

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

January 10, 2014

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

PSF 13OD-007

OAHU

Amend Prior Action dated December 14, 2012, Item D-12; Authorize Posting of Performance Bond for Removal of Remaining Structure of Pier; Kaneohe, Koolaupoko, Oahu, Tax Map Key: (1) 4-5-005:seaward of 059. And

The Amendment is to Seek Board’s Authorization to Revise the Applicant’s Name to WB Hui LLC and Issue a Revocable Permit Covering the Obligations of the Applicant.

BACKGROUND :

The previous owner of the abutting private property, Waikalua Development LLC, was planning a residential development on the property. However, the development was halted due to an encroachment that was found [remaining structure of a former pier] seaward of the property during the shoreline certification process.

On December 14, 2012, under agenda item D-12, the Board approved, as amended, the posting of a performance bond by the owner to resolve the encroachment issue. The approval required the owner to post a performance bond in an amount acceptable to the Chairperson, and provide an insurance policy protecting the State. A copy of the 2012 approved submittal is attached as **Exhibit 1**. In April 2013, the Chairperson approved the bond amount to be \$130,000. The Department of the Attorney General (“AG”) was requested to review the agreement provided by the applicant, as shown on **Exhibit 2**.

Around September 2013, Waikalua Development LLC sold the property to WB Hui LLC.

Recently, AG advised that a revocable permit should be used to address the issue, instead of the proposed agreement. After discussion with AG, staff understands that the conditions of the agreement at Exhibit 2 will be incorporated into the forthcoming revocable permit.

The current owner plans to rebuild the pier as part of the proposed development and understands that an approval by the Board is required for the disposition of the pier in the future.

Staff recommends the Board revise the prior approval by changing the manner of the disposition to revocable permit to be issued to the current owner.

As noted above, the revocable permit serves to document the obligations and responsibility of the abutting owner. Therefore, staff believes not charging rent for the requested revocable permit is in order. In the event the owner is able to obtain an approval from the Board for the long term disposition of the pier, consideration would become payable then.

RECOMMENDATION: That the Board amend its prior action of December 14, 2012, Item D-12 by:

A. Changing the applicant to WB Hui LLC.

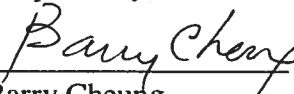
B. Replacing Recommendation 1 with the following:

“1. Authorize the issuance of a revocable permit over the subject area to WB Hui LLC under the terms and conditions cited above, which are by this reference incorporated herein and subject further to the following:

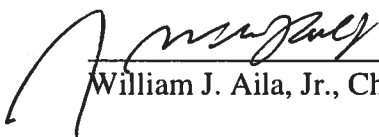
- A. The standard terms and conditions of the most current revocable permit form, as may be amended from time to time;
- B. Terms and conditions as mentioned in the draft agreement attached as Exhibit 2 hereof;
- C. Review and approval by the Department of the Attorney General; and
- D. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.”

C. All other terms in the December 14, 2012 approval shall remain in full force and effect.

Respectfully Submitted,

  
Barry Cheung  
District Land Agent

APPROVED FOR SUBMITTAL:

  
William J. Aila, Jr., Chairperson

**AMENDED**

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

December 14, 2012

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

OAHU

Authorize Posting of Performance Bond for the Removal of Remaining Structures of Pier; Waikalua Development LLC, Kaneohe, Koolaupoko, Oahu, Tax Map Key: (1) 4-5-005:059 seaward.

APPLICANT:

Waikalua Development LLC, a California limited liability company

LEGAL REFERENCE:

Section 171-6, Hawaii Revised Statutes, as amended.

LOCATION:

Portion of Government land located in Kaneohe, Koolaupoko, Oahu, identified by Tax Map Key: (1) 4-5-005:059 seaward as shown on the attached map labeled **Exhibit A**.

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.

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

Today's request does not involve the use of State land or State funds. Therefore, it does not trigger an environmental assessment pursuant to Chapter 343, Hawaii Revised Statutes.

