

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

June 13, 2014

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

GL 6043

OAHU

(1) Amendment of Grant of Non-Exclusive Easement S-6043 by Revising the Easement Area and Stipulating the Additional Consideration; and
(2) Consent to Assign and Assumption of Grantee's Rights and Obligations under Grant of Non-Exclusive Easement S-6043, James Hugh Duncan and Barbara-Jeann Duncan as Assignors to John Thomas King and Yvonne Geraldine King as Assignees, And Release of James Hugh Duncan and Barbara-Jeann Duncan from the Obligations under Grant of Non-Exclusive Easement S-6043; Kailua, Koolaupoko, Oahu, Tax Map Key: (1) 4-3-005: seaward of 056.

APPLICANT:

James Hugh Duncan and Barbara-Jeann Duncan, Assignors; and
John Thomas King and Yvonne Geraldine King, Assignees.

LEGAL REFERENCE:

Section 171-36(a)(5), Hawaii Revised Statutes, as amended.

LOCATION:

Portion of Government lands situated at Kailua, Koolaupoko, Oahu, identified by Tax Map Key: (1) 4-3-005:seaward of 056.

AREA:

1,308 square feet, more or less. See Remarks Section

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act

DHHL 30% entitlement lands pursuant to the Hawaii State Constitution: No

CHARACTER OF USE:

Right, privilege, and authority to use, maintain, repair, replace and remove existing seawall and revetment purposes.

TERM OF EASEMENT:

55 years, commencing on September 27, 2013 and expiring on September 26, 2068.

ANNUAL RENT & CONSIDERATION:

Not applicable.

RECOMMENDED PREMIUM:

Not applicable as the easement does not allow for a premium.

DCCA VERIFICATION:

Not applicable.

REMARKS:

On January 13, 2012, under agenda item D-17, the Board approved the issuance of a 55-year non-exclusive easement for revetment and seawall purposes to James and Barbara-Jeann Duncan. In September 2013, the easement (GL 6043) was issued, with an area of 1,268 square feet.

About the same time as GL 6043 was issued, the shoreline certification application submitted for the abutting property indicated the shoreline was further mauka, which resulted in an additional easement area of 40 square feet. After discussing with the applicants' agent, the Chairperson authorized a pro-rated additional consideration (\$2,680) based on the greater encroachment area and would consider the encroachment resolved for the purpose of the shoreline certification. There was no amendment document to the easement. The grantees paid the additional consideration. Therefore, staff is recommending today that the Board authorize the amendment of GL 6043 by revising the easement area to 1,308 square feet and noting that the additional compensation for this area is/was \$2,680 that has been fully paid.

More recently, through their attorney, the Duncans asked the Board give its consent to the assignment and assumption of grantees' rights and obligations under GL 6043, and sought to release the Duncans as the original holder of the easement from all obligations and conditions under the easement. Copies of the assignment and assumption document and the

consent are attached as **Exhibits 1 and 2**. For land documents generally, an assignment (such as for a lease or an easement) does not relieve the original lessee or grantee of an easement or lease from any of the obligations under the land document, unless specifically and expressly released. In this case, we're dealing with a shoreline encroachment easement, and not necessarily land leased for a particular purpose, such as for a gas station or other industrial use. Considering that the monetary compensation for the easement has already been fully paid, and because the new buyers of the private home and assignees of the easement will be fully responsible to comply with all of the terms and conditions of the easement (such as the procurement of the required liability insurance naming the State of Hawaii as an additional insured), staff has no objection to the Duncans' requested release from the easement obligations.

Staff notes that there is a standard condition allowing the easement to run with the abutting property. This condition removes, in effect, the necessity of seeking the Board's consent to any future assignment of the easement in the event the abutting private property is sold. Staff did not solicit comments from other agencies as the request does not involve a new disposition but is for housekeeping purposes only.

