

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-141

OAHU

Grant of Term, Non-Exclusive Easement to Douglas & Kathleen Giannetti for Seawall Purposes, Assess Administrative Costs of \$200, Kawailoa, Waialua, Oahu, Tax Map Key: (1) 6-1-003:024-0001 seaward.

APPLICANT:

Douglas & Kathleen Giannetti, husband and wife, tenants by the entirety.

LEGAL REFERENCE:

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

LOCATION:

Portion of Government land located in Kawailoa, Waialua, Oahu, identified by Tax Map Key: (1) 6-1-003:024-0001 seaward as shown on the attached map labeled **Exhibit A**.

AREA:

110 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 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:

Individuals, 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:

Applicants are the owners of the abutting property identified as tax map key (1) 6-1-003:024-0001 ("Parcel 24"). They plan to renovate the improvements, which triggers the shoreline certification process. A copy of the survey map is attached as **Exhibit C**. During due diligence, a portion of the seawall was found to be makai of the shoreline proposed by the Office of Conservation and Coastal Lands ("OCCL"), but located within the recorded boundary of the private parcel identified as tax map key (1) 6-1-003:036 ("Parcel 36")¹.

Land Division considers the portions of seawall makai of the proposed shoreline to be located on submerged land, i.e. State lands, notwithstanding the subject location once was within the recorded boundary of a private parcel (Parcel 36). Therefore, the portions of the seawall located makai of the shoreline are now considered as unauthorized encroachments on State submerged land. The applicants want to resolve the encroachment and request the Board authorize the issuance of a term, non-exclusive easement. A disposition is required to resolve the encroachment on State lands.

OCCL, by its letter attached as **Exhibit D**, supports a disposition request to resolve the encroachment issue. Department of Facility Maintenance, Board of Water Supply, Department of Planning and Permitting, Department of Health, and Division of Aquatic Resources have no comment/objection to the request. State Historic Preservation Division and Office of Hawaiian Affairs have not responded as of the suspense date.

According to the Applicant's attorney, the subject seawall is shown on the aerial photo dated May 8, 1949, which is attached as **Exhibit E**. Further, staff notes that the certified shoreline map for the neighboring parcel (Parcel 55) dated April 8, 1993 (**Exhibit F**) showed the continuation of the seawall going into Parcel 24 now owned by the Applicant.

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.

For Parcel 24, staff was not able to locate any past certified shoreline. However, the above mentioned 1993 shoreline of the neighboring Parcel 55 could be relevant to locate the shoreline if there were any shoreline certified for Parcel 24. The proposed shoreline for Parcel 24 would likely follow that of Parcel 55, i.e. along "face of seawall". It would result in the subject wall being located landward of the shoreline.

¹ Parcel 36 is owned by Jack and Karen Visin according to the website of the County's Real Property Tax Office.

Regarding the criteria of authorization under the proposed legislation mentioned above, it is noted from the 1949 aerial photo that the wall had existed prior to 1949. While OCCL does not require an after-the-fact Conservation District Use Permit for the subject wall (see Exhibit D), staff was not able to locate any government agency approval at the time of writing this submittal. Nevertheless, staff recommends the Board consider the information indicating the subject wall had existed prior to 1949 adequate for the purpose of authorization.

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 following the requested easement. If the bill is passed, staff will make recommendation of 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 Parcel 36, a private property.

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

Regardless of whether the proposed legislation will be approved, the subject encroachment, which is now located makai of the shoreline, is considered submerged land for the purpose of this request. Upon approval of today's request, applicants will be 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) will be pursued by the staff upon approval of today's request.

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 request the Board to defer payment of the consideration for the easement until the end of the 2013 legislative session, in view of the possible passing of the law which may allow for less than fair market value consideration. Further, the Applicants, through

their attorney, request the Board authorize the processing of the shoreline certification contingent upon approval of today's request. A copy of the letter from the attorney is attached as **Exhibit G²**. Staff does not have any objection to the request of deferring the payment and continuing with the shoreline certification process.

