

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Division of State Parks
Honolulu, Hawaii 96813

June 14, 2013

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawai'i

O'ahu

Denial of Request for Contested Case Hearing Regarding BLNR Agenda Item E-1, March 22, 2013, Regarding the Issuance of Six (6) Direct Leases to Occupants of Lands at Ahupua'a 'O Kahana State Park, Ko'olauloa, O'ahu, Tax Map Key: (1) 5-2-002: 001 (por.)

BACKGROUND

On March 22, 2013, under Agenda Item E-1 (attached as Exhibit A), the Board considered requests to grant leases to Ervin H. Kahala and Lucretia I. Kahala, Thoran Fawn Evans, Moses Mahealani Kahala and Dorothy Laniola Kahala, Dutchess K. Malepe and Aviu Malepe, Lena Puanani Soliven and Darryl James Soliven, and Sherri Lynn Leimomi Johnson at Ahupua'a 'O Kahana State Park (Kahana) pursuant to Act 15 (Sp. Session 2009). After discussion and amendments to the recommendations, the Board approved the requests. James M. Anthony and Grace V. Anthony (Petitioners) requested a contested case prior to the end of the meeting. Petitioners' oral request was followed up by a written request filed with DLNR on April 1, 2013 and is attached as Exhibit B. After consultation with the Department of the Attorney General (AG), the Division of State Parks (State Parks) recommends the Board deny the request for contested case as the Petitioners are not entitled to a contested case as a matter of law.

DISCUSSION

Petitioner Grace V. Anthony holds a residential lease at Kahana. She and her husband James Anthony, live on her leased property. Petitioners object to the issuance of the new leases and timely requested a contested case – both orally and in writing. The sole basis of the claims is that Act 15 is a special law, unconstitutional pursuant to article XI, section 5 of the Hawai'i State Constitution.

Petitioners are not entitled to a contested case because the Board cannot consider the question they raise and cannot provide petitioners with the relief they request. Administrative agencies and boards may not "pass upon the constitutionality of statutes." *Hawaii Insurers Council v. Lingle*, 120 Hawai'i 51, 72, 201 P.3d 564, 585 (2008). See *HOH Corp. v. Motor Vehicle Industry Licensing Bd., Dept. of Commerce and Consumer Affairs*, 69 Haw. 135, 141, 736 P.2d 1271, 1275 (1987):

Although an administrative agency may always determine questions about its own jurisdiction [it] generally lacks power to pass upon constitutionality of a statute. The law has long been clear that agencies may not nullify statutes.

Citations omitted.

Pursuant to HAR Section 13-1-29.1, the Board is allowed to deny a request for contested case without a hearing under certain circumstances, and specifically, when it is clear as a matter of law, that the request concerns a subject that is not within the adjudicatory jurisdiction of the Board or when it is clear as a matter of law that the petitioner does not have a legal right, duty or privilege entitling one to a contested case proceeding.

Based on the foregoing, State Parks recommends that Petitioner's request for a contested case be denied.

RECOMMENDATION: That the Board:

1. Deny the request for contested case on the basis that Petitioners are not entitled to a contested case hearing as a matter of law as discussed above.

Respectfully Submitted,



Daniel S. Quinn, Administrator

APPROVED FOR SUBMITTAL:



William J. Aila, Jr., Chairperson

Exhibit "A" March 22, 2013 Board Submittal

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Division of State Parks
Honolulu, Hawaii 96813

March 22, 2013

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

File No.: SP13AKSP01

O'ahu

Issuance of Six (6) Direct Leases to the following: Ervin H. Kahala and Lucretia I. Kahala, Thoran Fawn Evans, Moses Mahealani Kahala and Dorothy Laniola Kahala, Dutchess K. Malepe and Aviu Malepe, Lena Puanani Soliven and Darryl James Soliven, and Sherri Lynn Leimomi Johnson for Residential Purposes, Ahupua'a 'O Kahana State Park, Ko'olauloa, O'ahu, Tax Map Key: (1) 5-2-002:001 (por.)

APPLICANTS:

<u>Parcel ID</u>	<u>Proposed Lessee</u>
Lease Lot 1	Ervin H. Kahala and Lucretia I. Kahala
Lease Lot 2	Thoran Fawn Evans
Lease Lot 3	Moses Mahealani Kahala and Dorothy Laniola Kahala
Lease Lot 4	Dutchess K. Malepe and Aviu Malepe
Lease Lot 5	Lena Puanani Soliven and Darryl James Soliven
Lease Lot 6	Sherri Lynn Leimomi Johnson

LEGAL REFERENCE:

Act 15, SLH 2008 and relevant sections of Chapter 171, Hawai'i Revised Statutes

LOCATION:

Portion of Government lands of Kahana Valley State Park situated at Kahana, Ko'olauloa, O'ahu, identified by Tax Map Key: (1) 5-2-002:001 (por.), as shown on the attached descriptions and maps labeled Exhibit A.

ITEM E-1

AREA:

Parcel ID	Area
Lease Lot 1 (E. Kahala)	11,845 s.f., more or less
Lease Lot 2 (Evans)	13,956 s.f., more or less
Lease Lot 3 (M. Kahala)	11,874 s.f., more or less
Lease Lot 4 (Malepe)	12,559 s.f., more or less
Lease Lot 5 (Soliven)	12,907 s.f., more or less
Lease Lot 6 (Johnson)	12,502 s.f., more or less

Subject to confirmation by the Department of Accounting and General Services, Survey Division and described in Exhibit A.

ZONING:

State Land Use District: Conservation, Resource Subzone
County of Honolulu CZO: Preservation

TRUST LAND STATUS:

The properties were acquired after 1959 and are not ceded land.

DHHL 30% entitlement lands pursuant to the Hawaii State Constitution: YES ___ NO X

CURRENT USE STATUS:

Encumbered by Governor's Executive Order No. 3518 setting aside land for Kahana Valley State Park and occupied by the applicants without documented agreement.

CHARACTER OF USE:

Living park/residential purposes.

LEASE TERM:

Beginning approximately June 1, 2013 and Ending November 30, 2058

COMMENCEMENT DATE:

The first day of the month to be determined by the Chairperson.

BLNR - Issuance of Kahana Leases

Page 3

March 22, 2013

ANNUAL RENT:

In lieu of monetary rent, Lessee shall contribute in-kind services to the Department by participating in the interpretive programs at the Park in the amount of 25 hours per month for a total of 300 hours per year.

METHOD OF PAYMENT:

N/A.

RENTAL REOPENINGS:

N/A.

PERFORMANCE BOND:

N/A.

PROPERTY CHARACTERISTICS:

Utilities – Electricity and telephone. No water/sewer. Staff notes that no wastewater infrastructure is provided and the Department of Health advises no cesspools or individual wastewater systems are currently permitted on any of the lots. Lessee's are responsible for their own wastewater solutions, if any, and shall comply with all relevant governmental regulation.

Slope - Mostly level.

Elevation - Less than 50' MSL

Rainfall - Less than 100" and subject to flooding

SCS Soil Series - Mokuleia Clay Loam and Jaucas Sand

Land Study Bureau – Types C and D

Legal access to property – Staff has verified that there is legal access to the property off of Kamehameha Highway and Kahana Valley Road.

Subdivision – Staff has verified that the subject property is not a legally subdivided lot and will be described in the lease via metes and bounds legal description. No subdivision is planned.

Encumbrances – Staff has verified that the following encumbrances exist on the property Governor's Executive Order No. 3518

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

See Attached Exhibit B - Exemption Notification

BLNR - Issuance of Kahana Leases

Page 4

March 22, 2013

DCCA VERIFICATION:

Not required as applicants are individuals not required to register with DCCA.

APPLICANT REQUIREMENTS:

None.

REMARKS:

Kahana Valley State Park, now known as Ahupua'a 'O Kahana State Park, was acquired by the State through condemnation between 1965 and 1969 as a way to prevent a proposed resort development and to retain the open space a rural character of Windward O'ahu.

Each of the six lots described in this submittal is located in the Ahupua'a 'O Kahana State Park. This request is to issue leases to the residents described herein in similar form and substance to those previously issued to other lessee's in Kahana Valley.

In 1979, The Department of Land and Natural Resources (Department) completed a Revised Environmental Impact Statement (EIS) which planned for residential use of 18 lots mauka of the community building along Kahana Valley Road and in 1992, then Governor Waihe'e accepted a Final Supplemental EIS (Supplement) for the Kahana Valley State Park which included an additional 14 residential lots along Trout Farm Road. Both the EIS and the Supplement referenced residents living in the front portions of the park and recommended they re-locate to areas further back in the valley to avoid being in the flood plain and so the front areas of the park could be used for day use and interpretive purposes. During this period, however, the front areas were used for residential purposes.

