

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

January 13, 2017

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

PSF No.: 10HD-152

Hawaii

Issuance of Revocable Permit to Mary Katherine Foti, Trustee of the Mary Katherine Foti Revocable Living Trust dated December 14, 1990, Haukalua II, South Kona, Hawaii, Tax Map Key: (3) 8-7-05:05.

APPLICANT:

Mary Katherine Foti, Trustee of the Mary Katherine Foti Revocable Living Trust dated December 14, 1990.

LEGAL REFERENCE:

Sections 171-13 and -55, Hawaii Revised Statutes, as amended.

LOCATION:

Portion of Government lands of Haukalua II situated at South Kona, Hawaii, identified by Tax Map Key: (3) 8-7-05:05, as shown on the attached maps labeled Exhibits A-1 and A-2.

AREA:

5.18 acres, more or less.

ZONING:

State Land Use District: Agriculture
County of Hawaii CZO: A-5a

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 an improved dwelling on it.

CHARACTER OF USE:

Pasture and employee dwelling purposes.

COMMENCEMENT DATE:

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

MONTHLY RENTAL:

\$40.00 per month (minimum rent approved by Chairperson - Exhibit B) for the first year. Subsequent rent will be determined by an independent appraiser, subject to review and approval by the Board.

COLLATERAL SECURITY DEPOSIT:

Twice the monthly rental.

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

See Exhibit C attached.

DCCA VERIFICATION:

Not applicable. A trust is not required to register with the Department of Commerce and Consumer Affairs.

APPLICANT REQUIREMENTS:

Applicant shall have a Phase I Environmental Site Assessment conducted of the subject property at her own expense, and shall provide a copy of the written report of findings to DLNR's Land Division within three months of the Board's approval of this request. Within ten days of delivering the report to Land Division, Applicant shall advise Land Division in writing whether she desires to proceed with the issuance of the revocable permit.

REMARKS:

At its meeting of November 18, 1964, Item F-3, the Board of Land and Natural Resources approved the sale at public auction of a lease covering the subject land, as well as an adjoining lot designated as Tax Map Key: (3) 8-7-05:03, for "agricultural-residence purposes". The auction was held on April 15, 1966 and Eaton Magoon, Jr. was the successful bidder. General Lease No. S-3962 thereafter issued as of the auction date to Mr. Magoon for a term of 30 years terminating on April 14, 1996.

The Board approval of the lease required Mr. Magoon to construct a single-family dwelling on the property with a floor area of not less than 550 square feet, exclusive of garage, basement or open lanai, and costing not less than \$6,000.00. The improvements were to be made within two years of the commencement of the lease. These requirements were made a part of the lease. The file shows that Mr. Magoon secured an extension of time to satisfy the construction deadline, and a second-hand house meeting the specifications was relocated to the property, as permitted by the lease, as of August 4, 1969.

By letter dated March 11, 1996, counsel for Mr. Magoon submitted a letter to the Hawaii District Land Office requesting a one-year holdover of the lease, and the issuance of a revocable permit to Magoon after the holdover period. At its meeting of June 14, 1996, Item D-5, the Board approved the issuance of a month-to-month revocable permit to Mr. Magoon for pasture purposes pending the sale at public auction of a new lease for the property. With respect to the dwelling on the property, the Board submittal stated:

It is understood that both the lease at public auction and the interim revocable permit will be for pasture purposes only and residential use of the property will be prohibited. However, as in State issued pasture leases, use of the structure currently on the property as an employee dwelling and/or storage area is permissible.

Revocable Permit No. S-7044 was thereafter issued to Mr. Magoon as of April 15, 1996. The permit states that it is for pasture purposes, and captures the restriction on the use of the dwelling that was set forth in the Board action. Mr. Magoon and/or his employees occupied the premises until approximately October 2004 (and perhaps later). A second public auction of the parcels was not conducted. One reason for this is that although the property has a legal access from the highway, the access is not developed, and cannot be developed without considerable expense. Land Division has no vehicular access to the property and can only get there by vehicle with the consent and cooperation of adjoining landowners whose access roads to the area are gated and locked. During the years that Mr. Magoon used the property, he accessed it over abutting private lands owned either by him or Magoon Estate, Limited (Magoon Estate).¹

