

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

May 24, 2013

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

PSF No.:13OD-027

OAHU

Grant of Term, Non-Exclusive Easement to Gregory Michaels for Seawall and Concrete Footing Purposes; Issuance of Management Right-of-Entry; Assess Administrative Cost of \$500, Mokuleia, Waialua, Oahu, Tax Map Key: (1) 6-8-010:seaward of 021.

APPLICANT: ("Applicant")

Gregory Michaels

LEGAL REFERENCE:

Section 171-6, 13, 53, and 55, Hawaii Revised Statutes, as amended.

LOCATION:

Portion of Government land located in Mokuleia, Waialua, Oahu, identified by Tax Map Key: (1) 6-8-010:seaward of 021, as shown on the attached map labeled **Exhibit A**.

AREA:

144 square feet, more or less.

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 concrete footing 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 property identified as tax map key (1) 6-8-010:021 ("Parcel 21"), has been in the process of obtaining a shoreline certification. During the survey process, portions of the seawall and concrete footing were found to be makai of the shoreline (see **Exhibit C**). Applicant intends to resolve the encroachment.

Parcel 21 is described as Lot 16 of Land Court Application 1810, Map 4 approved by the State Surveyor on July 8, 1965. The original seaward boundary of Lot 16 was sited along "highwater mark at seashore dated January 15, 1958" as shown on the above mentioned Map 4. In the latest shoreline map depicted on Exhibit C, the shoreline was determined to be mauka of the recorded boundary and the seawall and concrete footing. Therefore, portions of the seawall and concrete footing are now considered as encroaching on State lands, i.e. below the highwater mark.

The subject encroachment, which is now located makai of the shoreline, is considered to be located on submerged land for the purpose of this request. Upon approval of today's request, Applicant will be reminded of the requirement to obtain a concurrent resolution from both houses of the legislature under Sect. 171-53(c), HRS.

By its letters dated January 24, 2012 attached as **Exhibit D**, Office of Conservation and Coastal Lands (OCCL) noted that the encroachment was authorized after-the-fact by the City and County of Honolulu under the Emergency Repair Work and Shoreline Setback Variances dated December 21, 2009. OCCL declined to ask for an after-the-fact conservation district use application on the subject encroachment.

Department of Facility Maintenance, Division of Aquatic Resources, Department of Parks and Recreation, Department of Health, and Board of Water Supply have no comments/objections to the request. Department of Planning and Permitting, State Historic Preservation Division, and Office of Hawaiian Affairs have not responded as of the due date soliciting for comments from agencies.

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 the subject encroachment was once within the recorded boundary of the private property.

As reported in some prior shoreline encroachment easement requests, the Department introduced a bill in the 2013 session asking the Legislature to allow the Board to issue easements at less than fair market value for special shoreline encroachment, which shall mean "... a structure that was authorized by a governmental authority and constructed landward of the shoreline (as defined in chapter 205A) within the record boundary of the landward property at the time of construction, but is now located seaward of the shoreline

on public land ...”<sup>1</sup>. For reasons unbeknownst to the Department, the bill did not get a hearing from the Senate or House Judiciary Committees, even though the Senate and House Water/Land Committees approved the Department's proposed bill, unamended and quite quickly. Though the bill died this session, it can be resurrected next session; and the Department will reintroduce another bill again just in case.

Staff is not aware of any previous shoreline certification at the subject location. Nevertheless, the shoreline set back variances in 2009 authorized the construction of the subject encroachment. Staff believes the subject request fits the criteria under the proposed legislation mentioned above, namely, landward of the shoreline and with authorization at the time of construction.

As noted above, the Department is planning to reintroduce the bill in the next session, with support from the affected applicants. In the interim, staff recommends the Board authorize the issuance of immediate right-of-entry subject to the standard indemnity and insurance conditions. Staff also recommends the Board impose a non-refundable administrative cost of \$500. Further, staff will proceed with the appraisal process as if the easement would be granted at fair market value. Applicant will be required to pay the appraisal fee, which is also non-refundable; and if the proposed bill does not pass next session, then the applicant will need to pay for the easement at fair market value.

Staff believes the issuance of right-of-entry will protect the State's interest by securing indemnity and insurance in favor of the State for the encroachment. Meanwhile, applicant can proceed with any shoreline certification, if needed, notwithstanding that an easement has not been issued.

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. Staff has no objection to the request.