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) 6-1-003:024-0001 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 Applicants fulfilling all of the Applicant Requirements listed above, authorize the issuance of a term, non-exclusive easement to Douglas and Kathleen Giannetti, covering the subject area for seawall 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) 6-1-003:024-0001, 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;

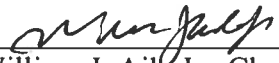
² The consideration, if any, will be determined by an independent appraiser. The estimate from the Applicants' attorney is irrelevant for today's request.

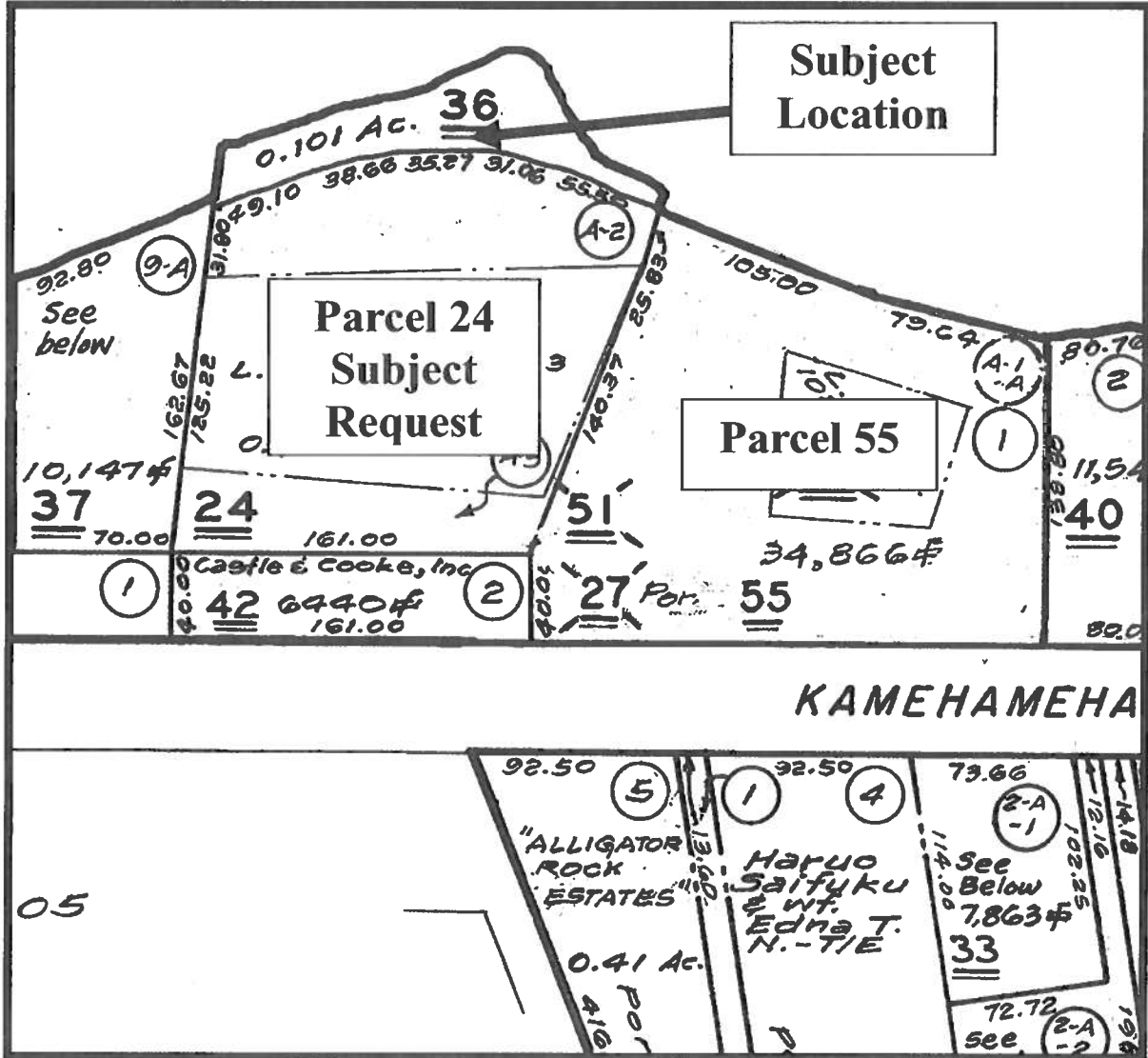
- E. Approve the execution of the easement with a temporary deferral of payment of the easement consideration under the terms and conditions as described above;
 - F. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State; and
 - G. Any shoreline hardening policy that may be adopted by the Board prior to execution of the grant of easement.
5. Authorize the Chairperson to proceed with the shoreline certification of Parcel 24.

