with the land and shall inure to the benefit of the real property respectively described as Tax Map Key: (1) 4-9-009:004 & 005, 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;
  - D. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State; and

- E. Any shoreline hardening policy that may be adopted by the Board prior to execution of the grant of easement.
4. Recognize the subject revetment fronting applicants' properties to be authorized structures for the purposes of shoreline certification under Hawaii administrative Rules, Section 13-222-19.
5. Authorize the Department to accept a deposit in the amount of \$236,110 from the Applicant as an estimated easement consideration pursuant to the conditions set forth in the Remarks section above.

Respectfully Submitted,



Barry Cheung  
District Land Agent

APPROVED FOR SUBMITTAL:

  
  
\_\_\_\_\_  
Laura H. Thielen, Chairperson

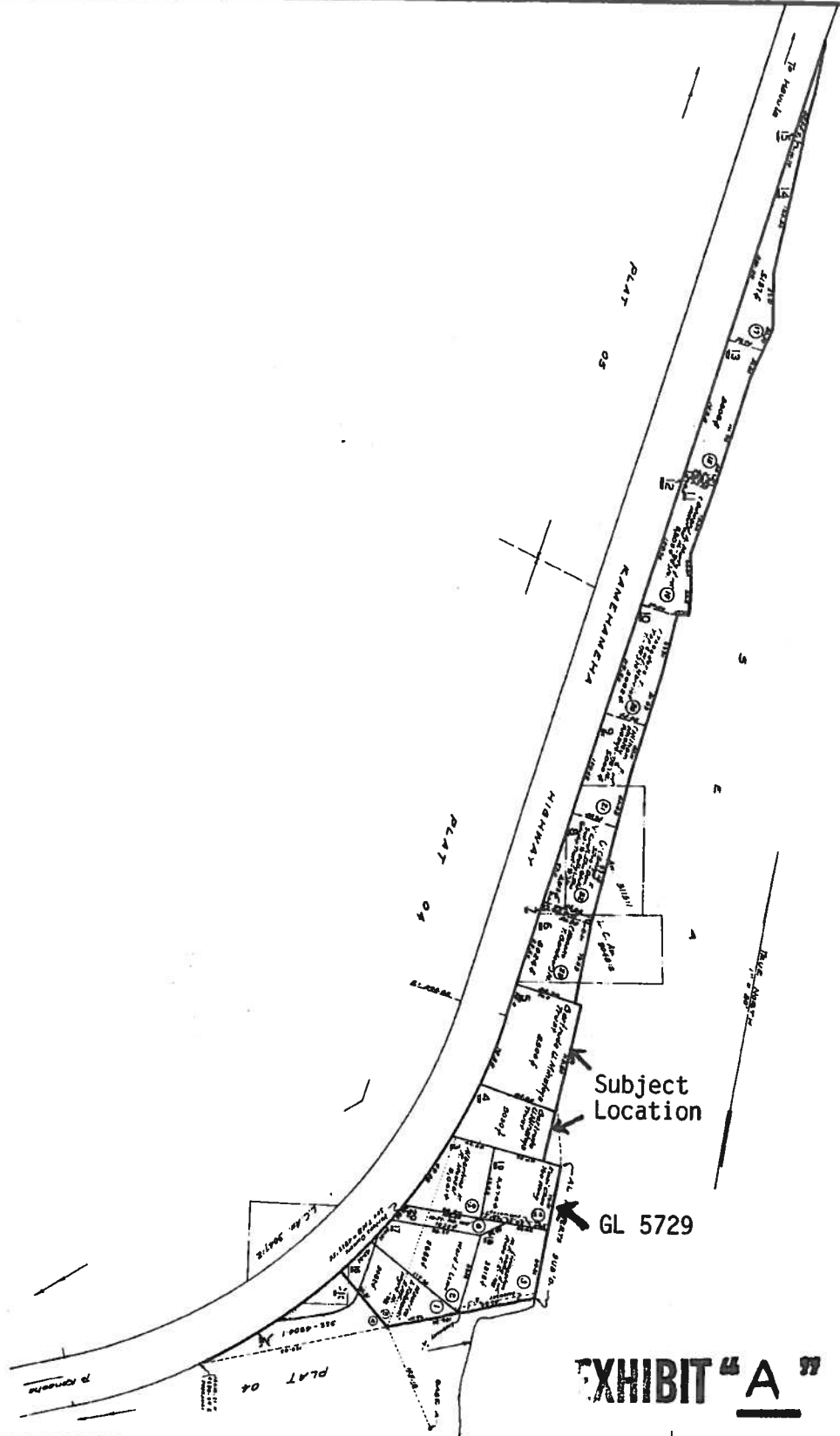


Day No. 3188  
 Source: M.H.R. / T.M.A.  
 By: H.N. - Dec 1961

FOR KUALA BEACH LOTS, KUALA, KOLAYUBONG, DAHU.