**RECOMMENDATION:** That the Board:

1. Declare that, after considering the potential effects of the proposed disposition as provided by Chapter 343, HRS, and Chapter 11-200, HAR, this project will probably have minimal or no significant effect on the environment and is therefore exempt from the preparation of an environmental assessment.
2. 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) 6-8-010:021 provided the succeeding owner(s) has not had a lease, permit, easement or other

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<sup>1</sup> Source: Original text from the bill proposed by the administration. In addition, staff believes the “authorization by government” would include after-the-fact approval, shoreline variance, and non-conforming status etc.

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 a term, non-exclusive easement to Gregory Michaels covering the subject area for seawall and concrete footing 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 easements shall run with the land and shall inure to the benefit of the property described as Tax Map Key (1) 6-8-010-021, provided however: (1) it is specifically understood and agreed that the easement(s) 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(s) is sold, assigned, conveyed, or otherwise transferred, the Grantee(s) 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, if applicable;
  - D. Review and approval by the Department of the Attorney General;
  - E. Approve the execution of the easements 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.
4. Authorize the issuance of a management right-of-entry permit to Gregory Michaels covering the subject area for seawall and concrete footing 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 right-of-entry permit document form, as may be amended from time to time;

- B. Assess a non-refundable administrative cost of \$500, under Section 171-6, HRS; and
- C. Such other terms and conditions as may be prescribed by the Chairperson.