*As Amended*  
APPROVED BY THE BOARD OF  
LAND AND NATURAL RESOURCES *DR*  
AT ITS MEETING HELD ON  
December 14, 2012

**EXHIBIT " 1 "**

DCCA VERIFICATION:

Place of business registration confirmed:	YES <u>  x  </u>	NO <u>    </u>
Registered business name confirmed:	YES <u>  x  </u>	NO <u>    </u>
Applicant in good standing confirmed:	YES <u>  x  </u>	NO <u>    </u>

BACKGROUND:

Applicant is the owner of the abutting private property identified as tax map key (1) 4-5-005:059 (“Parcel 59”), which is undergoing development into private residences. During the due diligence period, the remaining posts of a former pier (“PIER”) were found located seaward of Parcel 59. **Exhibit B** shows the PIER in an aerial image.

There is no authorization or land disposition pertaining to the PIER. Pursuant to §13-222-19, Hawaii Administrative Rules, the Chairperson shall not certify the shoreline when there is unauthorized encroachment. The same rule requires the Applicant to resolve the encroachment with the Department prior to any certification of the shoreline.

The current development plan does not include any pier. Nevertheless, the Applicant does not want to remove the PIER now, because the owners association to be formed under the proposed development may later request an easement to restore the PIER.

To resolve this dilemma, Applicant intends to post a performance bond, in the amount of the demolition cost plus associated permit fees, with the Department. Applicant requests the Board consider the posting of the performance bond as a means to resolve the encroachment, and allow the shoreline certification moving forward.

STAFF RESPONSE

In most shoreline encroachment cases, obtaining an easement with the consideration paid and provision of liability insurance to the State is the common outcome. In short, the encroachment will be allowed to remain during the term of the easement.

In the subject request, the PIER cannot be used currently due to its physical condition. The Applicant wants to keep the option open for the future residence owners to restore the PIER for recreational use.

Staff understands the bond amount will be determined by three quotes to be provided by the Applicant for the future demolition work, plus any permit fees. Staff anticipates seeking the assistance of the Engineering Division of the Department to review the bond amount.

Staff understands a bond is to be renewed every year upon Applicant’s payment of the premium. If the bond is not renewed, for example, if the company dissolves after the project is completed and no renewal premium is paid, the Department will have no recourse to fund the demolition of the PIER. In this event, a cash deposit would be preferable.

The development plan did not set aside any funding for the demolition of the PIER

because the developer was not aware of the issue until the shoreline certification process mentioned above. To address the issue of lack of funding at the present moment, staff believes the performance bond can be replaced by a cash deposit when the Applicant starts selling the residences with the downpayment coming to the Applicant. Therefore, staff recommends the Board request the performance bond be replaced in its entirety by cash bond before the fee transfer of Parcel 59 or portions thereof.

In addition, the Applicant shall also provide liability insurance naming the State as additional insured and indemnify the State.

If the future owners association desires to obtain a land disposition for the PIER, such request will be brought to the Board for consideration at a later date.

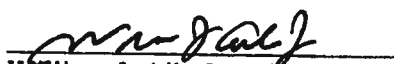
RECOMMENDATION: That the Board:

1. Authorize the posting of performance bond in an amount for the demolition cost and associated permit fees for the PIER under the terms and conditions cited above, which are by this reference incorporated herein and further subject to the following:
  - a. The performance bond amount shall be subject to approval by the Chairperson;
  - b. Applicant shall provide liability insurance to the State in an amount of at least \$1,000,000 per occurrence and \$2,000,000 aggregate, and naming the State as additional insured;
  - c. Applicant shall indemnify and hold harmless the State;
  - d. The performance bond shall be replaced in its entirety by a cash bond in the same amount before any fee transfer of Parcel 59 or portions thereof.
2. Upon compliance of Recommendation 1, authorize the Chairperson to proceed with the shoreline certification for Parcel 59.
3. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