In the years following the issuance of Revocable Permit No S-7044, Mr. Magoon and/or Magoon Estate sold the adjoining private lands and apparently Mr. Magoon lost his legal access to the State land. Correspondence between Land Division, Mr. Magoon and his attorney in 2004 shows that the State had concern over Mr. Magoon's continued access to the property in light of the sale of the private lands. The last correspondence from this period is a letter from Land Division to Mr. Magoon's attorney requesting that Land Division be provided with evidence of Mr. Magoon's legal access to the property, or the revocable permit would be terminated. The file shows no such evidence was submitted in response to the request. The billing was thereafter stopped on the permit, and no

¹ At the time the Haukalua Homesteads lots were created, lots 2 through 6 (located between the subject parcel and Mamalahoa Highway) contained a reservation for a 30 foot road reserve as shown on Exhibit A-1. It is believed, at the time of the auction in April, 1966, the road reserve was in use. Records indicate only one other lot (lot 4 – Right of Purchase Lease No. 266) was ever utilized. However, Right of Purchase Lease No, 266 was cancelled in 1961. Because Mr. Magoon accessed the lease parcel through his adjacent fee simple property, the designated roadway reserve became overgrown and unusable.

renewal of the permit was issued for 2005.

Land Division was contacted by Dr. Philip Foti as the agent for applicant Mary Katherine Foti Trust (Applicant). Staff has confirmed through County of Hawaii Real Property Tax records that Applicant owns the private land to the south of the subject property. Dr. Foti reported that the dwelling on the State property appeared to be in disrepair, but continued to be used by unknown persons occasionally. Dr. Foti expressed Applicant's interest in renting the property. Staff arranged a site inspection for January 9, 2015. To reach the State property, staff had to pass through a locked gate on private property and travel down an unimproved road over which Applicant has access rights. The site inspection showed the area around the house was cluttered with furniture, appliances, and personal effects. The rear of the house was unsecured and open to the elements (Exhibit D). The interior of the house was in disarray, but contained furniture, personal belongings and other items indicating that the structure had been used in the recent past. Farther from the house was one abandoned vehicle. Staff posted a Notice to Vacate at various points around the property.

Land Division generally does not permit residential use of pasturelands. One reason for this is to prevent large tracts of State land being converted to "gentlemen's ranches" where livestock grazing is non-existent or conducted at a mere nominal level to justify occupancy of the lands. In very limited cases, exceptions have been made for employee dwellings. Staff believes that the exception for an employee dwelling should be allowed in this case for the following reasons. First, there is an existing dwelling on the property that the State required the prior lessee to build. The structure reverted to State ownership when the lease terminated in 1996. Second, the property is in a very remote location in South Kona and a recent inspection showed use of the dwelling without State authorization and without payment to the State. Third, staff cannot access the site by vehicle without traversing private lands and passing through locked gates. The remoteness of the property and the lack of access make it exceedingly difficult for staff based in Hilo to prevent unauthorized use of the land and the dwelling. In short, staff believes that issuing a revocable permit to an adjoining landowner is in the best interests of the State, provided that use of the structure is limited to employee dwelling purposes and further provided that the Applicant grants Land Division access to the property for periodic inspections.

Applicant's application for a revocable permit for the property indicates that Applicant intends to hire ranch workers to expand grazing operations in the area. The ranch workers will occupy the dwelling. Applicant proposes to clean up the property and refurbish the dwelling. Applicant does not have experience grazing livestock herself, but will rely on experienced ranch hands to be employed by Applicant. Staff is including a recommendation below that Applicant provide Land Division with a brief statement of the ranching qualifications of each employee who occupies the employee dwelling during the term of the permit.

There are no utilities available on the property such as electricity or county water. The redwood tank adjacent to the house has severe dry-rot and cannot be restored.

The proposed use is allowable in the county zoning, which is Agriculture (A-5a). In recent years, Land Division has received no other requests for the same parcel.

The Applicant has 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.

A month-to-month permit is more appropriate than a long-term disposition in the present case due to the lack of access to the property. Land Division cannot put a long-term lease for the property out to auction without an established, legal access to the parcel.

Staff is recommending minimum rent of \$40.00 for the first year, as established by the Board at its meeting of May 13, 2005, agenda item D-19. Subsequent monthly rent will be determined by an independent appraiser, subject to review and approval by the Board.

