

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

February 27, 2015

Ref. No.: GLS-4105

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

HAWAII

After-the-Fact Consent to Assignment of Grant of Easement No. S-4105, Michael W. Gibson, Timothy E. Johns, and B.G. Moynahan, Successor Trustees of the Richard Smart Revocable Personal Trust dated August 3, 1978, Assignor, via Mesne Assignments to Mark D. O'Brien and Nicole O'Brien, Assignee; Amendment of Grant of Easement No. S-4105 to Allow the Easement to "Run with the Land" and be Assignable without the Prior Written Consent of the Board of Land and Natural Resources Puukapu, Waimea, South Kohala, Hawaii , Tax Map Key: (3) 6-4-001: portion of 060.

APPLICANT:

Richard Smart Revocable Personal Trust dated August 3, 1978, as Assignor, via mesne Assignments to Mark D. O'Brien and Nicole O'Brien, husband and wife, Tenants By Entirety, as Assignee.

LEGAL REFERENCE:

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

LOCATION:

Portion of Government lands situated at Puukapu, Waimea, South Kohala, Hawaii, identified by Tax Map Key: (3) 6-4-001: portion of 060, as shown on the attached map labeled Exhibit A.

AREA:

.204 acres, more or less.

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act

DHHL 30% entitlement lands pursuant to the Hawaii State Constitution:

YES _____ NO x

CHARACTER OF USE:

Non-exclusive easement for access purposes.

TERM OF LEASE:

65 years, commencing on September 6, 1967 and expiring on September 5, 2032. Last rental reopening occurred on September 6, 2012; next rental reopening is scheduled for September 6, 2022.

ANNUAL RENTAL:

Retrospective:	September 6, 2012 to September 5, 2017:	\$ 80.00
	September 6, 2017 to September 5, 2022:	\$ 90.00
Prospective:	September 6, 2022 to September 5, 2027:	\$ 99.00
	September 6, 2027 to September 5, 2032:	\$110.00

CONSIDERATION:

\$ 10.00.

RECOMMENDED PREMIUM:

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

DCCA VERIFICATION:

ASSIGNOR:

Not applicable.

Assignor(s), Warren J. Gunderson, Melvin Hewett, and Carl Arthur Carlson, Jr., as Trustees of the Richard Smart Revocable Personal Trust, dated August 3, 1978, are not required to register with DCCA.

ASSIGNEE:

Not applicable.

Assignee(s) as individuals are not required to register with DCCA.

REMARKS:

The subject property was originally privately owned, which was later part of a land exchange conducted on August 6, 1958, between a Lydia Maertens and the Territory of Hawaii. The land exchange was necessary to establish access to the Puukapu Cemetery. The land exchange, however, inadvertently landlocked the abutting private properties

from accesses to the adjacent homestead road. As a result, easements were later required to re-establish legal accesses for the various private properties affected.

At its meeting of February 12, 1982, Item F-2, the Board of Land and Natural Resources approved the issuance of an easement for access purposes to James Hooper Davis Sr. and Mabel Maertens Davis, Grantee. The easement was necessary to re-establish legal accesses to the landlocked private property identified as TMK: (3) 6-4-001:135.

At its meeting of August 12, 1983, Item F-1-g, the Land Board consented to the assignment of Grant of Easement No. S-4105, James Hooper Davis Sr. and Mabel M. Davis, Assignor, to James H. Davis Jr., Assignee. The Davises gifted their private property and the easement to their son, James H. Davis Jr.

At its meeting of January 10, 1992, Item F-1-a, the Board of Land and Natural Resources approved the assignment of Grant of Easement No. S-4105, from James Hooper Davis Jr, Assignor, to Brian Anderson, as Assignee, and a second consent to assignment from Brian Anderson, as Assignor, to the Richard Smart Revocable Personal Trust dated August 3, 1978, as Assignee.

James Hooper Davis, Jr., conveyed the Subject Property along with his interest in the easement to Brian Anderson by Warranty Deed dated August 27, 1987, recorded in the Bureau as Document 87-157234.

Brian Anderson conveyed the Subject Property along with his interest in the easement to Richard Smart, Warren J. Gunderson, Gillard P. Smart, and Richard Hendrick, as Trustees of the Richard Smart Revocable Personal Trust dated August 3, 1978, by Warranty Deed dated November 21, 1988, recorded in the Bureau as Document 88-170322.