Respectfully Submitted,

  
Barry Cheung  
District Land Agent

APPROVED FOR SUBMITTAL:

  
William J. Aila Jr., Chairperson

Land Board Meeting: December 14, 2012, D-12 : Approved as Amended:  
See additional page for Amendment:

Land Board Meeting: December 14, 2012, D-12; Approved as Amended:

**Approved as amended.** The Board amended recommendation 1c and 1d to read as follows:

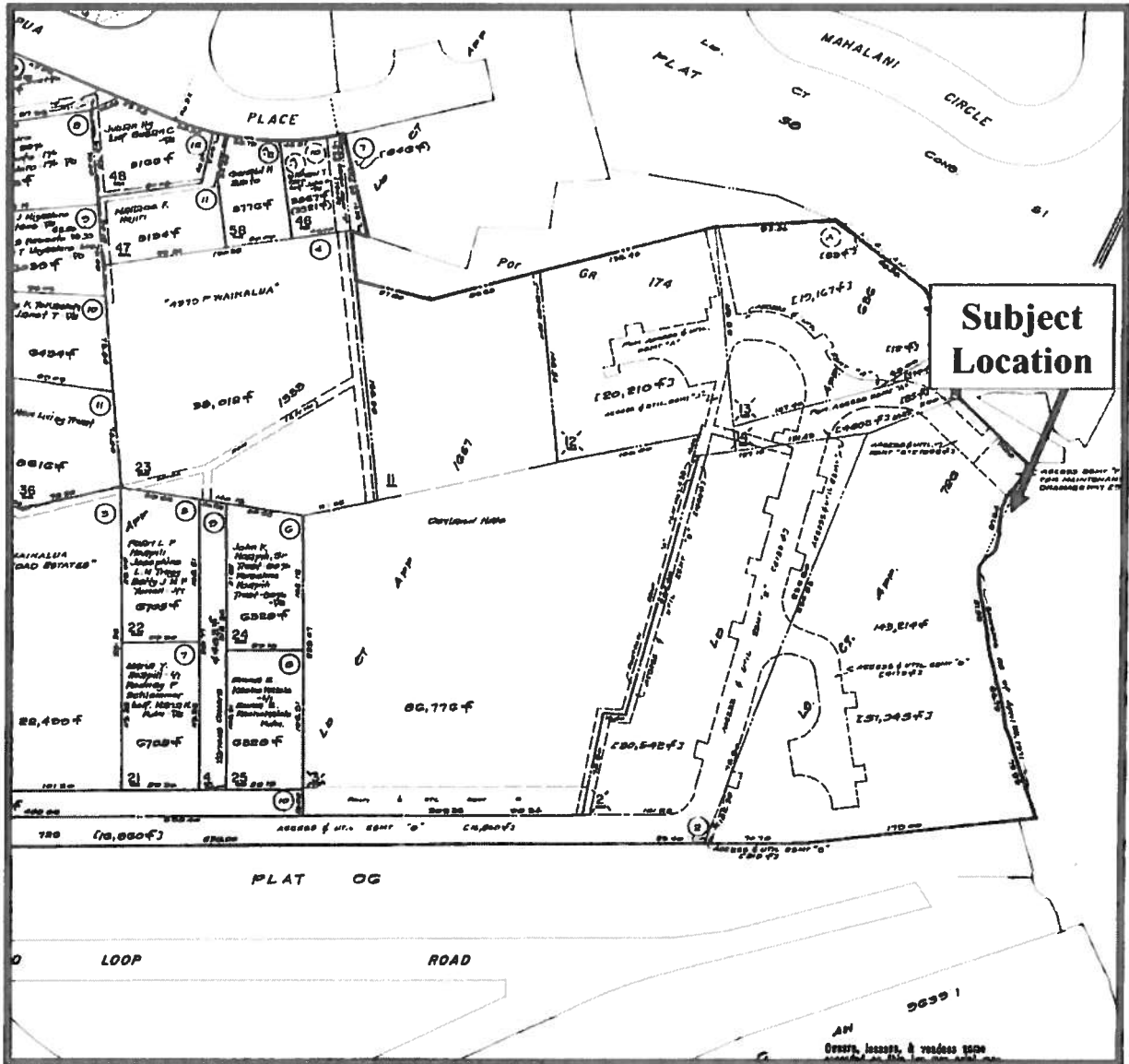
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*1c. Applicant shall indemnify and hold harmless the State pursuant to an Agreement that is approved by the Department of the Attorney General.*