SUBJECT TO CHANGE

Note: All lots owned by  
 James A. Grayson, - 1958  
 James A. Grayson, - 1959  
 James A. Grayson, - 1960  
 James A. Grayson, - 1961  
 James A. Grayson, - 1962  
 James A. Grayson, - 1963  
 James A. Grayson, - 1964  
 James A. Grayson, - 1965  
 James A. Grayson, - 1966  
 James A. Grayson, - 1967  
 James A. Grayson, - 1968  
 James A. Grayson, - 1969  
 James A. Grayson, - 1970  
 James A. Grayson, - 1971  
 James A. Grayson, - 1972  
 James A. Grayson, - 1973  
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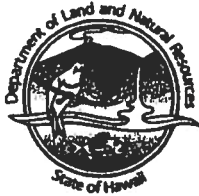


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EXHIBIT "A"



LINDA LINGLE  
GOVERNOR OF HAWAII



STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES

POST OFFICE BOX 621  
HONOLULU, HAWAII 96809

ALLAN A. SMITH  
INTERIM CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE MANAGEMENT

ROBERT K. MASUDA  
DEPUTY DIRECTOR

PETER T. YOUNG  
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  
ENFORCEMENT

FORESTRY AND WILDLIFE  
HISTORIC PRESERVATION  
KAHOOLAWE ISLAND RESERVE COMMISSION  
LAND  
STATE PARKS

REF:CC

MAY 23 2007

File Number Encroachment: OA-07-006

**MEMORANDUM:**

TO: Al Jodar, Land Agent  
Land Division

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

SUBJECT: Request to Resolve State Land Encroachment at  
Oahu (TMK: 4-9-009:004 & 005) Minatoya & Tanabe

This is in response to your March 22, 2007, request to resolve a state land encroachment seaward of private property in Kualoa, Island of Oahu.

According to information and maps contained with your request, there appears to be approximately 1081 square feet of encroachment (seawall and fast lands to mauka) on parcels 005 and 004, with 273 square feet and 808 square feet seaward of each parcel, respectively.

OCCL staff was unable to locate any construction permit or other land use authorization permits at the State for the subject improvements. However, aerial photographs provide evidence that the encroachment was in existence prior to 1967, with amplifying notarized testimony and dated family photographs showing the encroachment in existence prior to 1960.

As a consequence, DLNR does not consider the encroachment a Conservation District violation and will not be asking for an after-the-fact Conservation District Use Application to cure this matter.

The Board of Land and Natural Resource (BLNR) recently 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

EXHIBIT "C"

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. This form has been completed and submitted.