Act 5, SLH 1987, authorized the Department to issue long term residential leases to individuals who had been living on the lands and provided authorization for a residential subdivision in Kahana Valley. The law granted the Department relief from regulation regarding subdivision entitlements and construction standards. In 1993, the Department entered into 65 year leases covering 31 residential properties.

Pursuant to the terms of the leases, the residents are required to contribute at least twenty-five hours of service each month in lieu of rent. Act 238, SLH 1988, appropriated funds sufficient for 26 of the lessees to receive loans to build homes.

Since the completion of the homes and the issuance of the leases, other families have sought to obtain long term leases but the Department has been unable to issue them because Act 5 had expired. Over time, 3 of the 31 leases were forfeited due to defaults

and the issuance of new leases for these properties was delayed while legal and other issues were being evaluated.

Because of considerable controversy surrounding the Department's plans to evict occupants who remained on the property fronting the park, the Legislature enacted Act 15, SLH 2008, which prevented the Department from any evictions in Kahana for a period of two years. The law authorized the Department to negotiate and enter into long-term residential leases for sites in state parks under certain conditions. Act 15 also created the Living Park Planning Council (Council), placed within the DLNR for administrative purposes. The purpose of the Council was to create a master plan and advise the Department of matters pertaining to the park.

In a letter dated January 17, 2011 from Ralph K. Makaiau, Jr., Chair of the Hawai'i State Kahana Valley Living Park Planning Council, to Chairperson Aila, Mr. Makaiau recommended the Board approve granting six (6) new leases to each of the individuals named in this submittal based on 1), the Council's role pursuant to Act 15 and 2), a vote taken at the Council's December 15, 2010 meeting authorizing the letter. The six (6) proposed lessees had occupied the property prior to Act 15 and remain there today.

The locations of the six (6) lots were originally planned for park and interpretive use and residents were encouraged to locate homes further mauka. The State Parks discouraged the use of these lands for residential purposes because the use was not consistent with existing plans and because there would be permitting challenges due to being in a floodplain. Because of this, the lots were not subdivided. Despite the recommendation, however, the residents held to their desire to remain in their present locations.

State Parks recommends the Board approve the issuance of the leases and although the location of the lots is not ideal, leases would afford residents the ability to remain in their homes and continue being an integral part of the living park concept. The leases would simply document a use that has been in place for many years and no new changes and/or construction are contemplated for this area of the park.

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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 issuance of a direct leases to the residents described in this submittal covering the subject area under the terms and conditions cited above, which are by this reference incorporated herein and further subject to the following:
 - A. The standard terms and conditions of the most current lease document form, as may be amended from time to time;
 - B. Review and approval by the Department of the Attorney General; and
 - C. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.
3. Delegate the authority to the Chairperson to determine the precise boundaries of the lots and other terms and conditions necessary to complete the lease agreements.