RECOMMENDATION: That the Board:

- A. Amend the Grant of Non-Exclusive Easement S-6043 by revising the area to 1,308 square feet, and stipulating the additional consideration as \$2,680 which the Duncans previously paid.
 1. The standard terms and conditions of the most current amendment document form, as may be amended from time to time;
 2. Review and approval by the Department of the Attorney General; and
 3. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

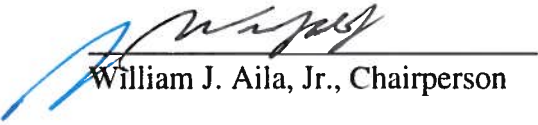
- B. Consent to the Assignment and Assumption of Grantees' rights and obligations under grant of Non-Exclusive Easement S-6043 from James Hugh Duncan and Barbara-Jeann Duncan, as Assignors to John Thomas King and Yvonne Geraldine King as Assignees, And Release of James Hugh Duncan and Barbara-Jeann Duncan from the Obligations under Grant of Non-Exclusive Easement S-6043, and subject to the following:
 1. Review and approval by the Department of the Attorney General; and
 2. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

Respectfully Submitted,



Barry Cheung
Russell Y. Tsuji
Land Division

APPROVED FOR SUBMITTAL:



William J. Aila, Jr., Chairperson

**ASSIGNMENT AND ASSUMPTION OF GRANTEE'S RIGHTS AND OBLIGATIONS
UNDER GRANT OF NON-EXCLUSIVE EASEMENT S-6043**

THIS INSTRUMENT ("Assignment") is made as of _____, 2014, by and between **JAMES HUGH DUNCAN and BARBARA-JEANN DUNCAN**, Individually and as Trustees of the Hugh and B.J. Duncan Family Trust dated July 22, 2013, whose address is _____ Malibu, California 90265 ("Assignors"), and **JOHN THOMAS KING and YVONNE GERALDINE KING**, husband and wife, as tenants in common, whose address is _____ Kailua, Hawaii 96734 ("Assignees") (collectively "Parties").

W I T N E S S E T H:

WHEREAS, the Assignors are parties to that certain Grant of Non-Exclusive Easement S-6043 between Assignors, as grantees, and the STATE OF HAWAII, by its Board of Land and Natural Resources as grantor, dated September 27, 2013 and recorded in the State of Hawaii Bureau of Conveyances on March 7, 2014 as Doc A-51790561 (the "Non-Exclusive Easement").

WHEREAS, as further described in the Non-Exclusive Easement attached hereto as Exhibit "A" and incorporated herein, the Non-Exclusive Easement grants Assignors the following non-exclusive and term easement rights for property located at Tax Map Key No. (1) 4-3-005:seaward of 056:

Right, privilege, and authority to use, maintain, repair, replace and remove existing seawall and revetment, subject to the terms and conditions herein, in, over, under and across that certain parcel of land ("area"), also referred to as "premises," situate at Kailua, Koolaupoko, Oahu, Hawaii, being identified as "Non-Exclusive Seawall and Revetment Easement," containing an area of 1,268 square feet, more or less, more particularly described in Exhibit "A" and delineated on Exhibit "B," both of which are attached hereto and made parts hereof, said exhibits being respectively, a survey description and survey map prepared by the Survey Division, Department of Accounting and General Services, State of Hawaii, designated C.S.F. No. 25,194 and dated June 8, 2012, TOGETHER WITH the rights of ingress and egress to and from the easement area for all purposes in connection with the rights hereby granted.

Subject to the following terms, conditions and covenants:

1. The term of this easement shall be fifty-five (55) years, commencing on the 27th day of September, 2013, up to and including the 26th day of September, 2068, unless sooner terminated as hereinafter provided, the Grantor reserving and the Grantee yielding and paying to the Grantor at the Office of the Department of Land and Natural Resources, Honolulu, Oahu, State of Hawaii, a one time payment, payable in advance, without notice or demand of EIGHTY FIVE THOUSAND AND NO/100 DOLLARS (\$85,000.00).

WHEREAS, Assignors desire to assign, and Assignees desire to acquire and assume, all of the rights, duties, obligations and liabilities of the Assignors under the Non-Exclusive

EXHIBIT " 1 "

Easement which runs with the land and inures to the benefit of the premises located at Kailua, Hawai`i 96734 TMK No. (1) 4-3-005:056.

NOW, THEREFORE, for and in consideration of the sum of TEN AND NO/100 DOLLARS (\$10.00), the mutual covenants and promises contained herein, and of the covenants and promises contained in the Non-Exclusive Easement, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties do hereby agree as follows:

1. Assignment. Assignors, as of the date hereof, do hereby assign, transfer, and convey all of their right, title, and interest in, under, and to the Non-Exclusive Easement to Assignees, including, without limitation, all of Assignors' right, title and interest in and to all improvements thereon, to have and to hold the same unto Assignees, its successors and assigns.