Comments on the proposed disposition were solicited from the State and County of Hawaii agencies identified below, are as follows:

County of Hawaii Agencies	Comments
Planning	Comments Below
Public Works	No Response
State of Hawaii Agencies	Comments
DOH-Environmental Management	No Comments
DHHL	No Response
DLNR-Historic Preservation	No Objections
Other Agencies	Comments
Office of Hawaiian Affairs	No Response
U.S. Army Corps. Of Engineers	No Response

The County Planning Department confirmed that the subject parcel is an existing lot of record and has a State Land Use designation of Agriculture.

Due to the presence of appliances, equipment and at least one vehicle on the subject property, staff is including an Applicant Requirement above that the Applicant conduct a Phase I Environmental Site Assessment (ESA) at her own cost as a condition to the issuance of a revocable permit. The ESA will establish a baseline for the property that will protect both Applicant and the State. Should the ESA show that remediation is required, Applicant may return to the Board at a later date to request amendment or rescission of the Board's approval.

According to the County of Hawaii Department of Public Works, Building Division no building permit was ever secured for the dwelling structure on the property. Staff believes it would be imprudent to allow any use or occupancy of the unpermitted structure. Accordingly, staff is including a recommendation below that Applicant be required to secure an after-the-fact building permit for the structure at her expense before any occupancy of the dwelling will be allowed.

There are no utilities available at the property. Applicant will be responsible for obtaining any necessary utilities.

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. Subject to the Applicant fulfilling the Applicant Requirement listed above, authorize the issuance of a revocable permit to Mary Katherine Foti, Trustee of the Mary Katherine Foti Revocable Living Trust dated December 14, 1990, covering the subject area for pasture and employee dwelling purposes 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 revocable permit form, as may be amended from time to time;
 - b. The revocable permit shall be for pasture purposes only and residential use of the property shall be prohibited. However, use of the structure currently on the property as an employee dwelling and/or storage area is permissible;
 - c. Applicant shall provide Land Division with a brief statement of the ranching qualifications of each employee who occupies the employee dwelling during the term of the permit;
 - d. Applicant shall grant Land Division access over Applicant's land to the State property for periodic inspections upon reasonable notice of at least two days;
 - e. Applicant shall obtain an after-the-fact building permit for the structure on the property before allowing any employees to occupy the structure. Applicant shall submit documentation to Land Division staff confirming the issuance and closure of the building permit within one year of the date of the revocable permit;
 - f. Review and approval by the Department of the Attorney General; and
 - g. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.
3. Issue an immediate right-of-entry permit to Applicant, her contractors, consultants and persons acting on her behalf, to allow Applicant to conduct the Phase I Environmental Assessment of the subject area, 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 right-of-entry form,

as may be amended from time to time;

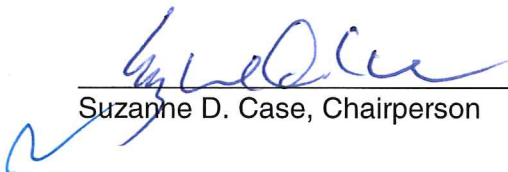
- b. This right-of-entry is effective upon Applicant's execution of right-of-entry permit and submission of proof of the required liability insurance under the permit, and shall continue until the revocable permit is finalized and executed; and
- c. The Department of Land and Natural Resources reserves the right to impose additional terms and conditions at any time if it deems necessary while this right-of-entry is in force.