*1d. Unless adequate assurance is provided to the Chairperson that the performance bond will continue to cover demolition costs and associated permitting fees [t]he performance bond shall be replaced in its entirety by a cash bond or certificate of deposit in the same amount before any fee transfer of Parcel 59 or portions thereof.*

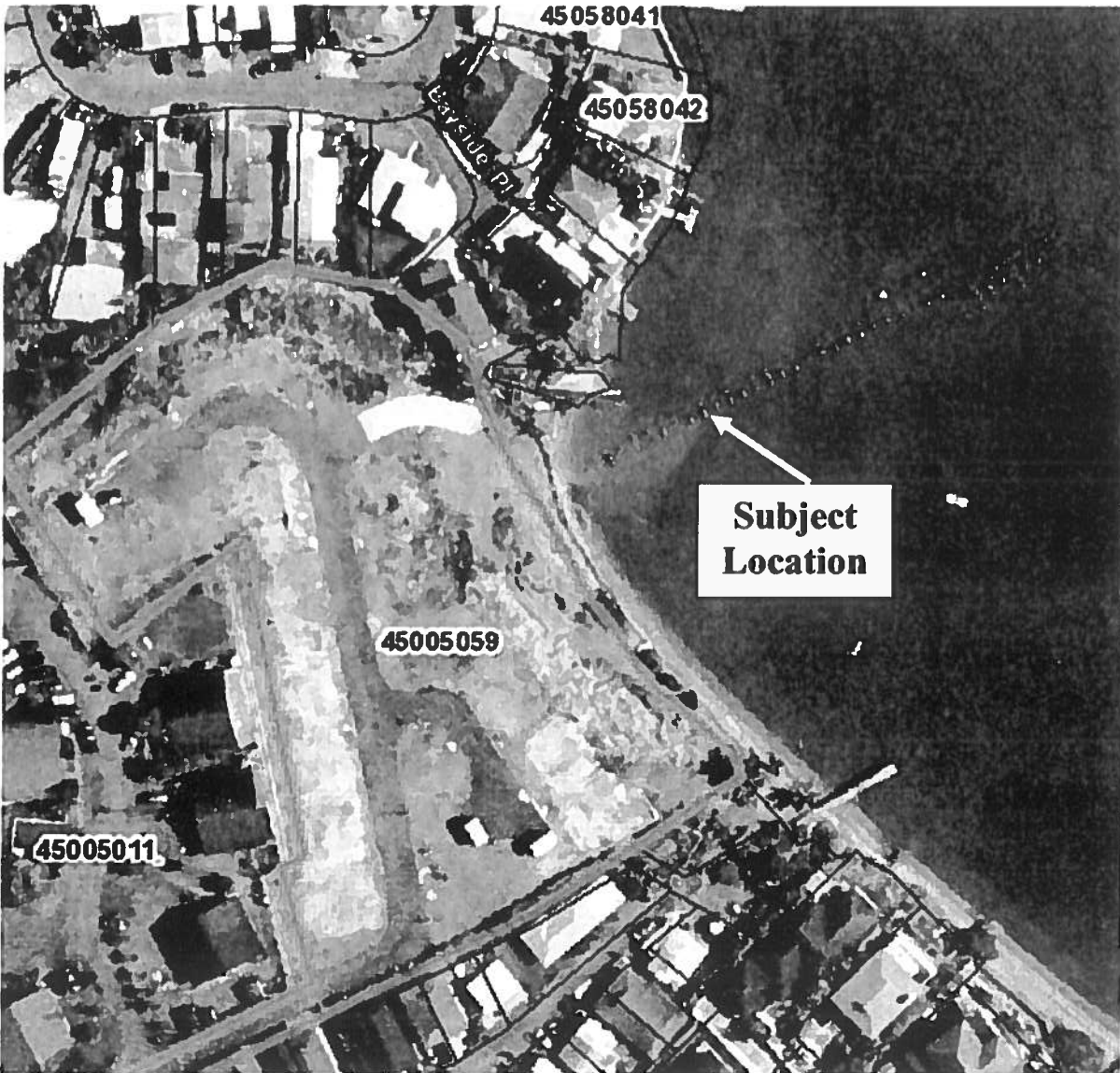
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*With the exception of the above, all other aspects of the staff submittal and recommendations were approved.*