2. Assumption. Assignees from and after the date hereof, hereby accepts from Assignors, the assignment, transfer, and conveyance of all of Assignors' right, title, and interest in, under, and to the Non-Exclusive Easement, and assumes all of the obligations and conditions of the Non-Exclusive Easement, including, without limitation, the obligation to perform timely all indemnification obligations, all maintenance and repair obligations, comply with all applicable laws and ordinances, procure and maintain all insurance obligations, and to perform timely, comply with and be bound by all other covenants, obligations, conditions and requirements contained in the Non-Exclusive Easement attached hereto as Exhibit "A".

3. Assignors Representations And Covenants. Assignors represent and warrant to Assignees, that as of the date of this Assignment, Assignors are not in breach, violation or default of the Non-Exclusive Easement.

4. Binding Effect. The rights and obligations of Assignors and Assignees shall be binding upon and inure to the benefit of their respective heirs, executors, personal representatives, successors and assigns.

5. Further Cooperation. The Parties agree to execute any and all other documents, agreements and instruments, and to take all other actions which may be reasonably necessary or desirable to effect the transactions contemplated hereunder.

6. Indemnity and Hold Harmless. Assignees agree to observe and perform all of the terms, covenants and conditions in the Non-Exclusive Easement contained and on the part of the grantee therein named to be observed and performed, and will indemnify, defend and hold harmless Assignors from and against any and all obligations, liabilities, claims, accounts and demands (including, without limitation, reasonable attorneys' fees) arising or accruing under the Non-Exclusive Easement out of Assignees' failure to observe and perform any of the terms, covenants and conditions in the Non-Exclusive Easement from and after the date that this Assignment is executed.

7. Governing Law. This Assignment, and the interpretation and enforcement of this Assignment, shall be governed by the laws of the State of Hawai`i.

8. Amendment. The terms, provisions, rights and obligations set forth in this Assignment may be amended at any time by the written approval of all Parties.

9. No Party Deemed Drafter. The Parties agree that neither shall be deemed to be the drafter of this Assignment, and that, in the event that this Assignment is ever construed by a court of law, such court shall not construe this instrument or any provision hereof against either party as the drafter hereof.

10. Severability. If any provision of this Assignment or the application thereof to any person or circumstance shall be invalid or unenforceable to any extent, the remainder of this Assignment and the application of its provisions shall not be affected thereby.

11. Counterparts. The Parties agree that this Assignment may be executed in counterparts, each of which shall be deemed an original, and the counterparts shall together constitute one and the same instrument, binding all Parties notwithstanding that all of the Parties are not signatory to the same counterparts. For all purposes, including, without limitation, filing and recording this Assignment, duplicate unexecuted and unacknowledged pages of the counterparts may be discarded and the remaining pages assembled as one document.

IN WITNESS WHEREOF, the parties hereto have executed this Assignment, as of the date first above written.

ASSIGNORS:

JAMES HUGH DUNCAN
Individually and as Trustee of the Hugh and B.J.
Duncan Family Trust dated July 22, 2013

BARBARA-JEANN DUNCAN
Individually and as Trustee of the Hugh and B.J.
Duncan Family Trust dated July 22, 2013

ASSIGNEES:

JOHN THOMAS KING

YVONNE GERALDINE KING

CONSENT TO ASSIGNMENT AND ASSUMPTION OF GRANTEE'S RIGHTS AND OBLIGATIONS UNDER GRANT OF NON-EXCLUSIVE EASEMENT S-6043

THIS CONSENT TO ASSIGNMENT AND ASSUMPTION OF GRANTEE'S RIGHTS AND OBLIGATIONS UNDER GRANT OF NON-EXCLUSIVE EASEMENT S-6043 (this "Agreement") is made as of _____, 2014 by and between **JAMES HUGH DUNCAN and BARBARA-JEANN DUNCAN**, Individually and as Trustees of the Hugh and B.J. Duncan Family Trust dated July 22, 2013, whose address is _____ Malibu, California 90265 ("Assignors"), and **JOHN THOMAS KING and YVONNE GERALDINE KING**, husband and wife, as tenants in common, whose address is _____, Kailua, Hawaii 96734 ("Assignees").