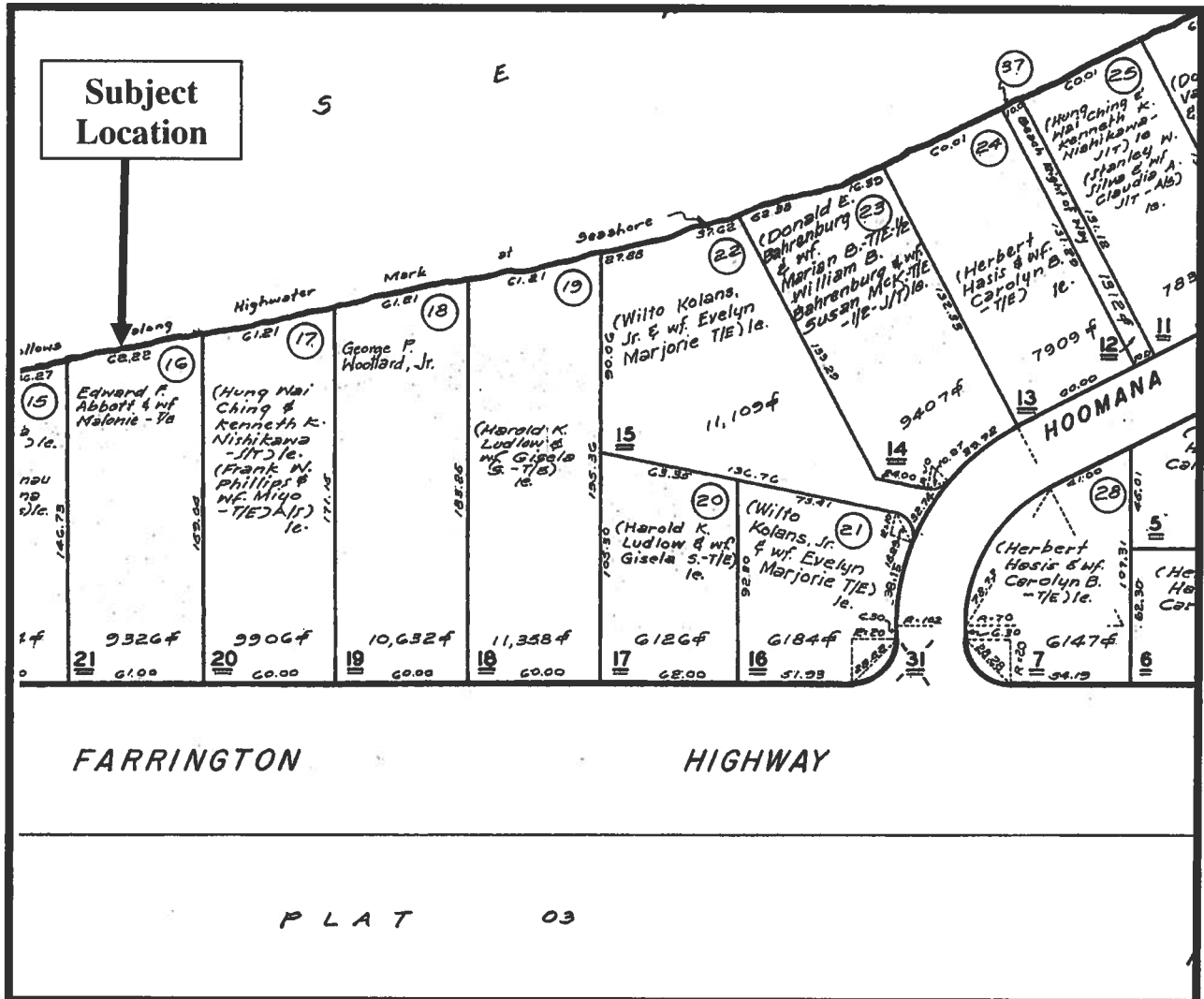
Respectfully Submitted,

  
\_\_\_\_\_  
Barry Cheung  
District Land Agent

APPROVED FOR SUBMITTAL:

  
\_\_\_\_\_  
William J. Aila Jr., Chairperson





**TMK (1) 6-8-010: seaward of 021**

**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 Concrete Footing Purposes

Project / Reference No.: PSF 13OD-027

Project Location: Mokuleia, Waialua, Oahu, Tax Map Key: (1) 6-8-010:seaward of 021.

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 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.