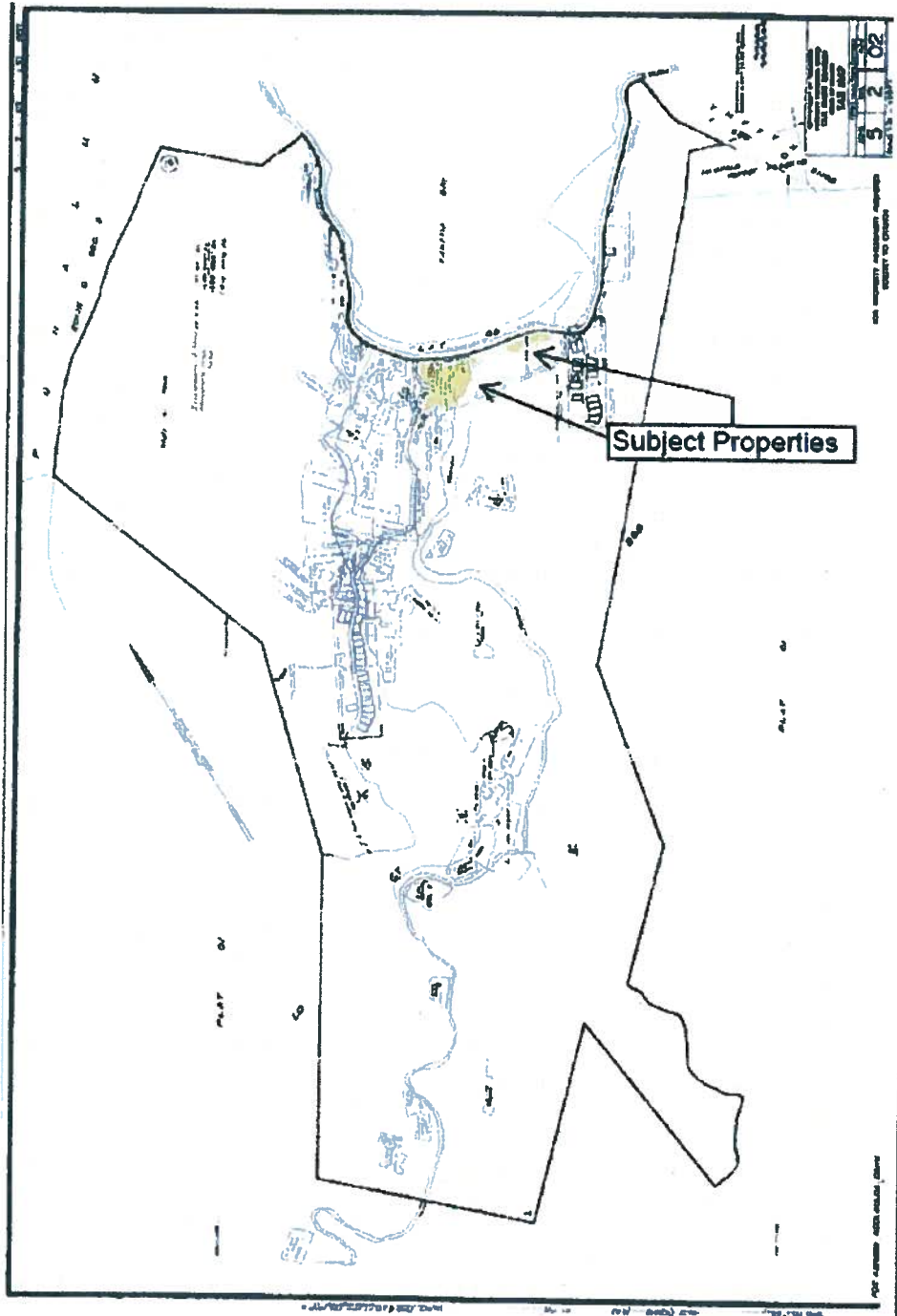
Respectfully Submitted,

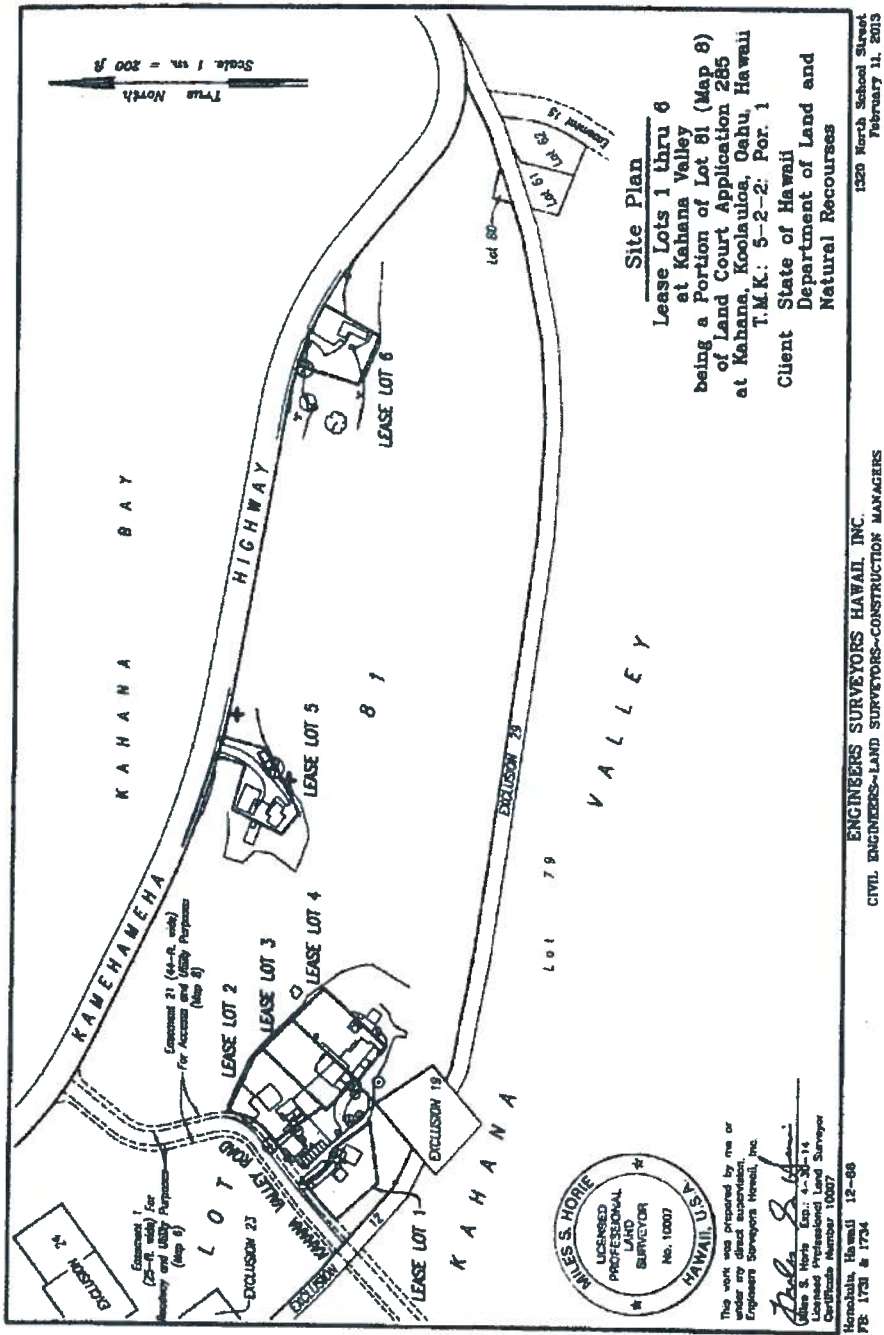

DANIEL S. QUINN
Administrator

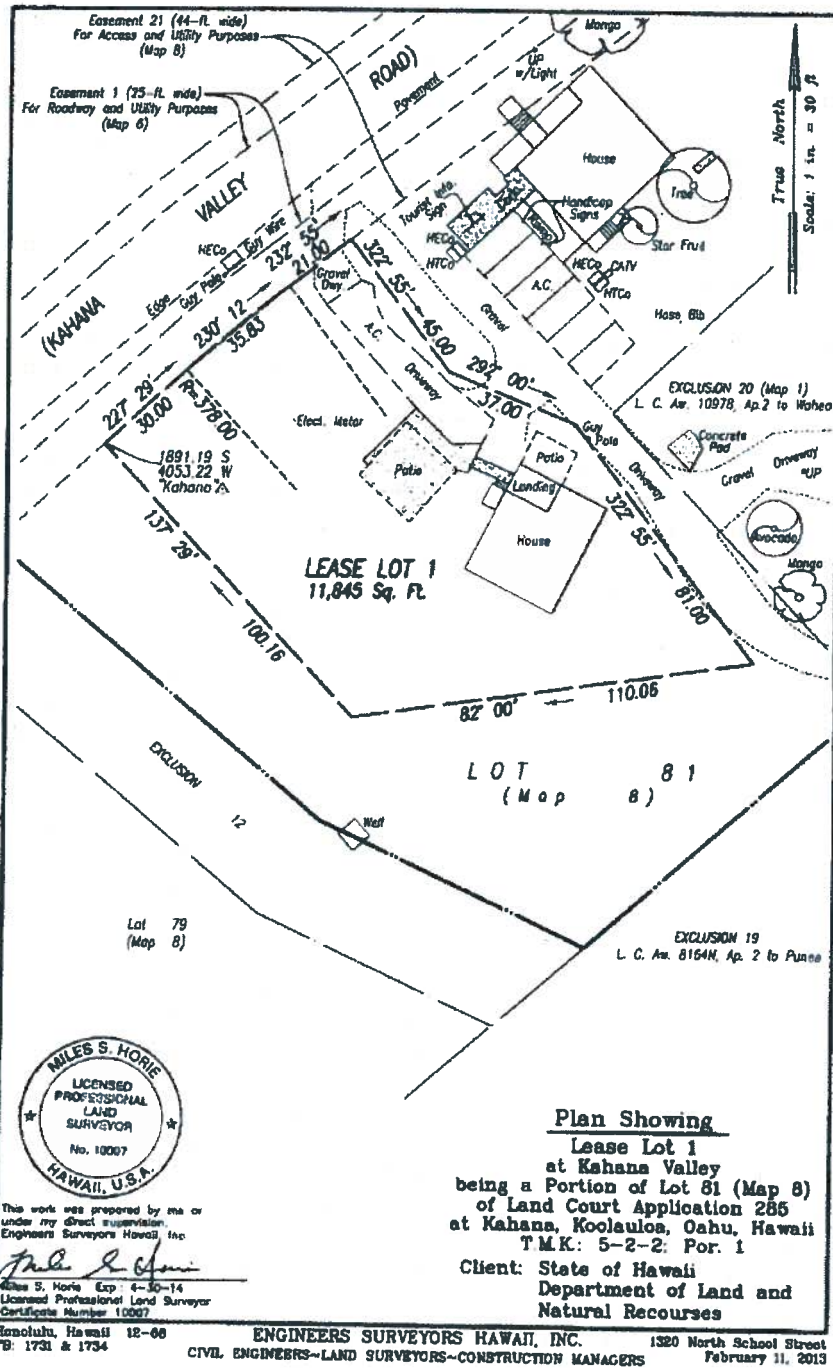
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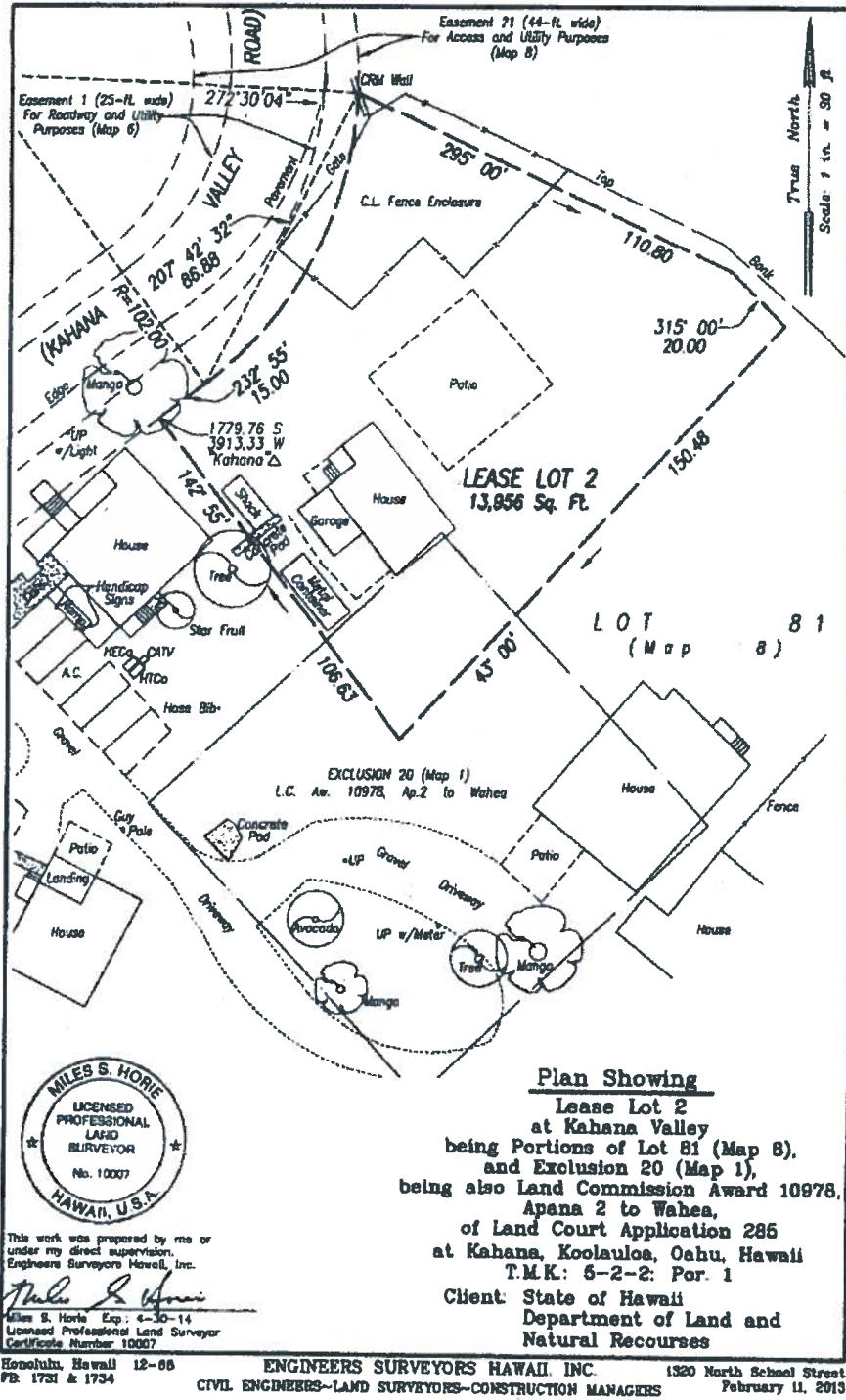