W I T N E S S E T H:

WHEREAS, The State of Hawaii, by its Board of Land and Natural Resources ("Grantor") entered into that certain Grant of Non-Exclusive Easement S-6043 granting a Non-Exclusive Easement to Assignors in, over, under and across that certain parcel of land ("Area"), also referred to as "premises," situate at Kailua, Koolaupoko, Oahu, Hawaii, being identified as "Non-Exclusive Seawall and Revetment Easement," containing an area of 1,268 square feet, more or less, more particularly described in the Non-Exclusive Easement attached hereto and incorporated herein as Exhibit "1" (the "Non-Exclusive Easement").

WHEREAS, the Non-Exclusive Easement runs with the land and inures to the benefit of the premises located at _____ Kailua, Hawai'i 96734, TMK No. (1) 4-3-005:056 ("Premises") and Assignors desire to convey the Premises to Assignees and desire to assign all of their right, title, and interest in, under, and to the Non-Exclusive Easement to Assignees; and

WHEREAS, Assignees desire to acquire all of Assignors' right, title, and interest in, under, and to the Non-Exclusive Easement and assume all the obligations of the Assignors under the Non-Exclusive Easement;

WHEREAS, to effectuate such assignment and assumption, Assignors and Assignees have entered into an Assignment and Assumption of Grantee's Rights and Obligations under Grant of Non-Exclusive Easement S-6043 dated _____ 2014 (the "Assignment") a copy of which is attached hereto as Exhibit "2".

WHEREAS, Grantor has agreed to consent to the Assignment and release Assignors of all obligations under the Non-Exclusive Easement subject to the terms and conditions of this Agreement.

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto hereby agree as follows:

1. Assignment. Assignees hereby accept the Area in its "as is" condition as of the date hereof. Assignees acknowledge that they have received a copy of the Non-Exclusive

EXHIBIT " 2 "

Easement, has read the Non-Exclusive Easement and is familiar with its contents, and agrees to be bound thereby in place of Assignors. Assignees hereby agree, for the benefit of Grantor and Assignors, that he has assumed, and shall perform timely, comply with and be bound by, all of the obligations of Assignors under the Non-Exclusive Easement, from and after the date hereof, including but without limitation, the obligation to perform timely all indemnification obligations, all maintenance and repair obligations, comply with all applicable laws and ordinances, procure and maintain all insurance obligations, and to perform timely, comply with and be bound by all other covenants, obligations, conditions and requirements contained in the Non-Exclusive Easement attached hereto as Exhibit "1". Assignors confirm that they have assigned all of their rights and obligations under the Non-Exclusive Easement to Assignees.

2. Release. Grantor from and after the date hereof, hereby accepts the assignment, transfer, and conveyance of all of Assignors' right, title, and interest in, under, and to the Non-Exclusive Easement, and releases and discharges Assignors from all of the obligations and conditions of the Non-Exclusive Easement.

3. Grantor's Consent. Grantor has executed this Agreement for the sole purpose of evidencing its consent to the Assignment and its release and discharge of Assignors from the obligations of the Non-Exclusive Easement. Grantor's consent under this Agreement nor anything contained in the Assignment shall be construed to modify, waive, impair or affect any of the covenants, agreements, terms provisions, obligations or conditions contained in the Non-Exclusive Easement (except as herein expressly provide), or to, in any way, be construed as giving Assignees any greater rights than those possessed by the Assignors.

4. Binding Effect. This Agreement shall be binding upon and inure to the benefit of the parties, and their respective heirs, executors, administrators, successors and assigns.

IN WITNESS WHEREOF, the STATE OF HAWAII, by its Board of Land and Natural Resources, has caused the seal of the Department of Land and Natural Resources to be hereunto affixed and the parties hereto have caused this Agreement to be executed as of the date first above written.

GRANTOR:

STATE OF HAWAII

Approved by the Board of
Land and Natural Resources at
its meeting held on

2014.

By _____
WILLIAM J. AILA, JR.
Chairperson
Board of Land and Natural Resources

APPROVED AS TO FORM:

WILLIAM J. WYNHOFF
Deputy Attorney General
Dated: _____

APPROVED AND AGREED TO:

ASSIGNORS:

JAMES HUGH DUNCAN
Individually and as Trustee
of the Hugh and B.J. Duncan Family Trust dated July 22, 2013

BARBARA-JEANN DUNCAN
Individually and as Trustee
of the Hugh and B.J. Duncan Family Trust dated July 22, 2013

ASSIGNEES:

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