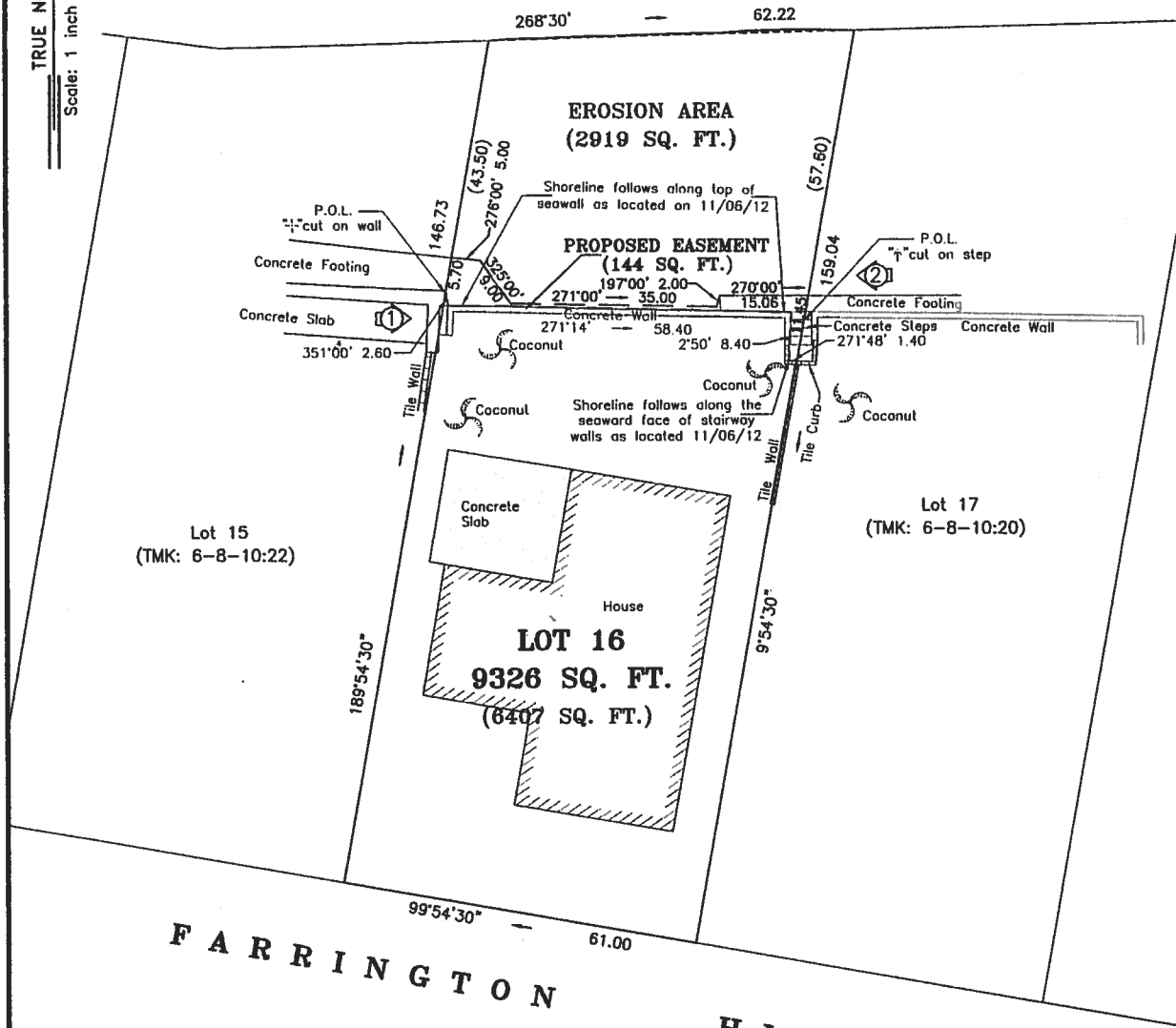
  
\_\_\_\_\_  
William J. Aila Jr., Chairperson  
Date 5/8/13

**EXHIBIT B**

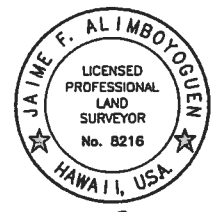


S e a

TRUE NORTH  
Scale: 1 inch = 20 feet



SHORELINE SURVEY MAP  
**LOT 16**  
 as shown on Map 4  
 of Land Court Application 1810  
 Mokuleia, Waialua, Oahu, Hawaii  
 Tax Map Key: 6-8-10:21  
 Scale: 1 inch = 20 feet  
 Date: November 15, 2012



*Jaime F. Alimboyguen*  
 exp. 4/30/14

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

Owner: Mr. Gregory Michaels  
 Mailing Address:  
 Temeluna, CA 92250

- NOTES:  
 1. Only improvements shown were located.  
 2. (1) Denotes number and direction of photographs.

EXHIBIT "C"

NEIL ABERCROMBIE  
GOVERNOR OF HAWAII

RECEIVED  
LAND DIVISION

2013 JAN 24 PM 3:49



DEPT. OF LAND &  
NATURAL RESOURCES  
STATE 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. AHA, JR.  
CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE MANAGEMENT

ESTHER KIA'AINA  
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  
KAIKOLAWE ISLAND RESERVE COMMISSION  
LAND  
STATE PARKS

REF:DLNR:BR

File Number Encroachment: OA-13-13

JAN 24 2013

Mr. Gregory Michaels  
c/o Jaime F. Alimboyoguen

Kapolei, Hawaii 96707

Dear Mr. Michaels,

SUBJECT: Request to Resolve State Land Encroachment at 68-689 Farrington Highway, Mokuleia, Oahu; Tax Map Key (1) 6-8-010:021; Owner: Gregory Michaels

This is in response to your January 2013 request to resolve the shoreline encroachments at Tax Map Key (1) 6-8-010:021. According to information and maps contained with your request, you have identified approximately 264 square feet of encroachment (CRM seawall) makai of the subject property onto State land.

The Department of Land and Natural Resources (DLNR), Office of Conservation and Coastal Lands (OCCL) has determined that the subject seawall is an authorized land use based on the City and County of Honolulu's December 21, 2009 approval letter for Shoreline Setback Variance (No. 2009/SV-10) for the subject seawall. As a consequence, 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:

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

EXHIBIT "D"

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. Farrington Highway runs along the mauka side of the property.*

Beach Resources:

*Due to a trend of long-term beach erosion (shoreline recession), little or no dry beach remains fronting the seawalls at the subject property and adjacent properties.*

Public Access:

*This section of coast has limited access along the beach fronting this property and adjacent properties with waves breaking against the base of the seawalls, except during low tides and low wave conditions. Beach access is available a few hundred feet to the east from Hoomana Road.*

Effect of Removing the Encroachment on:

**Beach Resources:** *The encroaching seawall and seawalls on adjacent properties are fronted by a narrow beach that is submerged during all but the lowest tides. Therefore, removal of the encroachment would not result in a substantial improvement to beach resources fronting the property.*

**Public Access:** *OCCL staff has determined that no improvement would be gained by removing encroaching portion of the seawall because the adjacent properties are fronted by similar seawalls and narrow beach.*

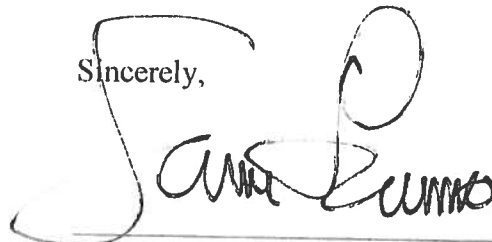
**Affect on Adjacent Properties:** *Removal of the encroaching portion of the seawall may destabilize seawalls and lawns at the adjacent properties.*

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 handwritten signature in black ink, appearing to read "Samuel J. Lemmo". The signature is written in a cursive style with a large, stylized initial "S".

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

cc: Land Division, Barry Cheung  
Hon. C&C DPP, Jamie Peirson