William J. Aila, Jr., Chairperson

EXHIBIT A - Tax Map Key and Lot Maps









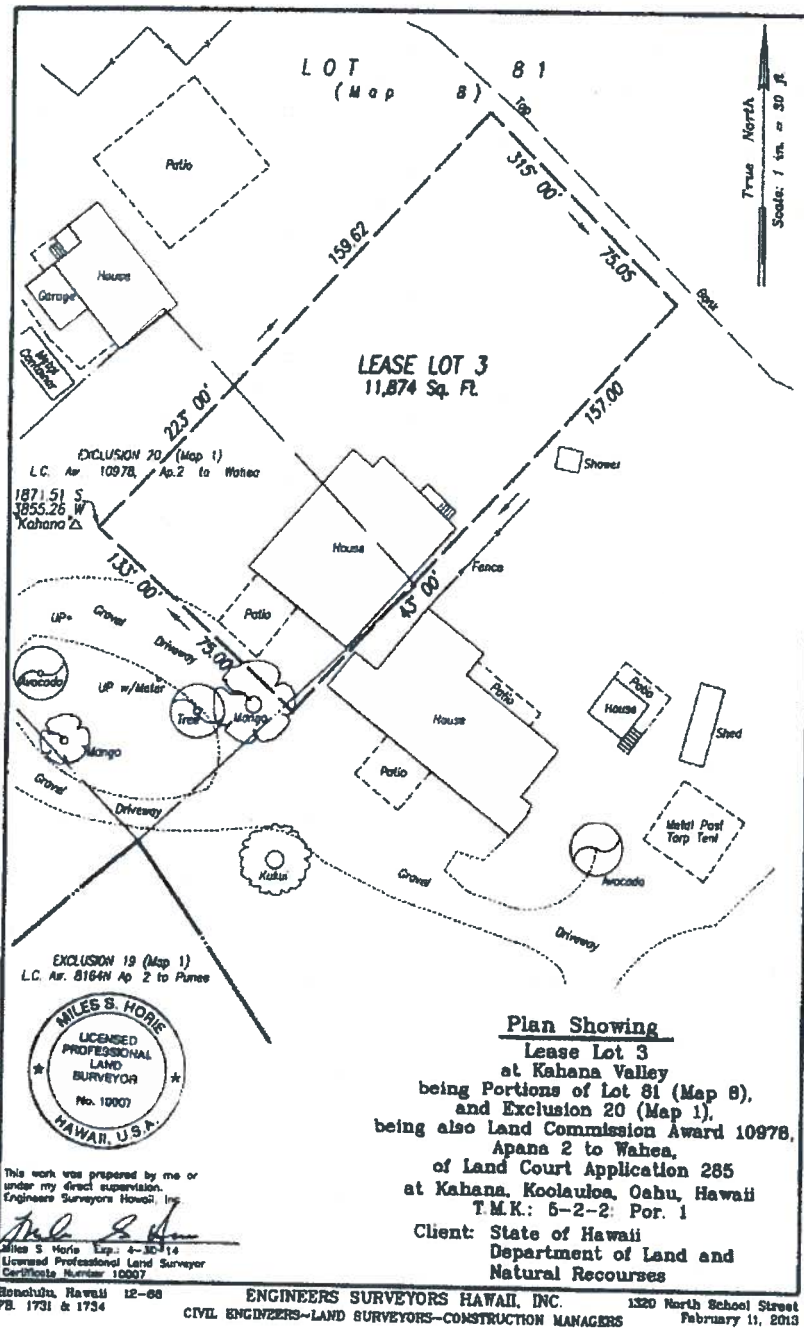
MILES S. HORIE
LICENSED PROFESSIONAL LAND SURVEYOR
No. 10007
HAWAII, U.S.A.

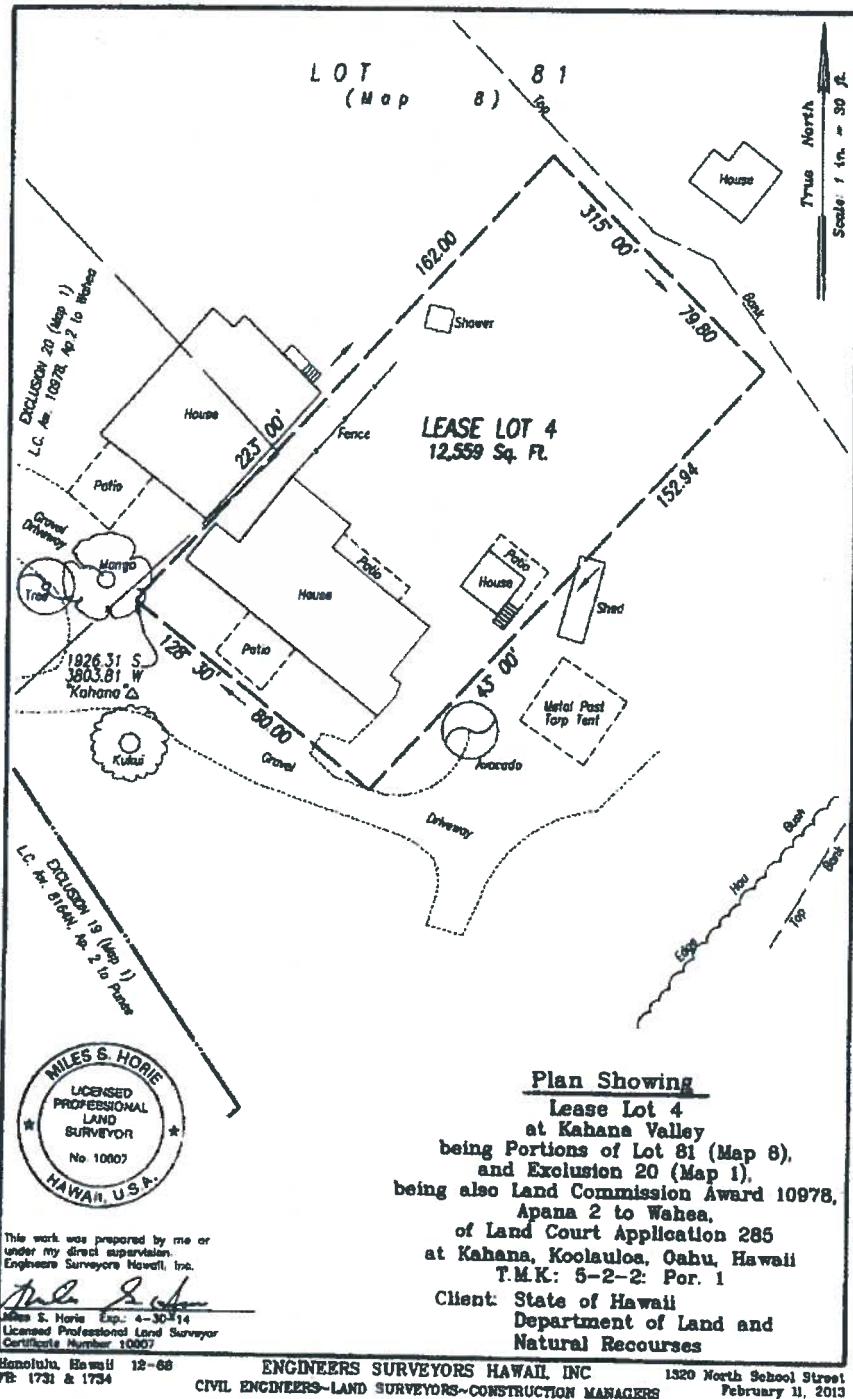
This work was prepared by me or under my direct supervision.
Engineers Surveyors Hawaii, Inc.