Respectfully Submitted,


Barry Cheung
District Land Agent

APPROVED FOR SUBMITTAL:


William J. Aila Jr., Chairperson



TMK (1) 6-1-003:024-0001 seaward

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 Purposes

Project / Reference No.: PSF 12OD-141

Project Location: Kawailoa, Waialua, Oahu, Tax Map Key: (1) 6-1-003:024-0001 seaward.

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

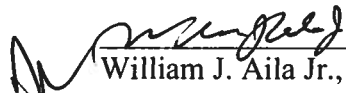
Chap. 343 Trigger(s): Use of State Land

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 around 1949 or earlier. 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.

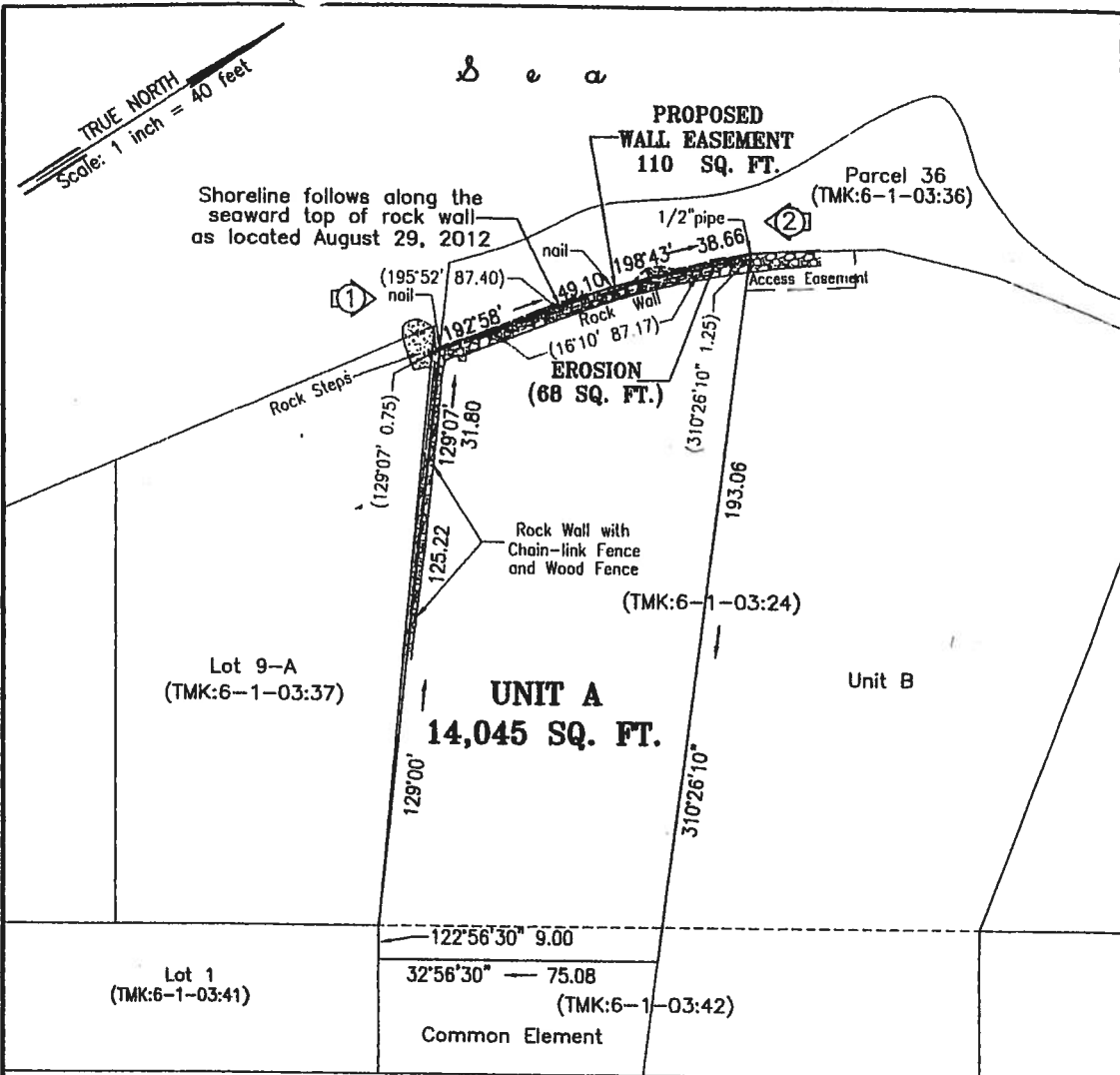
Consulted Parties Office of Conservation and Coastal Lands