TMK (1) 4-5-005:059 seaward

# EXHIBIT A



**TMK (1) 4-5-005:059 seaward**

**EXHIBIT B**



# AGREEMENT

THIS AGREEMENT (this "Agreement") made, executed, and delivered this \_\_\_\_\_ day of \_\_\_\_\_, 2013, by and between WAIKALUA DEVELOPMENT LLC, a California limited liability company ("Waikalua"), whose mailing address is One Corporate Plaza Drive, #110, Newport Beach, California 92660, and the DEPARTMENT OF LAND AND NATURAL RESOURCES OF THE STATE OF HAWAII, whose mailing address is P.O. Box 621, Honolulu, Hawaii 96809-0621, hereinafter called the "Department."

## WITNESSETH :

WHEREAS, Waikalua is the current owner of certain land abutting State waters and submerged lands, identified as tax map key (1) 4-5-005:059 ("Parcel 59"); and

WHEREAS, Waikalua is seeking a shoreline certification from the Department in connection with its planned development activities on Parcel 59; and

WHEREAS, the remaining posts of a former pier ("Pier") were found located seaward of Parcel 59, located on State submerged lands; and

WHEREAS, there is no authorization of land disposition pertaining to the Pier, and § 13-222-19, Hawaii Administrative Rules, provides that the Chairperson of the Board of Land and Natural Resources shall not certify the shoreline when there is an unauthorized encroachment and requires Waikalua to resolve the encroachment with the State prior to any certification of the shoreline; and

WHEREAS, Waikalua does not presently know whether it will demolish the remains of the Pier, or whether the owners association to be formed under the proposed development may later request an easement to restore the Pier; and

WHEREAS, Waikalua is willing to post a performance bond as a means to resolve the encroachment and to allow the shoreline certification to move forward; and

WHEREAS, at its meeting on December 14, 2012, the Board of Land and Natural Resources approved the following:

"That the Board:

1. Authorize the posting of performance bond in an amount for the demolition cost and associated permit fees for the PIER under the terms and conditions cited above, which are by this reference incorporated herein and further subject to the following:
  - a. The performance bond amount shall be subject to approval by the Chairperson;

**EXHIBIT " 2 "**

- b. Applicant shall provide liability insurance to the State in an amount of at least \$1,000,000 per occurrence and \$2,000,000 aggregate, and naming the State as an additional insured;
  - c. Applicant shall indemnify and hold harmless the State pursuant to an Agreement that is approved by the Department of the Attorney General.
  - d. Unless adequate assurance is provided to the Chairperson that the performance bond will cover the demolition costs and associated permitting fees, the performance bond shall be replaced in its entirety by a cash bond or certificate of deposit in the same amount before any fee transfer of Parcel 59 or portions thereof.
- 2. Upon compliance of Recommendation 1, authorize the Chairperson to proceed with the shoreline certification of Parcel 59.
  - 3. Such other terms and conditions as may be prescribed by the Chairperson”;

and

WHEREAS, the Chairperson has determined that the amount of \$130,000 would be acceptable to the Department as the amount of the performance bond.