By letter dated October 21, 2013, Mr. Roy A. Vitousek III, Cades Schutte, LLLP, representing Mark D. O'Brien and Nicole O'Brien, requested that the Land Board consent to the assignment of that certain unrecorded Grant of Easement No. S-4105, from the Richard Smart Revocable Personal Trust dated August 3, 1978, Assignor, via Mesne Assignments to Mark D. O'Brien and Nicole O'Brien, Assignee. Mark D. O'Brien and Nicole O'Brien are the current owners of the real property identified as TMK: (3) 6-4-001:135 (the "Property"), which utilize the subject easement as its legal access to the private property.

Although the private property was sold a number of times, the State was not properly notified of the intervening assignments between the Richard Smart Personal Trust and the O'Briens. As a result, a consent to assignment of the easement to each successive landowner was not approved by the Land Board, although each successive owner of the private Property benefitted by the Grant of Easement and received the sellers' interest in the Grant of Easement when they acquired the Property and conveyed their interest in the Grant of Easement to the purchaser when they sold the property. The current owners, the

O'Briens, were deeded the Seller's interest in the Grant of Easement by Warranty Deed dated July 2, 2013.

Warren J. Gunderson, Melvin Hewett, and Carl Arthur Carlson, Jr., Successor Co-Trustees of the Richard Smart Revocable Personal Trust, conveyed the Subject Property along with the Trust's interest in the easement to the Kahilu Theatre Foundation, a Hawaii nonprofit corporation, by Trustee's Limited Warranty Deed dated December 21, 1995, recorded in the State of Hawaii Bureau of Conveyances (the "Bureau") as Document No. 96-007568.

The Kahilu Theatre Foundation conveyed the Subject Property along with its interest in the easement to Steven Brewster Jordan, unmarried, by Warranty Deed dated July 1, 1996, recorded in the Bureau as Document No. 96-098242.

Steven Brewster Jordan conveyed the Subject Property along with his interest in the easement to Mark Edison de Reus, unmarried, by Warranty Deed dated August 25, 2001, recorded in the Bureau as Document No. 2001-137252.

Mark Edison de Reus conveyed the Subject Property along with his interest in the easement to Mark D. O'Brien and Nicole O'Brien, husband and wife, by Warranty Deed dated July 2, 2013, recorded in the Bureau as Document No. A-49370261.

Mark D. O'Brien and Nicole O'Brien have not had a lease, permit, easement or other disposition of State lands terminated within the last five years due to non-compliance with such terms and conditions.

The last rental reopening was on September 6, 2012. The next scheduled reopening is for September 6, 2027. There are no outstanding rental reopening issues.

No agencies or interest groups were solicited for comments as there will be no change in the land use or new disposition.

RECOMMENDATION: That the Board:

1. Subject to the Applicant fulfilling the Applicant requirements listed above, authorize after-the-fact, the consent to the assignment of Grant of Easement No. S-4105, Michael W. Gibson, Timothy E. Johns, and B.G. Moynahan, Successor Trustees of the Richard Smart Revocable Personal Trust, dated August 3, 1978, as Assignor, via Mesne Assignments to Mark D. O'Brien and Nicole O'Brien, as Assignee(s), subject to the following:
 - A. The standard terms and conditions of the most current consent to assignment 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.
2. Authorize the Amendment of Grant of Easement No. S-4105, Richard Smart Revocable Personal Trust, Grantee, to insert a provision allowing for the easement to run with the land, as stated below:

“This easement shall run with the land and shall inure to the benefit of the real property described as tax map key no. (3) 6-4-001:135, providing that the Grantee shall be required to carry liability insurance covering the easement area and comply with all other terms and conditions as provided herein, and that the Grantee, or authorized representative of the Grantee’s estate, shall notify the Grantor in writing when this easement is sold, assigned, conveyed, or otherwise transferred, and Grantee shall notify the Grantee’s successors or assigns of the insurance requirement in writing, separate and apart from this easement document .”

- A. The standard terms and conditions of the most current lease amendment document form, as may be amended from time to time; and
- B. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interest of the State.

Respectfully Submitted,



Wesley T. Matsunaga
Land Agent

APPROVED FOR SUBMITTAL:



Carty S. Chang, Interim Chairperson

SUBJECT



EXHIBIT A