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.

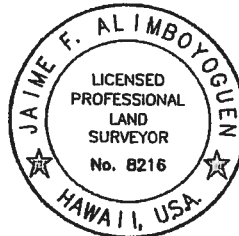


 William J. Aila Jr., Chairperson
 Date

EXHIBIT B



KAMEHAMEHA HIGHWAY



SHORELINE SURVEY MAP
UNIT A
of "61-237 Kamehameha Highway"
as shown on Condominium Map 4869
Kawailoa, Waiialua, Oahu, Hawaii

Tax Map Key: 6-1-03:24 CPR 1
Scale: 1 inch = 40 feet
Date: August 29, 2012

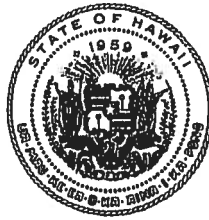
Owner: Douglas Giannetti
61-237 Kamehameha Highway, Unit A
Haleiwa, Hawaii 96712

- NOTES:**
1. Only improvements shown were located.
 2. [Symbol] Denotes number and direction of photographs.

[Signature] exp. 4/30/14

This work was prepared by me or under my direct supervision.

NEIL ABERCROMBIE
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

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

PAUL J. CONRY
INTERIM 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:BR

File Number Encroachment: OA-13-7

OCT - 4 2012

Douglas and Kathleen Giannetti
c/o Steven E. Tom, Esq.
Burke McPheeter Bordner & Estes
119 Merchant Street, Suite 200
Honolulu, Hawaii 96809

RECEIVED
LAND DIVISION
2012 OCT - 4 P 2: 5
DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

Dear Mr. and Mrs. Giannetti,

SUBJECT: Request to Resolve State Land Encroachment at
Haleiwa, Oahu, Tax Map Key (1) 6-1-003:024.
Owner: Douglas and Kathleen Giannetti

This is in response to your June 2012 request to resolve the shoreline encroachments at Tax Map Key (1) 6-1-003:024. According to information and maps contained with your request, you have identified approximately 110 square feet of encroachment (CRM seawall) makai of the subject property onto State land.

An aerial photograph provided by the applicant dated April 22, 1967 shows a seawall fronting the subject property. In addition, a legal affidavit provided by a prior owner of the property indicates that the seawall has been in existence since the mid-1950s or earlier. As a consequence, the Department of Land and Natural Resources (DLNR), Office of Conservation and Coastal Lands (OCCL) will not be asking for an after-the-fact Conservation District Use Application to cure this matter. OCCL may reconsider this finding should we find that the seawall was built without permits, within the Conservation District after 1964.