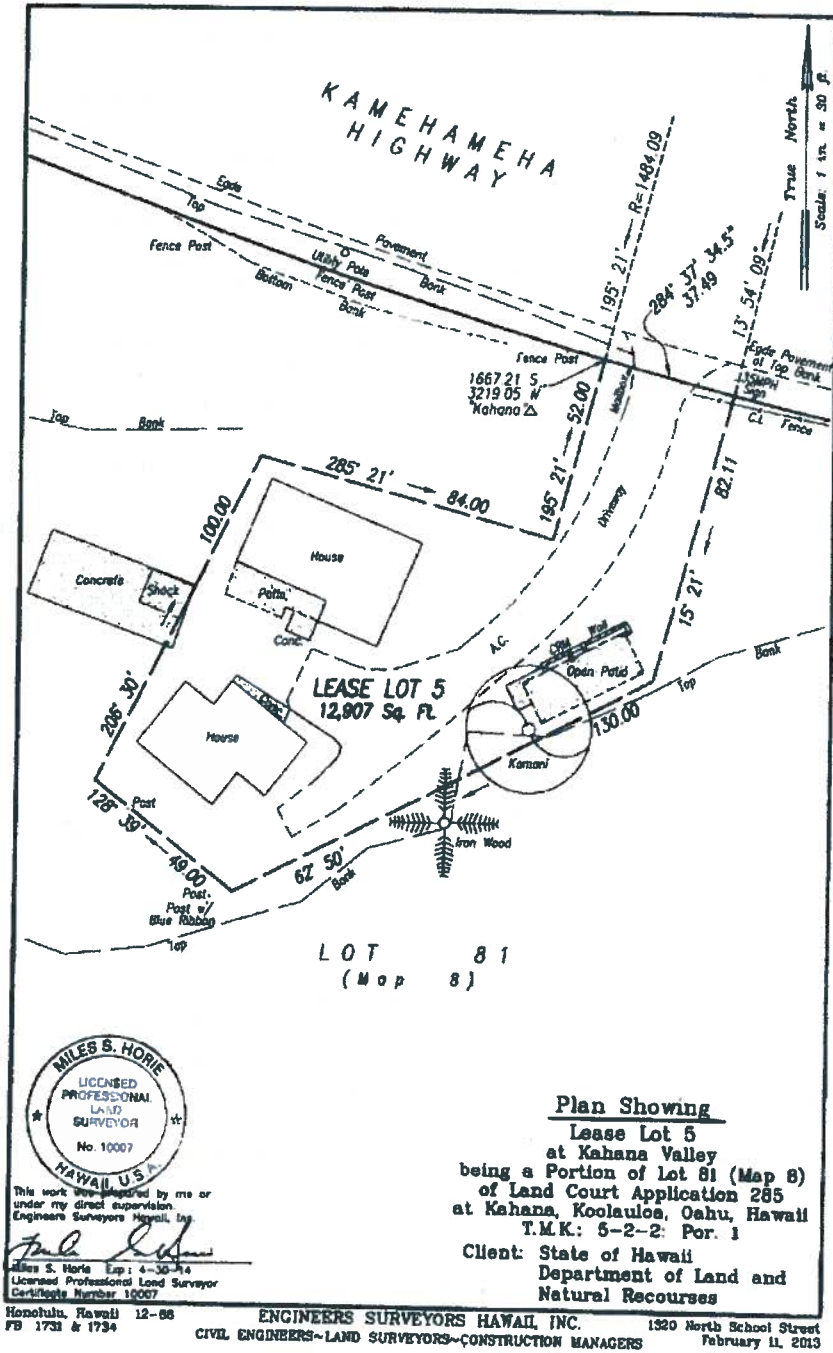
Miles S. Horie
Miles S. Horie Exp. 4-30-14
Licensed Professional Land Surveyor
Certificate Number 10007

Plan Showing
Lease Lot 2
at Kahana Valley
being Portions of Lot 81 (Map 8),
and Exclusion 20 (Map 1),
being also Land Commission Award 10978,
Apana 2 to Wahea,
of Land Court Application 285
at Kahana, Koolauloa, Oahu, Hawaii
T.M.K.: 5-2-2: Por. 1
Client: State of Hawaii
Department of Land and
Natural Resources

Honolulu, Hawaii 12-06 ENGINEERS SURVEYORS HAWAII, INC. 1320 North School Street
PB: 1731 & 1734 CIVIL ENGINEERS-LAND SURVEYORS-CONSTRUCTION MANAGERS February 11, 2013







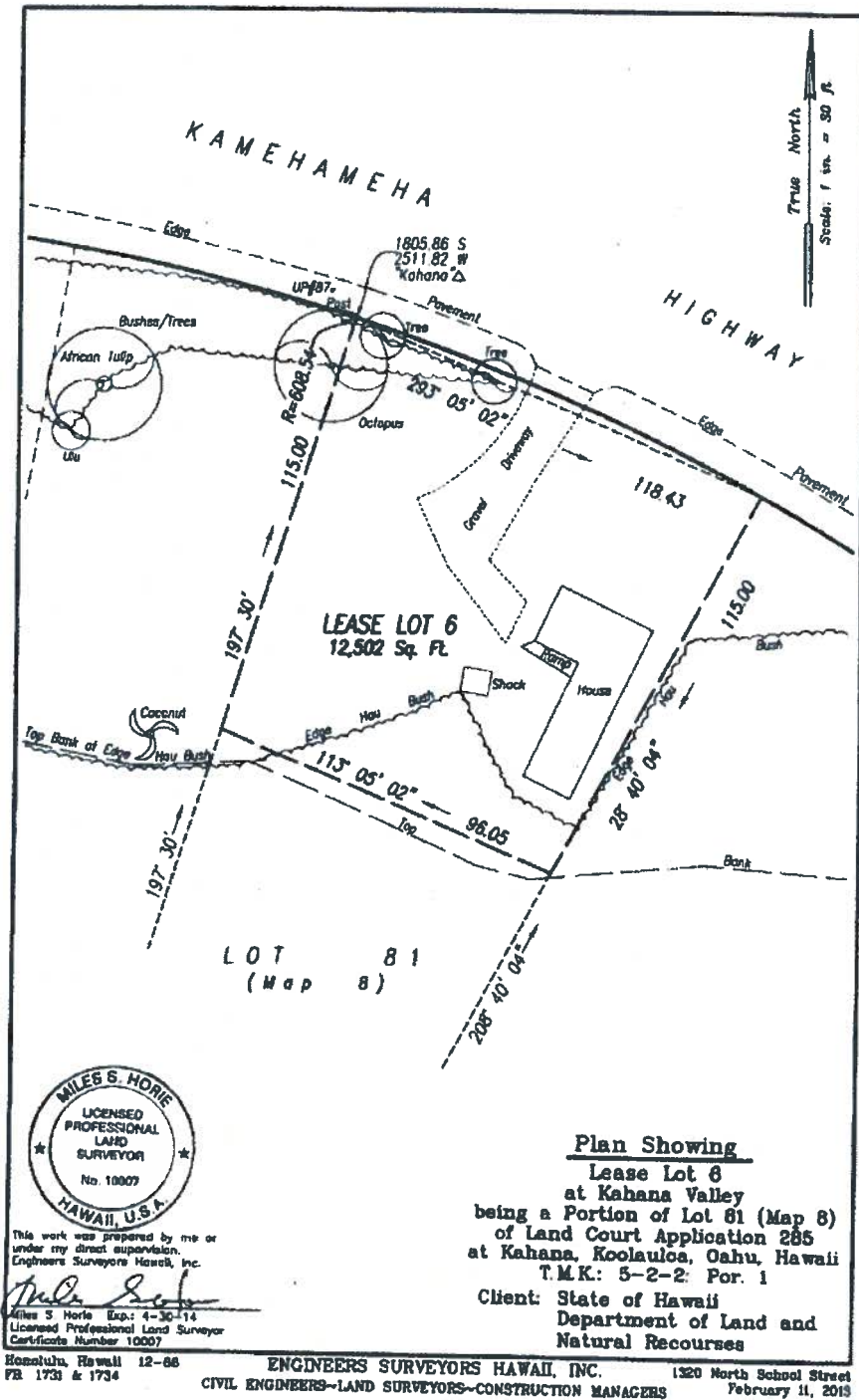


EXHIBIT B – Exemption Notification

NEIL ADERCRUMBIE
GOVERNOR OF HAWAII



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
DIVISION OF STATE PARKS
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
DIRECTOR, STATE PARKS

WILLIAM M. FAHI
DEPUTY DIRECTOR, STATE PARKS

AGLATE BISHOP
BOARDING AND DEPARTURE
BUREAU OF CONVEYANCE
COMMISSION ON WATER RESOURCE MANAGEMENT
CONCRETE FISH AND CRAB LARVAE
CORRECTION AND RESOURCES DEVELOPMENT
COUNCIL ON
FOREST AND WILDLIFE
HISTORIC PRESERVATION
LAND AND NATURAL RESOURCES
STATE PARKS

EXEMPTION NOTIFICATION

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

Project Title: Issuance of Six (6) Direct Leases to the following: Ervin H. Kāhala and Lucretia I. Kāhala, Thoran Fawn Evans, Moses Mahealani Kāhala and Dorothy Laniola Kahala, Dutchess K. Malepe and Aviu Malepe, Lena Puanani Soliven and Darryl James Soliven, and Sherri Lynn Leimomi Johnson for Residential Purposes, Ahupua'a 'O Kahana State Park, Ko'olauloa, O'ahu, Tax Map Key: (1) 5-2-002:001 (por.)

