

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

October 10, 2014

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

Ref: 14OD-154  
OAHU

Denial of Request for Contested Case Hearing by Pacific Alliance to Stop Slavery Regarding Petition for Contested Case Hearing Regarding Issuance of Direct Lease and Immediate Right-of-Entry to the City and County of Honolulu for Temporary Mobile Access to Services and Housing (TMASH) for Housing First Transition Purposes, Sand Island, Honolulu, Oahu, Tax Map Key: (1) 1-5-041: Portions of 130 and 334, together with rights of access and utility easements

BACKGROUND:

The petitioners, Pacific Alliance to Stop Slavery (PASS)<sup>1</sup>, requested a contested case hearing concerning the issuance of a direct lease and immediate right-of-entry to the City and County of Honolulu (City) by the Board on September 12, 2014, Item D-4. We recommend that the Board deny the petition for a contested case hearing by PASS that was received by the Land Division on September 22, 2014.

DISCUSSION:

On September 12, 2014, under agenda item D-4 (**Exhibit 1**), the Board approved as amended the staff recommendation of issuance of a direct lease and immediate right-of-entry to the City. A number of oral requests for a contested case hearing were made at the September 12, 2014 meeting by persons in attendance including PASS’s representative. But only PASS followed up with a written petition for a contested case hearing that was received on September 22, 2014, and is attached as **Exhibit 2**.<sup>2</sup>

Land Division, after consultation with the Department of the Attorney General, recommends denial of the request on the basis that PASS is not entitled to a contested case hearing by statute,

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<sup>1</sup> The legal name of this entity is Pacific Alliance to Stop Slavery, Incorporated. The word “incorporated” is omitted on the written request for contested case.

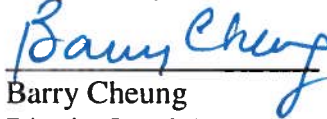
<sup>2</sup> Applicable Hawaii Administrative Rules require that written request for contested case be submitted. Oral requests not followed by a written request for contested case are therefore procedurally defective.

rule, or due process.

**RECOMMENDATION:** That the Board:

1. Deny the petition for a contested case hearing by PASS due to lack of right to a contested case hearing, which will allow the issuance of the direct lease and right-of-entry as previously approved;
2. Determine that administrative proceedings on all contested case requests are concluded

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

September 12, 2014

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

PSF 14OD-154

Oahu

Issuance of Direct Lease and Immediate Right-of-Entry to the City and County of Honolulu for Temporary Mobile Access to Services and Housing (TMASH) for Housing First Transition Purposes, Sand Island, Honolulu, Oahu, Tax Map Key: (1) 1-5-041:Portions of 130 and 334, together with rights of access and utility easements.

APPLICANT:

City and County of Honolulu, Department of Emergency Management ("City" or "Applicant").

LEGAL REFERENCE:

Section 171-11, 55, and 95(a) Hawaii Revised Statutes, as amended.

LOCATION:

Portion of Government lands situated at Sand Island, Honolulu, Oahu, Tax Map Key: (1) 1-5-041: Portion of 334 ("Parcel 1"), comprising approximately 4.792 acres, as shown on the attached map labeled **Exhibit A**, together with rights of access and utility easements over TMK (1) 1-5-041:Portion of 130 ("Parcel 5") (the "TMASH Site").

AREA:

Approximately 4.792 acres, as shown on the attached map labeled **Exhibit A**, together with rights of access and utility easements.

ZONING:

State Land Use District: Urban

as amended  
APPROVED BY THE BOARD OF  
LAND AND NATURAL RESOURCES  
AT ITS MEETING HELD ON  
September 12, 2014

**EXHIBIT " 1 "**

D-4

City and County of Honolulu CZO: P-2 (TMASH is a Public Use)

**TRUST LAND STATUS:**

Section 5(a) lands of the Hawaii Admission Act, and PL 88-233, i.e. non-ceded and ceded respectively.

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

**CURRENT USE STATUS:**

Governor's Executive Order No. 4170 setting aside 33.024 acres to Department of Transportation ("DOT") for maritime purposes. The proposed TMASH Site is not currently being used by DOT.