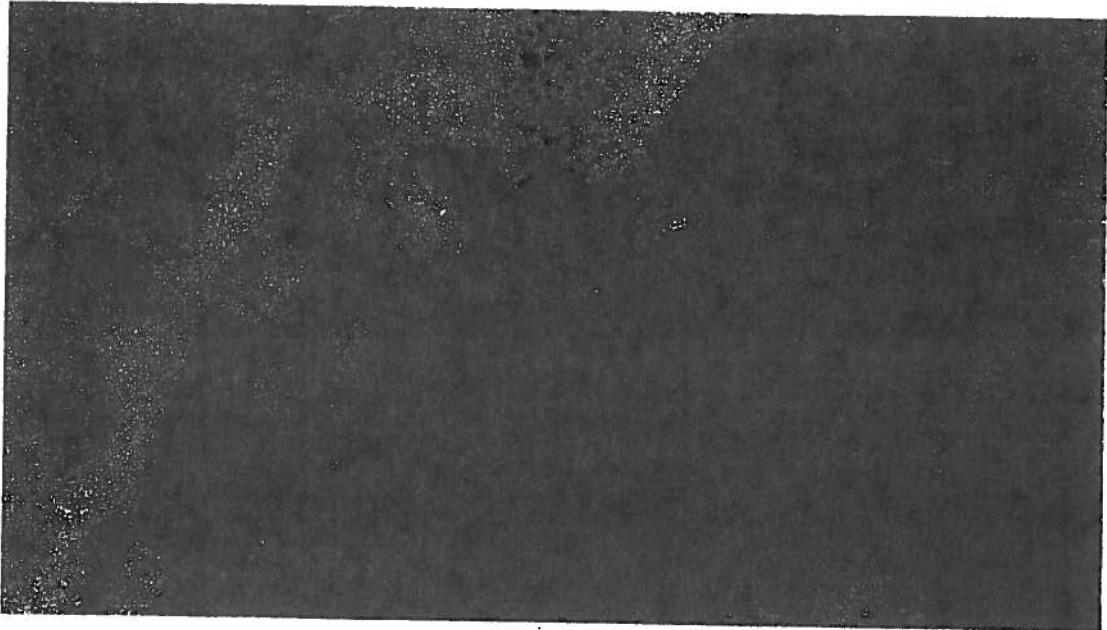
Surrounding Land Uses:

The surrounding uses are residential (homes makai of Kamehameha Road), agricultural (Kualoa Ranch), and recreational (Kualoa Beach Park) in nature.

Beach Resources:

The inter-tidal zone includes the beach at the subject parcels and adjacent properties. There are numerous groins in the area that compartmentalize sand storage and transport. There are also numerous seawalls on the coastline, including the subject parcels. Erosion rates at Kualoa Beach Park, located at the downdrift end of the sediment cell, are some of the highest in the state. It is assumed that the locally extreme erosion rates at the beach park are the result of the groins located updrift, including those surrounding the subject parcels.

*Image. Parcels are outlined in red.*



Public Access:

Public access to the shoreline fronting the parcel is possible from Kualoa Beach Park to the south. Access along the shoreline is good. The area has a beach, sections of which may be submerged at higher tides. The waters offshore are popular for boating recreation, fishing, diving, and surfing.

Effect of Removing the Encroachment on:

*Beach Resources: Removal of the encroaching seawall would likely release trapped sediment to the beach resource as the shoreline migrates landward while equilibrating with the current environment. This action would help to create a temporary pocket beach*

*fronting the parcel. The lifespan of the beach is unknown. This area shows signs of beach accretion when comparing historical and modern aerial photographs.*

*Hawaii Revised Statute (HRS) §205A Section 2.c.9 provides for policies and objectives for beach protection. The DLNR draws its specific practices from these and other laws and polices. Based on these polices and practices, the OCCL believes that it would unwise to allow the impoundment of sediment or armoring of sandy shorelines on state lands and these resources should be returned to the state where feasible and reasonable. According to HRS §205A, no structures should be placed in locations that interfere with shoreline processes and recreation and waterline activities. Under this context, the OCCL believes that the structure would not be permitted under the current regulations, and thus the OCCL would not encourage the granting of an easement.*

*Public Access: OCCL staff has determined that public access may be enhanced by removal of the encroachment, and the development of a small pocket beach.*

*Affect on Adjacent Properties: It is not know what effect removal of this encroachment would have on the surrounding parcels. Though the seawall is one of several connected seawalls, and removal of this seawall may destabilize others.*

It has been a general policy and practice of the OCCL to support easement requests that have no discernable effect on beach and recreational resources. However, in line with the BLNR policy we have opposed the issuance of easements that might be detrimental to the resources. In addition, the OCCL does not see an immediate threat to any inhabitable structures.

Upon review and careful consideration of the information gathered on this case, staff has determined that removal of the encroachment best conforms to the requirements stated in HRS §205A. Therefore, the OCCL does not support a disposition request being processed. Pursuant to Chapter 171.