Project / Reference No.: SP13AKSP01

Project Location: Portion of Government lands of Kahana Valley State Park situated at Kahana, Ko'olauloa, O'ahu, identified by Tax Map Key: (1) 5-2-002:001 (por.),

Project Description: Kahana Valley Leases for Six (6) Families

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

Exemption Class No.: In accordance with Hawaii Administrative Rule Section 11-200-8(a)(1), the subject request is exempt from the preparation of an environmental assessment pursuant to Exemption Class No. 1, Number 3 of the State Parks Exemption List which states "Cabins, pavilions, picnic and trail shelters, utility buildings and shed – within developed, maintained portions of State Parks [February 5, 1976] and Exemption Class 4 which exempts minor alteration in the conditions of land, water, or vegetation [HAR Section 11-200-8(a)(4)].

Consulted Parties: DLNR/Land Division

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

William J. Aila Jr., Chairperson

Exhibit "B" Contested Case Petition



STATE OF HAWAII
BOARD OF LAND AND NATURAL RESOURCES

PETITION FOR A CONTESTED CASE HEARING

RECEIVED
2013 APR -1 PM 2:25
DEPT. OF LAND & NATURAL RESOURCES
STATE OF HAWAII

OFFICIAL USE ONLY	
Case No.	Date Received
Board Action Date / Item No.	Division/Office

INSTRUCTIONS:

- File (deliver, mail or fax) this form within ten (10) days of the Board action date to:

Department of Land and Natural Resources
Administrative Proceedings Office
1151 Punchbowl Street, Room 130
Honolulu, Hawaii 96813
Phone: (808) 587-1496, Fax: (808) 587-0390
- DLNR's contested case hearing rules are listed under Chapter 13-1, HAR, and can be obtained from the DLNR Administrative Proceedings Office or at its website (<http://hawaii.gov/dlnr/rules/Ch13-1-Official-Rules.pdf>). Please review these rules before filing a petition.
- If you use the electronic version of this form, note that the boxes are expandable to fit in your statements. If you use the hardcopy form and need more space, you may attach additional sheets.
- Pursuant to §13-1-30, HAR, a petition that involves a Conservation District Use Permit must be accompanied with a \$100.00 non-refundable filing fee (payable to "DLNR") or a request for waiver of this fee. A waiver may be granted by the Chairperson based on a petitioner's financial hardship.

A. PETITIONER		
(If there are multiple petitioners, use one form for each.)		
1. Name <i>James M. Anthony & Grace V. Anthony; husband and wife</i>	2. Contact Person <i>Dr. James M. Anthony</i>	
3. Address [REDACTED]	4. City <i>Kaa'awa</i>	5. State and ZIP <i>HAWAII 96730</i>
6. Email [REDACTED] <i>com</i>	7. Phone [REDACTED]	8. Fax _____

B. ATTORNEY (if represented)		
9. Attorney Name <i>No attorney of record at this date</i>	10. Firm Name	
11. Address	12. City	13. State and ZIP
14. Email	15. Phone	16. Fax

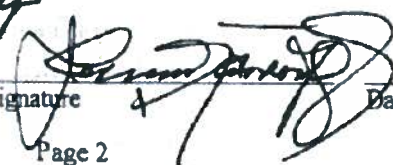
C. SUBJECT MATTER	
17. Board Action Being Contested <i>The decision made by the Board to authorize its Division of State Parks to issue new leases to six parties listed on page 1 of the Staff Submittal dated March 22, 2013</i>	
18. Board Action Date <i>March 22, 2013</i>	19. Item No. <i>E-1</i>
20. Nature and Extent of Petitioner's Interest That May Be Affected by the Board Action <i>See separate sheet attached hereto and made a part hereof</i>	
21. Any Disagreement Petitioner May Have with an Application before the Board <i>See separate sheets attached hereto and made a part hereof</i>	
22. Any Relief Petitioner Seeks or Deems Itself Entitled to <i>See separate sheets attached hereto and made a part hereof</i>	
23. How Petitioner's Participation in the Proceeding Would Serve the Public Interest <i>See separate sheets attached hereto and made a part hereof</i>	
24. Any Other Information That May Assist the Board in Determining Whether Petitioner Meets the Criteria to Be a Party under Section 13-1-31, HAR <i>See separate sheets attached hereto and made a part hereof</i>	

- Check this box if Petitioner is submitting supporting documents with this form.
 Check this box if Petitioner will submit additional supporting documents after filing this form.

*For and on behalf of self
and wife, GRACE V. ANTHONY*
JAMES M. ANTHONY

Petitioner or Representative

Signature



Date

3-27-2013

STATE OF HAWAII
BOARD OF LAND AND NATURAL RESOURCES

PETITION FOR A CONTESTED CASE HEARING

(Supplementary sheets attached to signed hard copy and made a part of it).

20. Petitioner Grace V. Anthony is a lessee of record in Kahana Valley State Park [REDACTED]. Petitioner James M. Anthony is the husband of lessee Grace V. Anthony and has a life estate in said lease. The lease and life estate are matters of record, copies of which will be provided at a later date should this be necessary.

Petitioners are also citizens of the United States besides being residents of the State of Hawaii and of Kahana Valley State Park in particular.

Petitioners believe that in its reliance on Act 15, SLH 2008 to issue new leases, the Board has acted illegally and unconstitutionally—in violation, particularly, of Article XI, Section 5 of the Hawaii State Constitution and the precedent set in the Superferry case (*Sierra Club v. Department of Transportation*, 120 Hawaii 181, 202 P.2d 1226 (2009)).

Petitioners believe that the Board, in taking the illegal and unconstitutional action that it has, has set the stage for all leases in Kahana to be called into question and possibly declared by a court of competent jurisdiction to be invalid. Petitioners have invested close to \$500,000 in on site improvements on the leased lot they currently occupy. Petitioners have other property interests in Kahana that may be affected if all leases there were to be found to be legally defective.

21. The Staff Submittal dated March 22, 2013 claims that six parties applied to the Board for issuance of new leases. We have not seen these applications although a request has been made for the purported applications to be produced. Petitioners disagree with the applications before the Board if they in fact exist.

22. In view of the fact that the Petitioners believe that the Board acted illegally and unconstitutionally in their reliance on Act 15, SLH 2008, the relief Petitioners seek is that the decision made on March 22, 2013 be set aside and nullified.

23. The public interest is invariably served when citizens take action to uphold their Constitution at any level of the polity. In so doing, citizens act to defend and uphold the rule of law which lies at an important part the heart of what we call the 'public interest'. The rule of law protects us all. When citizens believe that their government has acted illegally and unconstitutionally they have a special obligation in the public interest to seek appropriate redress wherever they can get a hearing.

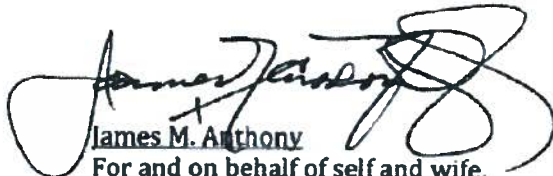
24. **Section 13-1-31, HAR:** In our view, as Petitioners, we clearly meet the criteria to be admitted as parties as set out in Section 13-1-31 (b) (2):

- We have property interests in the lands that are a part of Kahana Valley State Park;

2

- we lawfully reside on the land on which we built a home and other structures duly approved by the Division of State Parks;
- we are adjacent property owners;
- our interests are clearly such as to be distinguishable from those of the general public, although, as citizen taxpayers, we are also members of the general public who have legitimate interests in how public lands are used and the connection of such lands to special legislation.

The additional information provided in this section should be read in conjunction with what precedes it in the answer to question #20 set out on the preceding page.



James M. Anthony
For and on behalf of self and wife,
Grace V. Anthony

March 27, 2013

To Whomsoever it may concern

I hereby authorize my husband,
Dr. James M. Anthony to represent me
in all matters related to the Contested
Case Hearing we are about to file
in connection with a decision made
by the Board of Land & Natural Resources
on March 22, 2013 regarding the
issuance of six leases in the ahupua'a
O Kahana State Park.

Grace V. Anthony

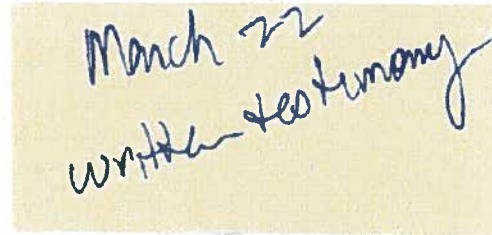
GRACE V. ANTHONY

Signed at Kahana, O'ahu on March
27, 2013.