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, OCCL established criteria to guide decision-making over specific cases. The criteria are as follows:

EXHIBIT "D"

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, OCCL developed a "Shoreline Encroachment Information Sheet" that is intended to provide the State with additional information to guide OCCL's decisions on the disposition of shoreline encroachments.

Surrounding Land Uses:

The surrounding land uses are primarily residential. The adjacent properties are fronted by similar seawalls and revetments. Kamehameha Highway runs along the mauka side of the property.

Beach Resources:

There are no beach resources fronting the encroachment. The shoreline consists of basalt boulders, cobble, and isolated outcrops of basalt and reefrock.

Public Access:

This section of coast has fair access along the rocky shoreline at low tide during low surf conditions, fronting this seawall and others. There is public access in the immediate area, approximately 100 yards to the north.

Effect of Removing the Encroachment on:

Beach Resources: There are no beach resources along the rocky shoreline fronting the subject property.

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

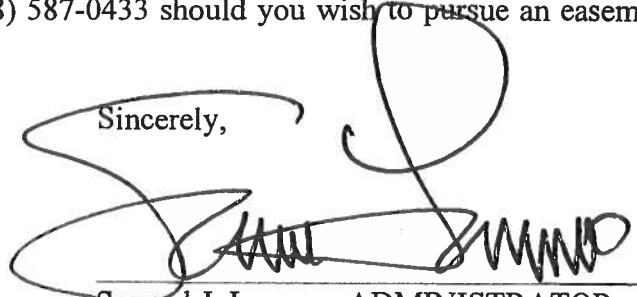
Affect on Adjacent Properties: Removal of the encroaching portion of the seawall may destabilize seawalls and lawns at the adjacent properties.

It has been a general policy and practice of 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, OCCL has determined that the requirements stated in HRS § 205A, HRS § 183C, and in OCCL's evaluation criteria would support a disposition request being processed for the subject shoreline encroachment. OCCL suggests that any disposition require the land uses remain unimproved.

Please feel free to contact Sea Grant Extension Agent Brad Romine at OCCL at (808) 587-0049 or Bradley.M.Romine@hawaii.gov should you have any questions pertaining to this letter. Please contact DLNR Land Division at (808) 587-0433 should you wish to pursue an easement for the subject shoreline encroachment.

Sincerely,

A large, stylized handwritten signature in black ink, appearing to read 'S. Lemmo', written over a horizontal line.

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

cc: Land Division, Attn: Barry Cheung



SUBJECT LOCATION

EXHIBIT "E"

The delineation of the boundary as shown on this plan is hereby confirmed as being correct and true to the actual boundaries as shown on the ground.