We hope this letter helps resolve some of the outstanding issues regarding the subject property. Please feel free to contact Sam Lemmo, of the Office of Conservation and Coastal Lands at 587-0381.

cc: Oahu Board Member  
Chairperson's Office  
City and County of Honolulu  
Department of Planning and Permitting



June 21, 2007

Harvey K. Minatoya, MD  
1003 Pensacola Street  
Honolulu, HI 96814

Subject: Coastal Engineering Response to May 23, 2007 DLNR/OCCL  
Memorandum on "Request to Resolve State Land Encroachment at  
Oahu (TMK: 4-9-009:004  
& 005) Minatoya & Tanabe"

Dear Dr. Minatoya:

The following is Oceanit's response to the subject memorandum to Mr. Al Jodar, Land Agent, Land Division. The memorandum concludes that "[T]he removal of the encroachment best conforms to the requirements stated in HRS 205A." Some of the statements presented in the memo are not correct and do not support the OCCL determination. Oceanit's response to these statements is given in the following paragraphs.

On page 2, paragraph 3, of the May 23, 2007 memorandum OCCL states:  
*Erosion rates at Kualoa Beach Park, located at the downdrift end of the sediment cell, are some of the highest in the state. It is assumed that the locally extreme erosion rates at the beach park are the result of the groins located updrift, including those surrounding the subject parcels.*

Response: Oceanit does not agree with the assumption that erosion rates at the beach park are the result of the groins located updrift. Oceanit has done extensive studies, including a hydraulic model study, of the coastal processes at Kualoa Regional Park. The coastal area of the park is part of a large sand area that was deposited before recorded history. Graphical and photo records show that the beach area has been changing since the 1800s, prior to any groins being constructed. Sand is eroded from the east-facing beach, carried around Kualoa Point, and deposited along the south shoreline and on the Hakipu'u sandbar. We estimate that the east beach has receded about 3 feet per year and that Kualoa Point was receding about 7 feet per year before it was protected.

The outer reef and reef flat minimize the size of waves approaching the east beach. However, the waves pump water over the reef, and this water flows south carrying eroded sand. The current is strong enough to be

**EXHIBIT "D"**

dangerous at times. Waves moving around Mokoli'i Island (Chinaman's Hat) push the sand west to the south beach and Hakipu'u sandbar. The sand erosion and accretion at Kualoa are part of a littoral system that includes far more than just the groins located north of the park.

There is no groin retaining sand on the Minatoya property. A 1932 surveyed T-sheet shows a continuous shoreline along the land where the Minatoya house is located and the east beach of the park. The T-sheet shows a rock wall at the first property to the north of the park (south of Minatoya's lot) but no indication of shoreline recession to the south.

Based on our studies and observations, Oceanit does not believe that the groins to the north of Kualoa Park have a significant effect on erosion at the park. The total erosion is far greater than the amount of sand that might be supplied by removing the seawalls at the Minatoya house or their neighbors.

In page 2, paragraph 4, Public Access, the OCCL memorandum states: *Access along the shoreline is good.*

Response: We do not agree that access along the shoreline is good. At higher tides, people would have to wade in the water. The small beach area at the north end of the Minatoya property is too small for any recreational use.

Also on page 2, paragraph 4, Public Access, the May 23, 2007 memorandum states that: *The waters offshore are popular for boating recreation, fishing, diving, and surfing.*

Response: This statement is true; however, the beach at Kualoa Regional Park extends for about 1 mile. The park has parking, restrooms, water, and picnic areas. The public has more access to offshore recreation at the park than nearly any other location on Oahu. The Minatoya seawall does not affect access to recreation.

The last paragraph on page 2 of the memorandum addresses the effect of removing the encroachment on beach resources. It states the following: *Removal of the encroaching seawall would likely release trapped sediment to the beach resource as the shoreline migrates landward while equilibrating with the current environment. This action would help to create a temporary pocket beach fronting the parcel.*

Response: Oceanit believes that wall removal would cause several problems. Removal of the seawall would release sediment but would also release vegetation, debris, and topsoil that have accumulated over years

causing water pollution. Removal would also require destruction of two old ironwood trees that could be part of the "prominent ironwood grove" shown on the 1932 T-sheet. The ironwood grove existed prior to the later sand loss at the present beach park. Approximately 80 cubic yards of sediment might be released if the seawall was rebuilt along the property line. It is not likely that all of this material would stay in place and create a pocket beach. Most would move down toward the park. Also the small existing beach at the north end of the property could be carried away if the wall was reoriented. Eighty cubic yards is an insignificant amount when compared with the many thousands of cubic yards needed to rebuild the beach at the park. Wall removal would cause severe damage to neighboring property to the south, which will be discussed further.