**PURPOSE:**

Temporary Mobile Access to Services and Housing (TMASH). A temporary triage for services and housing to determine the needs of homeless individuals / families based on their circumstances. The City's on-site contract service providers will assess and evaluate the vulnerability of homeless individuals / families to prepare for Housing First placement, while providing them with temporary shelter.

**TERM:**

Three (3) years. The City will have the right to early termination of the Term, upon its determination that its TMASH operation is concluded and no longer needed on the subject site.

**RENT**

Gratis

**CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:**

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.". See **Exhibit B**.

**APPLICANT REQUIREMENTS:**

The Applicant shall work with the Department to provide map and legal description of the requested parcel.

**REMARKS:**

Governor's Executive Order No. ("EO") 4170 was issued to the Department of Transportation ("DOT") in August 2006 for maritime purposes. EO 4170 encumbers State lands, consisting of Parcels 1 to 6 (inclusive), as depicted on **Exhibit A**.

By a memo dated August 15, 2013, DOT requested cooperation from the Department in the withdrawal of five of the six parcels, excluding Parcel 2 [and its access right over Parcel 5], from EO 4170. Parcel 2 will continue to be used by DOT's lessee. The TMASH site is a portion of Parcel 1.

Land Division staff conducted an inspection of the five parcels around November 2013. The TMASH site is not being used by the DOT and is not required for DOT purposes.

Recently, the City approached the State and requested the use of a portion of Parcel 1<sup>1</sup> for TMASH. The City plans to transport homeless individuals and families on Oahu to the TMASH Site for temporary shelter and assessment purposes, in order to prepare for Housing First placement, while social service providers provide on-site services to the homeless individuals and families. City anticipates the use of the area will last between 18 and 36 months.

Pursuant to the discussions held among the City, DOT, the Department of the Attorney General ("AG"), and the Department, it was agreed that the withdrawal request from DOT will be brought to the Board at a later date. The Department will recommend that the Board issue an immediate right-of-entry to the City for the TMASH purposes. It is understood by the parties that the property is being provided to the City in an unimproved condition. The Department also understands that the City does not intend to erect any permanent structures on the property. The City will be required to comply with all applicable federal, state, and county laws, regulations or consent decrees in making any changes to the condition of the property in connection with this project.

Prior to the issuance of the lease, an immediate right-of-entry will be issued to the City.

Other than the agencies involved in the transfer and the disposition, the Division did not solicit comments from other agencies.

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<sup>1</sup> On January 10, 2014, item D-11, the Board approved-in-principle the issuance of a direct lease to the University of Hawaii for educational purposes. A right-of-entry was also issued to UH over about 2 acres, more or less, of Parcel 1 under EO 4170, for due diligence purposes. The City is aware of the UH's request and is amenable to work with UH on final configuration of the respective areas. Current estimate of the City's requested area is about 4.792 acres, more or less.

**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 lease to City and County of Honolulu 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 direct 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. Authorize the issuance of a right-of-entry permit to the City and County of Honolulu 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 right-of-entry permit 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.

Respectfully Submitted,



**Barry Cheung**  
District Land Agent

APPROVED FOR SUBMITTAL:



**William J. Aila, Jr., Chairperson**

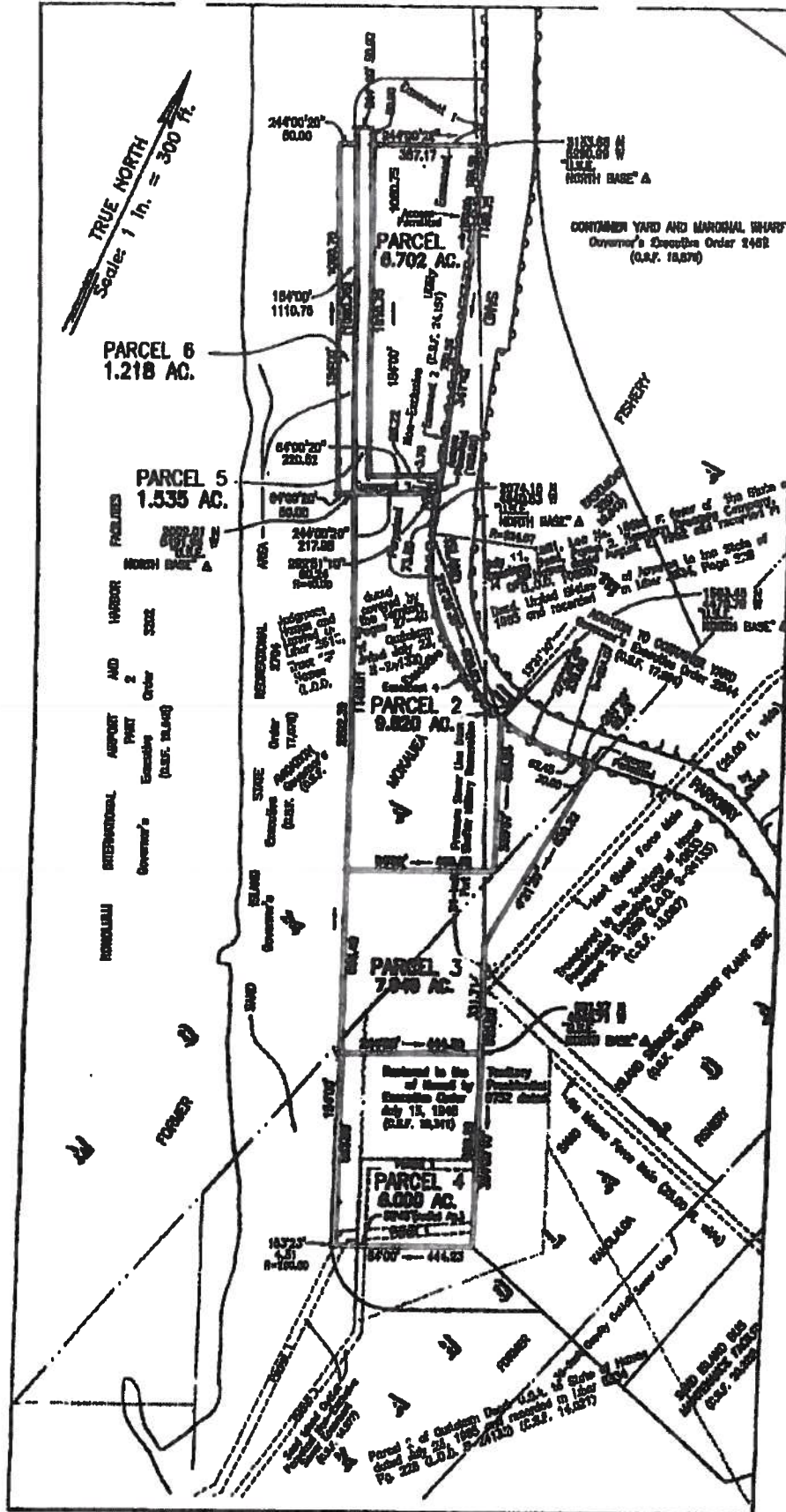


Land Board Meeting: September 12, 2014; D-4:  
Approved as amended.

Approved as amended. See attached page.

Land Board Meeting: September 12, 2014; D-4: Approved as amended.

**Approved as amended. The Board amended the staff recommendation to include the following conditions: 1) Applicant shall obtain approval from the Department of Health for the intended use; 2) In the event the lease is extended beyond three years for any reason, the HRS Chapter 343 environmental assessment exemption shall no longer be applicable; 3) Applicant shall be responsible for security at the site and for getting input from other State and City and County agencies on the project; 4) Before occupying the site, Applicant shall report to the Chairperson on the status of the project and required approvals; and 5) The Board stayed the effectiveness of its approval of the lease and right-of-entry until administrative proceedings on any contested case requests are concluded.**



**EXHIBIT "A"**



**EXEMPTION NOTIFICATION**

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

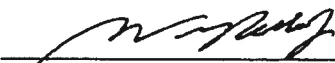

Project Title: Issuance of Direct Lease  
 Project / Reference No.: PSF 14OD-154  
 Project Location: Sand Island, Honolulu, Oahu, TMK (1) 1-5-041: portions of 130 and 334  
 .Project Description: Temporary Mobile Access to Services and Housing (TMASH) for Housing First Transition Purposes  
 Chap. 343 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 transition area proposed by the City mainly comprises tent and associated temporary sanitary facilities. The City is responsible to dispose of trash and sewage strictly following any legal requirements for such disposal. There will be minimal alteration in the conditions of land, water, and vegetation. 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, which is basically a vegetated area.