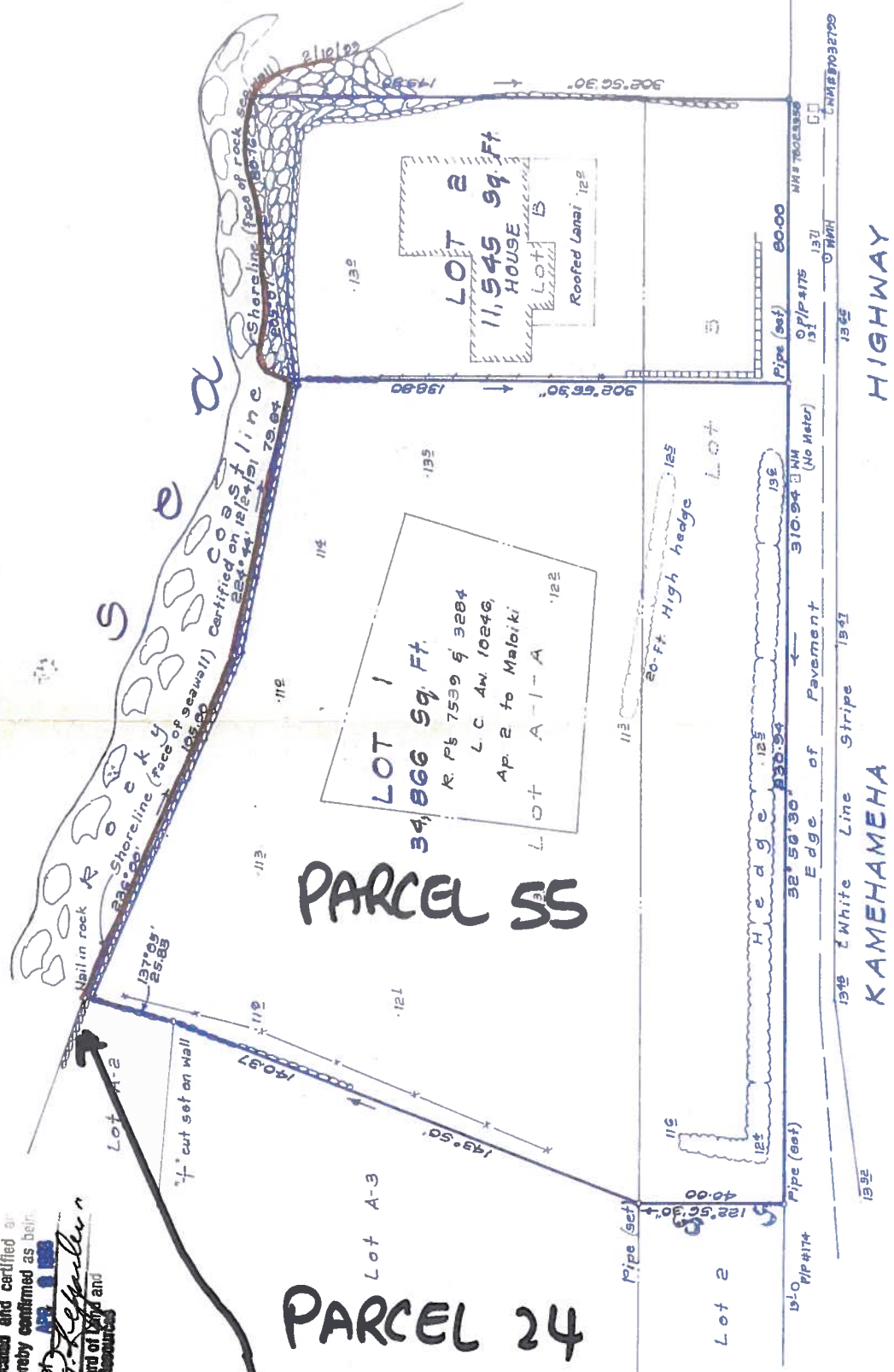
John P. Kappeler
 State Engineer, Board of Land and Natural Resources

PARCEL 24
SUBJECT LOCATION

PARCEL 55

LOT 1
 34,866 Sq. Ft.
 R. P. 7539 of 3284
 L. C. A. 10246,
 Ap. 2 to Malibiki
 Lot A-1-A

LOT 2
 11,545 Sq. Ft.
 HOUSE
 Lot B
 Roofed Lanai 129



HIGHWAY

KAMEHAMEHA

← to Haleiwa

EXHIBIT " F "

Edmund Burke, Of Counsel
Direct Line: (808) 599-2138

Howard F. McPheeters
Direct Line: (808) 599-2102

William A. Bordner
Direct Line: (808) 599-2145

James T. Estes, Jr.
Direct Line: (808) 599-2119

BURKE MCPHEETERS BORDNER & ESTES
ATTORNEYS-AT-LAW ♦ A LAW CORPORATION

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Stangenwald Building
Honolulu, Hawaii 96813

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Christal P. Cuadra
Direct Line: (808) 599-2135

October 5, 2012

Barry Cheung, Oahu District Land Agent
Department of Land and Natural Resources
Land Division
Oahu District Land Office
1151 Punchbowl Street, Room 220
Honolulu, Hawaii 96813

RECEIVED
LAND DIVISION
2012 OCT -9 A 9:37
DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

Re: Shoreline Easement Application for Douglas and Kathleen
Giannetti's (TMK: 6-1-03:24 CPR 1)

Dear Mr. Cheung:

Last week I submitted the Shoreline Encroachment Information Sheet to begin the process of applying for a 55-year non-exclusive easement. I was pleased to receive a letter today from DLNR's Office of Conservation and Coastal Lands stating that it would support the requested easement and not require an after-the-fact Conservation District Use Application.