At the top of page 3, the OCCL memorandum states: *This area shows signs of beach accretion when comparing historical and modern aerial photographs.*

Response: If this area shows signs of beach accretion, then it is likely that changing the shoreline configuration could disrupt the accretion process.

Memorandum paragraph 2 on page 3 states: *Public Access: OCCL staff has determined that public access may be enhanced by removal of the encroachment, and the development of a small pocket beach.*

Response: We disagree with this determination. The OCCL determination is not based on experiment or measured data. The basis for the determination should be proved before the landowner is required to remove a seawall that was built prior to HRS 205A.

Paragraph 3 on page 3 of the May 23, 2007 memorandum states: *Affect on Adjacent Properties: It is not known what effect removal of this encroachment would have on the surrounding parcels. Though the seawall is one of several connected seawalls, and removal of this seawall may destabilize others.*

Response: This statement is partially correct. Removal of the Minatoya seawall will not only destabilize other walls, it will cause severe damage to the neighboring property to the south. Since the Minatoya property line is approximately 20 feet inland from the neighbor's property corner, wall removal would create a minimum 20-foot gap along the shore-perpendicular property line between the two properties. This line is protected only by a CMU (hollow tile) fence wall that does not have a deep foundation. It is not a seawall. The CMU wall would collapse very quickly when exposed to waves, and flanking erosion would move around the north end of the neighbor's seawall. The seawall would likely be undermined by the new erosion. There is a relatively new home on the neighbor's property that is close to the potential erosion area. This home



Harvey K. Minatoya, MD  
June 21, 2007  
Page 4 of 4

could be threatened. The neighbor would have to apply to the City and County of Honolulu for a permit to build a new seawall to replace the tile wall. They would also need a new shoreline survey, which, after the initial erosion, probably would not follow their property line.

In summary, it is Oceanit's technical opinion that the probable damage to property, effect of water pollution, and loss of the existing small beach far outweigh the potential of creating another small beach or increasing public access on foot to an area that is often under water and not well suited for beach recreation. Leaving the Minatoya seawall in place is the best solution and is not detrimental to beach and recreational resources.

If you need additional information, please contact us.

Sincerely,



Warren E. Bucher, Ph.D., P.E.  
Senior Ocean Engineer

LINDA LINGLE  
GOVERNOR OF HAWAII



RECEIVED  
LAND DIVISION

2008 MAY 14 P 1:38  
STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Office of Conservation and Coastal Lands  
POST OFFICE BOX 621  
HONOLULU, HAWAII 96809

LAURA H. THIELEN  
CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE MANAGEMENT  
RUSSELL Y. TSUJI  
FIRST DEPUTY  
KEN C. KAWAHARA  
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

DLNR:OCCL:CC

File Number Encroachment: OA-07-006

MAY 14 2008

Mr. Burt T. Lau  
Kobayashi, Sugita & Goda  
999 Bishop Street, Suite 2600  
Honolulu, Hawaii 96813-4430

Dear Mr. Lau,

SUBJECT: Request to Resolve State Land Encroachment at  
Oahu (TMK: 4-9-009:004 & 005) Minatoya

The Department of Land and Natural Resources' (DLNR) Office of Conservation and Coastal Lands (OCCL) has received your letter from May 9, 2008. Your letter details recent events associated with your client's, the Minatoya family, attempts to resolve the encroachment at TMK (1) 4-9-009:004 & 005, and your own opinions of the current situation and potential outcomes of OCCL's recommended resolution for the encroachment.

The OCCL is directed in its actions and policies by a mandate to protect and preserve the natural resources of the state for the present and future generations. These directives are articulated in statutes, rules, policies, and an office ethic of healthy natural resource stewardship. Though we are not supportive of granting an easement from the perspective of beach conservation, we do understand the hardship that has evolved during your client's attempts to resolve the encroachment and the history of the wall that has affected neighboring properties. As such, the OCCL believes that your client should be afforded an opportunity to present their request for an easement to the Board of Land and Natural Resources (BLNR) considering the circumstances.

Should you have any questions regarding this letter, please contact the Office of Conservation and Coastal Lands at 587-0377.

Sincerely,

SAMUEL J. LEMMO, Administrator  
Office of Conservation and Coastal Lands

CC: Chairperson  
Oahu Board Member  
Land Division  
City and County of Honolulu  
Department of Planning and Permitting

EXHIBIT "E"