Respectfully Submitted,



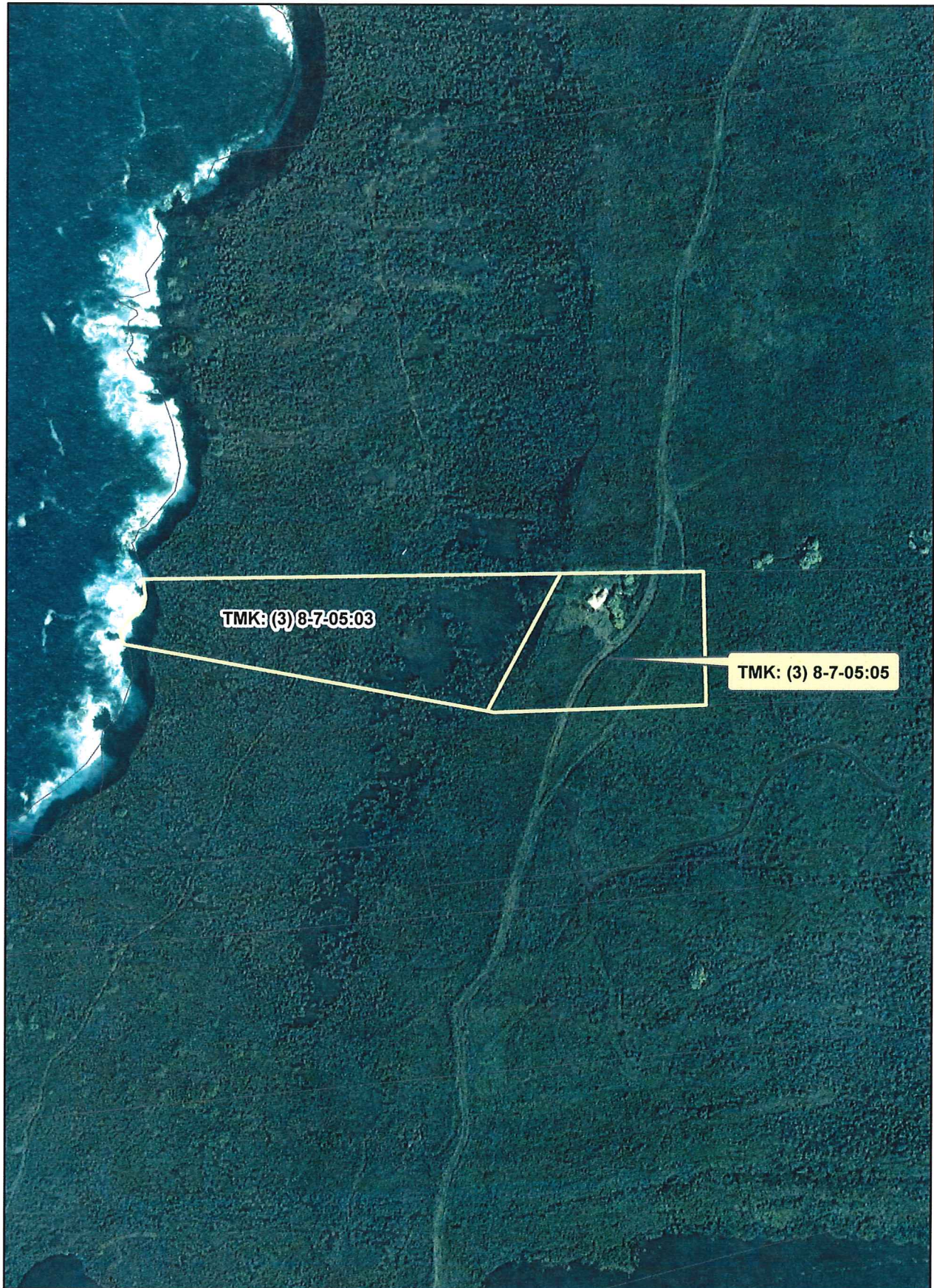
Gordon C. Heit
District Land Agent

APPROVED FOR SUBMITTAL:



Suzanne D. Case, Chairperson

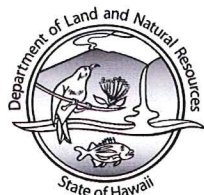
Foti RP



0 115 230 460 690 920
Feet



EXHIBIT A-2



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
LAND DIVISION


75 Aupuni Street, Room 204
Hilo, Hawaii 96720
PHONE: (808) 961-9590
FAX: (808) 961-9599

September 30, 2016

MEMORANDUM

TO: Suzanne D. Case, Chairperson

THROUGH: Russell Y. Tsuji, Land Administrator

FROM: Gordon Heit, District Land Agent 

SUBJECT: In-House Valuation Recommendation – Revocable Permit for Pasture Purposes.

PSF No.: 10HD-152

Applicant: Mary Katherine Foti, Trustee of the Mary Katherine Foti Revocable Living Trust dated December 14, 1990

Location: Haukalua II, South Kona, Hawaii

Tax Map Key: (3) 8-7-005:005

Char. Of Use: Pasture and employee dwelling purposes.

We are attempting to determine the monthly rental amount for the issuance of a revocable permit for Pasture and employee dwelling purposes on the above-referenced property.