Consulted Parties: Agencies as noted in the submittal.

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  
 Date 8/28/14 

**EXHIBIT B**



STATE OF HAWAII  
BOARD OF LAND AND NATURAL RESOURCES

PETITION FOR A CONTESTED CASE HEARING

RECEIVED

2014 SEP 22 AM 9:09

DEPT. OF LAND & NATURAL RESOURCES  
STATE OF HAWAII

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

RECEIVED  
LAND DIVISION  
2014 SEP 22 AM 10:37  
DEPT. OF LAND & NATURAL RESOURCES  
STATE OF HAWAII

**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.
- All materials, including this form, shall be submitted in three (3) photocopies.

A. PETITIONER		
(If there are multiple petitioners, use one form for each.)		
1. Name Pacific Alliance to Stop Slavery (PASS)	2. Contact Person Kathryn Xian	
3. Address 4348 Waiialae Ave. #307	4. City Honolulu	5. State and ZIP HI 96816
6. Email kathy@passhawaii.org	7. Phone	8. Fax 888-825-1501

B. ATTORNEY (if represented)		
9. Attorney Name Brian Brazier	10. Firm Name Brian Brazier Law	
11. Address 430 Lewers St. #20E	12. City Honolulu	13. State and ZIP HI 96815
14. Email brianbrazierlaw@gmail.com	15. Phone 808-922-2032	16. Fax

**C. SUBJECT MATTER**

**17. Board Action Being Contested**

Issuance of Direct Lease and Immediate Right of Entry to the City and Council of Honolulu for temporary mobile access to services and housing (TMASH) for Housing First Transition purposes, Sand Island, Honolulu TMK 1-5-041, portions of 130 and 334 together with rights of access and utility easements.

**18. Board Action Date**  
September 12, 2014

**19. Item No.**  
D-4

**20. Nature and Extent of Petitioner's Interest That May Be Affected by the Board Action**

PASS is a provider of direct services to human trafficking victims and Honolulu's houseless population, many of whom are children. Homeless youth are at high risk of being subjected to sexual exploitation and human trafficking. Recent studies show that as many as 80 percent of runaways, for example, are targets of sexual exploitation. Moreover, in the Hawaii Supreme Court's 2007 *Superferry I* decision, the court noted that Article XI, Section 9 of the Hawaii State Constitution guarantees a "clean and healthful environment," interpreting this provision to ground a "less rigorous" standing test in Chapter 343 (environmental assessment) cases. Adopting a broadened procedural standing test, the court articulated the following guidelines: "(1) the plaintiff has been accorded a procedural right, which was violated in some way... [such as] a failure to conduct an EA; (2) the procedural right protects the plaintiff's concrete interests; and (3) the procedural violation threatens the plaintiff's concrete interests, thus affecting the plaintiff "personally," which may be demonstrated by showing (a) a "geographic nexus" to the site in question and (b) that the procedural violation increases the risk of harm to the plaintiff's concrete interests." We argue that the city's failure to conduct, and BLNR's failure to compel, an environmental assessment violates our and the public's procedural rights, threatening our capacity to expediently provide necessary services to the population that we serve. We further contend that the rights of the population we represent are violated in the same way, and that this population's health interests may be jeopardized by the city's negligent and forcible relocation of homeless persons to the Sand Island site.

**21. Any Disagreement Petitioner May Have with an Application before the Board**

City's application regarding intended use, scope, and timeframe of Temporary Mobile Access to Services and Housing (TMASH) is vague and misleading;

2) To accommodate human habitation, city's TMASH application requires indeterminate use and significant alteration to a portion of government lands situated at Sand Island, Honolulu, Oahu, Tax Map Key: (1) 1-5-041: Portion of 334 (Parcel 1), comprising approximately 4.792 acres, and rights of access and utilities easements over TMK (1) 1-5-041: Portion of 130 (Parcel 5), collectively known as the "TMASH Site";

3) HRS §343 requires an environmental assessment be provided with "beneficial public participation" for "the use of state or county lands" that impacts the environment and, subsequently, public health. The City and County of Honolulu, in its application, justified their request for an environment assessment exemption based on Hawaii Administrative Rule Section 11-200-8(a)(1) and (4), which involve

"operations, repairs, or maintenance of existing structures, facilities, equipment, or topographical features invoking negligible or no expansion or change of use beyond that previously existing" (Class 1) and "minor alteration in the conditions of land, water, and vegetation" (Class 4). The city further asserted that "there will be minimal alteration in the conditions of land, water, and vegetation" and "negligible or no expansion or change in use of the subject area beyond that previously existing, which is basically a vegetated area."