NOW, THEREFORE, it is hereby agreed by Waikalua and the State as follows:

- 1. Waikalua and its surety, \_\_\_\_\_, will provide the State with a performance bond (the “Bond”) in the amount of \$130,000, in a form substantially similar to that attached as Exhibit “A” to this Agreement, and conditioned upon the faithful performance of any and all work required to be done by Waikalua in accordance with the provisions of this Agreement. The performance bond shall name the Department as an Obligee, having the power to execute the bond at its sole discretion.
- 2. The Bond shall remain in place up until the date that any fee interest in Parcel 59 is transferred to a third party. If demolition has not been completed by that date, prior to the transfer of such interest Waikalua shall inform the Chairperson in writing of the pending transfer, and shall at that time inform the Chairperson whether Waikalua desires to continue the Bond and shall provide such reasonable assurances to the Chairperson that the Bond will continue to cover the demolition costs and associated permitting fees.
- 3. Until such time as the Pier is demolished, Waikalua shall provide liability insurance to the State of Hawaii in an amount of at least \$1,000,000 per occurrence and \$2,000,000 aggregate, and shall provide the Department with a certificate demonstrating that such coverage exists and is in force.

4. Upon receiving the Bond and certificate of insurance demonstrating the coverage required by this Agreement, the Department shall process Waikalua's shoreline certification application for Parcel 59, and the Chairperson shall proceed to approve the certified shoreline for Parcel 59 upon fulfillment of the requirements set forth in §§ 13-222-7 through 10 of the Hawaii Administrative Rules.

5. In the event Waikalua fails to complete demolition of the Pier by the date that any fee interest in Parcel 59 is transferred to a third party, or fails to obtain approval from the Chairperson for continuance of the Bond subsequent to such transfer, or this Agreement is terminated by the Department for Waikalua's noncompliance with any provision contained in this agreement, the Department may complete the demolition through the execution of the Bond. Waikalua shall be solely liable for any cost and expense associated with completion of the demolition to the satisfaction of the Department in excess of the amount or the scope of work guaranteed by the Bond.

6. The Department agrees to release and exonerate the Bond once (1) demolition has been completed by Waikalua, or (2) there has been a written amendment to this Agreement that allows the replacement of the Bond by another performance bond or other surety reasonably acceptable to the Chairperson that covers either the demolition of the Pier or its restoration in the event that a future association of owners for Parcel 59 desires to restore the Pier.

7. Waikalua agrees to indemnify and hold the State harmless from any and all loss, cost, liability, damage, claim and/or expense arising out of Waikalua's use or demolition of the Pier.

8. This Agreement may be amended only by a writing signed by each of the parties to this Agreement.

9. This Agreement may be assigned by Waikalua to a successor or nominee, provided that such successor or nominee undertakes in writing to perform all of the obligations of Waikalua set forth in this Agreement.

10. This Agreement constitutes and contains the entire agreement between Waikalua and the State and supersedes any and all prior negotiations, correspondence, understandings and agreements between these parties respecting the subject matter of this Agreement.

11. The parties agree that neither shall be deemed to be the drafter of this Agreement and that, in the event that this Agreement is ever construed by a court of law, such court shall not construe this Agreement or any provision hereof against either party as the drafter hereof.

12. This Agreement shall be controlled, construed and enforced in accordance with the laws of the State of Hawaii.

13. The parties hereto agree that this Agreement may be executed in counterparts, each of which shall be deemed an original, and said counterparts shall together constitute one and the same agreement, binding all of the parties hereto, notwithstanding that all of the parties are not signatory to the original or the same counterparts.

IN WITNESS WHEREOF, the parties have caused these presents to be executed the date and year first written.

WAIKALUA DEVELOPMENT LLC, a California limited liability company

By \_\_\_\_\_  
Its

DEPARTMENT OF LAND AND NATURAL RESOURCES:

By \_\_\_\_\_  
William J. Aila, Jr., Chairperson  
Board of Land and Natural Resources

APPROVED AS TO FORM:

Deputy Attorney General

Date: \_\_\_\_\_