[REDACTED]

eMail: [REDACTED]

March 22, 2013



March 22
written testimony

Formal submission to the Board of Land & Natural Resources by J.M. Anthony, PhD, Grace V. Anthony and 100 John and Jane Does on Agenda Item E-1: a proposal to issue new leases to six individuals in Kahana Valley State Park based on the details set out in a Division of State Parks staff submittal (15 pages, including attachments) issued under the signature of Daniel S. Quinn, Administrator and approved by William J. Aila, Chairperson of the Department of Land & Natural Resources

Date of Staff Submittal: March 22, 2013 Department File No. SP13AKSP01

Introduction:

J.M. Anthony, PhD and Grace V. Anthony are husband and wife. Both are citizen taxpayers of the United States and are residents of Kahana Valley State Park at [REDACTED]. Grace is the lessee of record for [REDACTED] in Kahana Valley State Park. Dr. Anthony has a life estate in Grace's lease as provided for in a legal instrument recorded with the State of Hawai'i's Department of Land and Natural Resources, Division of State Parks and the State Bureau of Conveyances.

The Staff Submittal (hereafter, "the Submittal")

1. Although the Submittal lists the names of 6 persons as 'applicants' there is no evidentiary material attached to it that shows that any applications were ever submitted by these alleged 'applicants'.
2. The Submittal does not disclose pertinent personal details—for example, that Sheri Johnson is the daughter of Kahana Planning Council (hereafter "Council") member, Ululani Beirne and that Lena Soliven is the sister of Council member Ben Shafer. There are other details which are not disclosed—the history, for example, of how long the 6 have lived in the Park without making any contributions that lessees have made as part of their contractual obligations to the State. The fact, for example, that Thoran Evans once had a lease, gave it to his sister and then had it cancelled by the Division of State Parks.
3. The Submittal lists Act 15 as "Legal Reference". As a matter of fact a substantial part of the legal basis for the proposal that new leases be granted to the named 6 individuals is based on Act 15, SLH 2008. *We contend that Act 15 SLH 2008 is in conflict with Article XI, Section 5 of the Hawaii State Constitution and is therefore unconstitutional. The proposal to grant new leases under Act 15, SLH 2008 is, therefore, defective in law. In a string of previous correspondence, submissions made to the Chair of this Board (the current Chair as well as his predecessor), to Mr. Quinn and others, this point has been made time and time again over several years. See*

also correspondence dated March 17, 2008 from then A-G Mark Bennett and Deputy A-G William Wynhoff. A similar letter from the A-G's Department dated March 24, 2008 is also pertinent. Both are attached hereto and made a part hereof as Appendices 1 and 2. These same submissions were placed before the Kahana Planning Council on several occasions and systematically, arbitrarily and capriciously ignored. Since its very inception the Kahana Planning Council has acted as a law unto itself, ignoring the community of lessees and the 'bottom/up' provisions built into Act 15.

4. **The Submittal fails to mention that both Mr. Quinn and Lauren Tanaka (State Parks representative on the Kahana Planning Council) both knew, as they still do, that Governor Lingle, who vetoed Act 15, said that it violated Article X1, Section 5 of the Hawaii State Constitution – *and more seriously, if Act 15 were to be struck down as being unconstitutional, "then all the leases would be in jeopardy."* (See Attachment 3, highlighted section). *Dan Quinn knows that, Lauren Tanaka knows that, and William Aila, the current Chair also knows that—and yet they are all parties to pushing the proposal embodied in the Submittal—without disclosing this to you so that you may fairly decide this matter with all of the relevant facts before you. Selective disclosure is not transparency.* Selective disclosure dishonors this Board and distorts a process that was designed to assure fairness and good sense. This Submittal puts us all back on the road to another Paulette Kaleikini 'Iwi' case.**
5. **The Board should, for the reasons cited above alone, reject the proposal before it. The proposal is illadvised, divisive of the people who live in Kahana, endangers their interests and does nothing to enhance the State Park.**
6. **As set out in the Submittal, page 5, it relies also on the January 17, 2011 letter signed by Ralph Makaiau as purported Chair of the Kahana Planning Council as its basis for acting on the 6 leases. Makaiau's claim to be Chair of the Planning Council has no basis that arises from the provisions of Act 15, legal or not.**
7. **The vote mentioned in the Makaiau letter of January 17 is that there were 3 votes in favor, one against and one abstention. The letter does not mention that the voting record was challenged because Ululani Beirne, who had a conflict of interest which she never declared or acknowledged (as her nephew Ben did). There were actually only two legitimate yea votes out of 5. Two out of 5 is not a majority.**
8. **There are dispute resolution administrative procedures in Kahana that have never been followed since the Planning Council was established. This is a matter that was raised some time ago in another law suit anchored in**

Kahana. The Submittal does not mention this and does not take cognizance of it.

Summary

The foregoing arguments taken together, in our view, are a formidable barrier to accepting the proposal before you as set out in Mr. Quinn's submittal. This Staff submittal has taken two full years and more to put together. In its present form it is just a desperate gamble.

The Board should better acquaint itself with the larger picture in which Kahana is embedded and not allow itself to be bulldozed into acting precipitately. Keep in mind that the one major issue that the Planning Council was supposed to have addressed remains undone to this day: a Master Plan. Not only is there no Master Plan in place but, four years down the road, even the skeletal outlines are not in place. This new leases proposal is political theater: a calculated, reckless disregard of the law, legal precedent, persuasive authority.

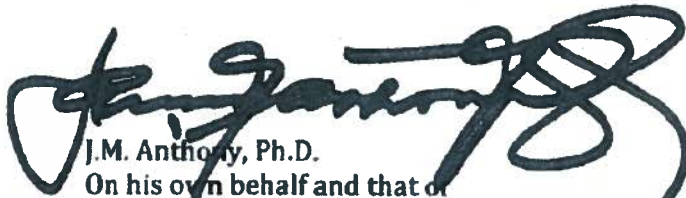
The Staff Submittal is woefully inadequate. It hop, skips and jumps over vital information that the Board needs to have to be fair and reasonable, to do the right thing.

Further, the Staff Submittal is a gamble. The Chair is gambling on the hope that nobody will oppose what is in this very thin Staff Submittal which is shallow, falsifies history, presents a distorted, incomplete record.

This Board, under this Chair, gambled on the rail *iwi* case and lost—big time. You will lose again if you go down the road carved out for you in the Staff Submittal before you. This is the time to take stock and think again.

You have two honorable options before you: **defer** the incomplete proposal before you or **reject** it.

If you vote to accept this seriously defective Staff Submittal, we give you notice that we will proceed to request a contested case hearing.



J.M. Anthony, Ph.D.

On his own behalf and that of

Grace V. Anthony and others who might seek to take this matter further



**TESTIMONY OF THE STATE ATTORNEY GENERAL
TWENTY-FOURTH LEGISLATURE, 2008**

ON THE FOLLOWING MEASURE:

S.B. NO. 3, S.D. 1 RELATING TO KAHANA VALLEY STATE PARK.

BEFORE THE:

HOUSE COMMITTEE ON WATER AND LAND

DATE: Monday, March 17, 2008 TIME: 9:00 A.M.

LOCATION: State Capitol Room 312
Deliver to: Clerk, Room 427, 3 copies

TESTIFIER(S): Mark J. Bennett, Attorney General
or William J. Wynhoff, Deputy Attorney General

Chair Ito and Members of the Committee:

The Department of Attorney General opposes this bill and believes it would be unconstitutional if enacted.

This bill would authorize issuance of long-term leases on additional parcels of land within Kahana Valley.

Article XI, section 5 of the Hawaii Constitution provides:

The legislative power over the lands owned by or under the control of the State and its political subdivisions shall be exercised only by general laws, except in respect to transfers to or for the use of the State, or a political subdivision, or any department or agency thereof.

No Hawaii case deals with article XI, section 5. One formal opinion from this department addresses it. In our Opinion No. 61-36, at page 2 (fn. omitted), we said:

[I]t is clear that once land was "owned by the State or under its control," the framers of the Constitution intended that it be distributed by means of general laws and to prohibit its dissipation "through private, or special laws". (Vol. 1, Proceedings of the Constitutional Convention of Hawaii, pp. 233, 336.)

The impetus for adoption of article XI, section 5 appears to have been "special land exchange deals or things of that nature which as we know in the past have definitely caused a considerable loss to the Territory." 2 Proceedings of the Constitutional Convention of Hawaii of 1950, at 631 (1961). The committee report refers to "dissipation of assets by land exchanges under private laws or by homestead laws governing a particular tract of land." Stand. Comm. Rep. No. 78, 1 Proceedings of the Constitutional Convention of Hawaii of 1950, at 233 (1960). Although land exchange deals and homestead laws governing particular tracts of land appear to have been foremost in the minds of the delegates to the 1950 Constitutional Convention, the constitutional proposal they agreed to was not limited to those transactions. The committee report instead states "in administering and disposing of the natural resources the legislature must do so by general law." Id. Intergovernmental transfers were the only exceptions provided. Id.