These assertions are contradictory. City leaders concede that the property's preexisting condition is static vegetation. Yet, they intend to build a tent city for up to 100 houseless persons, including sanitary facilities, trash and sewage disposal systems, transportation routes, cement, tents, furnishings, and, of course, people—a significant deviation from static vegetation. City leaders have proposed repaving the parcel to diminish toxicity concerns (a request for quotations has already been issued). We contend that the city cannot adequately address lingering toxicity without fully studying and understanding current risks.

Coupled with toxicity depletion, proposed changes to the parcel can hardly be described as "minor" or "negligible" if the land "previously exists" as vacant vegetation. Turning a barren plot of toxic land into a two or more-year tent city is a major use change, one that would involve and result in lasting alteration of the parcel's topography and future maintenance.

The Hawaii Supreme Court has consistently held, in *Kahana Sunset Owners v. County of Maui* (1997) and elsewhere that public participation requirements trump economic considerations in the realm of environmental reviews, holding also that environmental assessments must be performed under strict procedural requirements. We argue that the City's reasoning for the proposed Sand Island encampment is wholly economic: City officials have been clear and direct in stating that their desire to relocate transient populations to advance tourism businesses. Whether not one agrees that relocating transient people is an efficacious or moral method of boosting tourism, Hawaii Supreme Court rulings clearly indicate that such a consideration is secondary to the people's right to participation in environmental due process.

## **22. Any Relief Petitioner Seeks or Deems Itself Entitled to**

We are seeking a rehearing on BLNR's issuance of Direct Lease and Immediate Right of Entry to the City and Council of Honolulu for TMASH, at which time we will amply demonstrate that city officials should, at the very least, be compelled to perform an environmental assessment before proceeding. Additionally, we will argue that toxicological assessments of Sand Island, Honolulu TMK 1-5-041, portions of 130 and 334, have been inadequate to determine ecological and human health risk. Thus, the city should conduct an appropriate environmental response that includes toxicological assessment and subsequent removal of any and all substances designated pursuant to section 311(b)(2)(A) of the Clean Water Act; any element, compound, mixture, solution, or substance designated pursuant to section 102 of CERCLA; any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act; any toxic pollutant listed under section 307(a) of the Clean Water Act; any hazardous air pollutant listed under section 112 of the Clean Air Act, as amended (42 U.S.C. §§7401-7626); any imminently hazardous chemical substance or mixture regulated under section 7 of the Toxic Substances Control Act, as amended (15 U.S.C. §§2601-2671), oil, trichloropropane, and any other substance or pollutant or contaminant designated by Hawaii Administrative Rule.

**23. How Petitioner's Participation in the Proceeding Would Serve the Public Interest**

This petition attempts to satisfy the needs of justice for chronically homeless persons, houseless persons impacted by recent "sit-lie bans" that restrict such persons' places of accommodation, and advocates for the homeless who will face an undo financial burden in filling service gaps left open by the city. We each have a personal stake in cases in which our rights—to environmental safety and public welfare—might otherwise be denied hearing in an administrative or judicial forum. Success or failure of this issue and the public policy it contests is of societal importance because of its implications for public welfare with regard to potential environmental health hazards, particularly for the state's most vulnerable residents. Moreover, the number of people standing to benefit from the outcome of this case extends beyond the chronically homeless in the urban corridor, encompassing all homeless persons subject to increased criminalization (facing the decision of "Sand Island or jail"), nearby communities at risk from lax security, and taxpayers responsible for financing lawsuits resulting from toxicity-induced illness.

**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**

N/A

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.

Kathryn Xian, Pacific Alliance to  
Stop Slavery

\_\_\_\_\_  
Petitioner or Representative (Print Name)

  
\_\_\_\_\_  
Signature

9/22/14

\_\_\_\_\_  
Date