Last week you mentioned for the first time the potential necessity of submitting a deposit for the easement cost after BLNR approval of the easement but prior to the appraisal in order to obtain building permits before the appraisal process is complete. I want to clarify that we are requesting a temporary deferral of payment of the easement cost until the close of the 2013 Legislative Session in hopes that the legislature approves the DLNR's legislative proposal.

On August 10, 2012, the BLNR granted Harland Cabot Amstutz *et al's* request for deferral of an easement payment for a shoreline encroachment. In the application to the BLNR for the deferral, DLNR's Land Division wrote:

"Considering that the primary purpose of seeking the easement is to resolve indemnity and insurance issues regarding encroachments, the Department will attempt to remedy the situation by introducing proposed legislation for the 2013 Legislative Session. The proposed legislation will seek to grant the Board the authority to approve at a nominal rate, the issuance of

EXHIBIT "G"

BURKE MCPHEETERS BORDNER & ESTES

Page 2

easements for encroaching structures now located seaward of the shoreline but were authorized and built within the record boundary of the property and landward of the shoreline at the time of construction. The Department believes that passage of this proposed legislation would encourage compliance from other landowners in similar situations in obtaining easements.”

I believe the Giannettis’ situation is analogous to, or even more compelling, than that of the Harland Cabot Amstutz *et al*’s application which was granted a deferral by the BLNR. The Giannettis’ seawall currently at issue was constructed in the 1940’s. The seawall only partly encroaches onto State land based on the shoreline being established at the top of the seawall rather than the bottom. Since, only the footing of the wall is encroaching on State land, the top surface is private property and the public cannot walk on it. The area of encroachment is only 110 square feet compared to the 1,632 square feet the Harland Cabot Amstutz *et al*’s property. In addition, the Harland Cabot Amstutz *et al* had structures built beyond the record property boundary. On the other hand, all of the Giannettis’ seawall is constructed within the record boundary of the property. Furthermore, according to tax records, the land makai of the seawall is privately owned by another party (not the State).

Therefore, the Giannettis request a 55-year non-exclusive easement and allow temporary deferral of payment until the close of the 2013 Legislative Session, which would allow the proposed legislation to be enacted. The Giannettis understand that payment for the remaining balance is only temporarily deferred, not waived. If the proposed legislation passes, then the Giannettis would be excused from any further payment obligation.

If a deposit will be required, an estimate of the market value of the easement can be made based on the recent sales price and a recent appraisal.

| | Total Land Value (14,045 sq ft) | Per Square Foot | Easement Area (110 sq ft) |
|-------------------------------------|------------------------------------|-----------------|------------------------------|
| Actual Sales Price* (04/13/2012) | \$1,100,000 | \$78.32 | \$8,615 |
| Recent Appraisal† (06/16/2012) | \$1,160,000 | \$85.59 | \$9,085 |

Therefore, current fair market value of the 110sqft easement will mostly likely be less than \$9,085.

* Exhibit 1: City and County of Honolulu Real Property Assessment & Treasury Division, Public Access website, Printed October 2, 2012

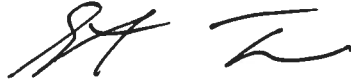
† Exhibit 2: Appraisal by Guevarra Appraisal Services, June 16, 2012

BURKE MCPHEETERS BORDNER & ESTES

Page 3

Please let me know if you have any questions or need any additional documents.

Very truly yours,

A handwritten signature in black ink, appearing to read 'S. E. Tom', written in a cursive style.

STEVEN E. TOM

SET/ 1615-98

Exhibits: 1) City and County of Honolulu Real Property Assessment & Treasury Division, Public Access website, Printed October 2, 2012
2) Appraisal by Guevarra Appraisal Services, June 16, 2012

cc: Douglas and Kathleen Giannetti