S.B. No. 3 is (plainly) the product of the exercise of legislative power and involves land owned by the State. The bill does not fall within the exception clause of article XI, section 5, because it does not involve an intergovernmental transfer.

S.B. No. 3 is not a general law because the bill singles out one parcel of land in a specific locale. We believe that S.B. No. 3 is an exercise of legislative power over the lands owned by the State by special, not general, law and is, therefore, unconstitutional. We opposed a similar bill, H.B. No. 1664, in 2006 for similar reasons.

It does not appear that this problem can be solved by amendment, because the title to the bill requires that it relate to Kahana Valley.

Aside from the problems with the constitutionality of the measure, the bill describes qualified lessees as "persons who reside and have continually lived in the state park since before 1987 in a culturally and appropriate manner and have served as caretakers of the state park." We know from past experience that this definition will be difficult to interpret and apply. What evidence could prove or disprove that a person has "continually" lived in the park since 1986? What about, for example, persons who lived elsewhere during time spent in military service or in college?

In addition, the phrases "culturally and appropriate manner" and "served as a caretaker of the state park" are inherently ambiguous. If these phrases are intended to impose additional qualifications beyond living in the park since 1986, they should be defined or clarified. During what part of the time must the person have been a caretaker of the park? How would the phrases apply to a person in his or her twenties who was a child during most of the relevant time?

The Department of Attorney General believes that this bill should be held.

LINDA LINGLE
GOVERNOR



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MARK J. BENNETT
ATTORNEY GENERAL

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DEPARTMENT OF THE ATTORNEY GENERAL
425 QUEEN STREET
HONOLULU, HAWAII 96813
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LISA M. GINOZA
FIRST DEPUTY ATTORNEY GENERAL

& M
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March 24, 2008

The Honorable Laura H. Thielen
Chairperson, Board of Land and Natural Resources
State of Hawai'i
1151 Punchbowl Street, Room 130
Honolulu, Hawai'i 96813

RE: Request for Advice Regarding New Leases at Ahupua'a 'O Kahana State
Park, Oahu

Dear Ms. Thielen:

Question and summary of answer

May the Department of Land and Natural Resources issue new leases of residential lots at Ahupua'a 'O Kahana State Park, Oahu?

No. The legislation authorizing issuance of such leases provides that the authority to do so ends, at the latest on July 1, 1993. This department's previous advice concerning this issue was in error.

Facts

In 1970, the State acquired land in Kahana Valley for park purposes. It then faced the issue of what to do with persons living in the valley as tenants of the previous owner. Families of many of these persons had lived in the valley for generations.

In 1985, the Board of Land and Natural Resources ("board") approved issuance of 31 revocable permits covering families deemed qualified for residency in the park. As a long-term solution, the Department of Land and Natural Resources ("department") proposed a "living park" concept by which the State would issue residential leases to residents. Lessees would not pay rent, but would be required to build new homes and participate in the park's interpretive programs. The legislature accepted this proposal. To implement the living park concept, the legislature adopted Act 5, 1987 Hawai'i Session Laws 16.

Ms. Laura H. Thielen
March 24, 2008
Page 2

Act 5 authorized the department to directly negotiate long-term residential leases of lots at Kahana Valley with existing residents. Section 6 of the Act provides that the authority to enter these leases expired, at the latest, on January 2, 1992:

Notwithstanding any other law to the contrary, including chapter 171, Hawaii Revised Statutes, the department of land and natural resources is authorized to negotiate and enter into lease agreements in accordance with the provisions and limitations of this Act; provided that the authority granted by this Act shall expire (1) when leases have been negotiated and recorded in the bureau of conveyances for all parcels meeting the criteria in this Act, or (2) on January 2, 1992, whichever occurs first.

In 1992, the legislature extended the sunset date to July 1, 1993. Act 58, 1992 Hawaii Session Laws 90.

The department created 35 lots and entered into 31 leases (one with each of the families that had revocable permits) before the deadline.

For two reasons, the department faced the issue of whether to issue new leases after the sunset date. First, children in the original 31 families have grown up and want their own leases in Kahana. Second, three of the original 31 leases were canceled for default. This department's responses to various initiatives to issue new leases have arguably been inconsistent.

In 2001, the chairperson of the board asked whether the sunset provision in the legislation prohibited issuance of new leases to replace those canceled for default. Our response said the primary purpose of the legislation was to establish a "living park" and that the sunset clause defeated this primary purpose. Therefore, we said, the department could issue new leases to replace leases canceled for default. But (we said) the department could not lease new parcels.

More recently, residents have lobbied the legislature to increase the number of leases. H.B. 1664 (2005) authorized (but did not require) the department to negotiate new leases. We wrote a letter to the legislature saying that the bill was probably unconstitutional as a violation of Art. XI, section 5 (forbidding special legislation as to land). That bill did not move.

Senator Hee introduced basically the same bill in 2007 (S.B. 3). We submitted testimony in both the 2007 and 2008 sessions arguing that this bill is also unconstitutional.

Discussion

In 2001, our office advised the chairperson that the "reason and spirit of the law, and the cause that induced the legislature to enact it" were sufficient in this case to override what was

Ms. Laura H. Thielen
March 24, 2008
Page 3

2

conceded to be "the strict, literal reading" of the sunset clauses. However, we have conducted a further review of the acts and re-assessed the prior advice.

The Hawaii Supreme Court discussed rules of statutory interpretation in T-Mobile USA, Inc. v. County of Hawaii Planning Commission, 106 Haw. 343, 352-353, 104 P.3d 930, 939-940 (2005) (citation omitted):

A cardinal canon of statutory construction is that this court cannot change the language of the statute, supply a want, or enlarge upon it in order to make it suit a certain state of facts. This is because we do not legislate or make laws. It is a cardinal rule of statutory interpretation that, where the terms of a statute are plain, unambiguous and explicit, we are not at liberty to look beyond that language for a different meaning. Instead, our sole duty is to give effect to the statute's plain and obvious meaning.

Acts 5 and 58 are not ambiguous. These acts give the department power to enter into leases at Kahana Valley "provided that the authority granted by this Act shall expire [at the latest] on July 1, 1993." This language leaves no room for interpretation. In light of the "sole duty to give effect to the statute's plain and obvious meaning," we conclude the department does not have authority to enter into new leases at Kahana Valley.

Conclusion

If you have any questions, please do not hesitate to contact me.

Very truly yours,



William J. Wynhoff
Deputy Attorney General

WJW:w

Approved:



Mark J. Bennett
Attorney General of the State of Hawai'i

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From: Lauren.A.Tanaka@hawaii.gov
To: drjant@aol.com
Subject: Papa Mau
Date: Mon, Oct 18, 2010 4:18 pm

Hi Jim:

I want to thank you for the ticket to see Papa Mau. I was greatly moved by the portrayal of him as a humanitarian, a visionary and a man who had a tremendous influence on the way polynesian navigation is viewed and defined in the modern world. As I search for the words to describe what a great man he was, I am at a loss. Had I known how powerful his influence was to the people involved with the Hokulea, I may have made an effort to try to be in his presence to feel what an awesome person he was. Although I am not a religious person, his aura is probably as mind boggling and earth shaking as Jesus was to the Christians. If you met him and had a chance to talk with him, you are a very lucky man.

There were some names in the film credits, Na'alehu and James Anthony. Are they your children?

I also wanted to let you know that I spoke with Dan last week and asked him what he thought about me writing to the AG and asking if Act 15 gives the department/Board the authority to issue new leases in Kahana and that the request was coming from the council as well as the residents. He said that the council should submit a formal request in writing, however, given the position of the Chair on all matters relating to Kahana that there is a hands off policy until the moratorium is over, the request would not go anywhere.

Dan also gave me a copy of the Governor's statement of objections to HB 1552 which became Act 15. In it she says, "...the moratorium provision of this bill is special legislation in violation of section 5 of Article XI of the Hawaii Constitution". He also said if Act 15 is declared to be unconstitutional, then all the leases would be in jeopardy. As a result, I decided that pursuing this issue under the current administration would be an effort in futility.

By now you and Grace must have received a letter from me together with the list of questions. I am quite disappointed to have not received a single response yet and am hoping that this latest attempt to ask for their participation has not put out the small embers of hope that were burning in this fire.

May I ask that the contents of this email, at least for now, remain confidential. I have not shared the information with any others of the planning council. I have devoted a major portion of the entire week to writing the progress report and am hoping to experience a few revelations which may help me find a way to resolve at least one of the issues that keep the living park an unattainable dream.