The subject property is unencumbered State land in the South Kona district on the Island of Hawaii. It is a rectangular shaped piece of land consisting of 5.18 acres of rocky soil (soil series, E-289). The property was previously encumbered under revocable Permit No. S-7044 to, Eaton Magoon, owner of the adjacent fee property, for pasture purposes. The Applicant purchased the adjacent property and wishes to utilize the State land for the same purposes as the previous Permittee. The applicant is currently grazing cattle on their fee property.

There is only one other month to month revocable permit issued for pasture use in the South Kona district (RP S-7159). It comprises approximately 885 acres at the rate of \$60.00 per month. This request is for a similar use but on a much smaller parcel.

EXHIBIT B

Staff is therefore recommending the minimum rental rate of \$480.00 per annum or \$40.00 per month.

Special Assumptions and Limiting Conditions

- 1) This rental valuation estimate is for internal purposes only. This document does not take the place of an appraisal and does not constitute an appraisal that adheres to the Uniform Standards of Professional Appraisal Practices.
- 2) The subject property was not inspected by the staff appraiser.

Approved/Disapproved:



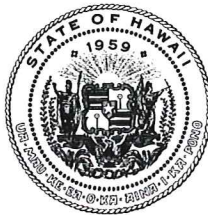
Suzanne D. Case, Chairperson



Date

cc: District File
Central File

DAVID Y. IGE
GOVERNOR OF HAWAII



**STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES**

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

SUZANNE D. CASE
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

KEKOA KALUHIWA
FIRST DEPUTY

JEFFREY T. PEARSON, P.E.
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

EXEMPTION NOTIFICATION

From the preparation of an environmental assessment under the authority of Chapter 343, HRS and Chapter 11-200, HAR

Project Title: Issuance of Revocable Permit to Mary Katherine Foti, Trustee of the Mary Katherine Foti Revocable Living Trust dated December 14, 1990

Project Number: PSF No. 10HD-152

Project Location: Haukalua 2nd, South Kona, Hawaii, Tax Map Key: (3) 8-7-005:005

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

Project Description: Issuance of Revocable Permit to Mary Katherine Foti, Trustee of the Mary Katherine Foti Revocable Living Trust dated December 14, 1990, over State agriculture lands for pasture and employee dwelling purposes

Consulted Parties: DLNR, Division of Forestry and Wildlife; County of Hawaii Planning Department; and others

Exemption Class No.: In accordance with Hawaii Administrative Rule Sections 11-200-8(a)(1) & (4) and the Exemption List for the Department of Land and Natural Resources approved by the Environmental Council and dated June 5, 2015, the subject request is exempt from the preparation of an environmental assessment pursuant to Exemption Class No. 1, Item 47 that states "Leases of state land involving negligible or no expansion of change of use beyond that previously existing", and Item 51 that state "Permits, licenses, registrations, and rights-of-entry issued by the Department that are routine in nature, involving negligible impacts beyond that previously existing", respectively.

Project Description: This exemption is appropriate because the new permittee, Mary Katherine Foti, Trustee of the Mary Katherine Foti Revocable Living Trust dated December 14, 1990 (Applicant), will obtain a revocable permit over State agricultural land previously used for

EXHIBIT C

pasture and employee dwelling purposes, which includes the maintenance responsibilities as described in the exemption. Furthermore, the area will continue to be used by Applicant for pasture and employee dwelling purposes as done previously.

The proposed use has continued since approximately 1964 and will continue. Such use has resulted in no known significant impacts, whether immediate or cumulative, to the natural, environmental and/or cultural resources in the area. As such, the proposed use would involve negligible or no expansion or change in use of the subject area beyond that previously existing. If further actions are taken that result in a material change, Applicant will be required to be in compliance with Chapter 343.

Recommendation:

It is anticipated the issuance of a new permit to Applicant in itself will probably have minimal or no significant effect on the environment and is presumed to be exempt from the preparation of an environmental assessment. It is recommended that the Board of Land and Natural Resources find that the issuance of the permit is exempt from the preparation of an environmental assessment. Inasmuch as the Chapter 343 environmental requirements apply to any future use of the lands, Applicant shall be responsible for compliance with Chapter 343, HRS, as amended.



Suzanne D. Case, Chairperson



Date

12/21/16

Abandoned Structure on the Former Magoon RP



View of House Structure Looking South



View of House Structure Looking North

EXHIBIT D

Abandoned Structure on the Former Magoon RP



Rear View of House Structure



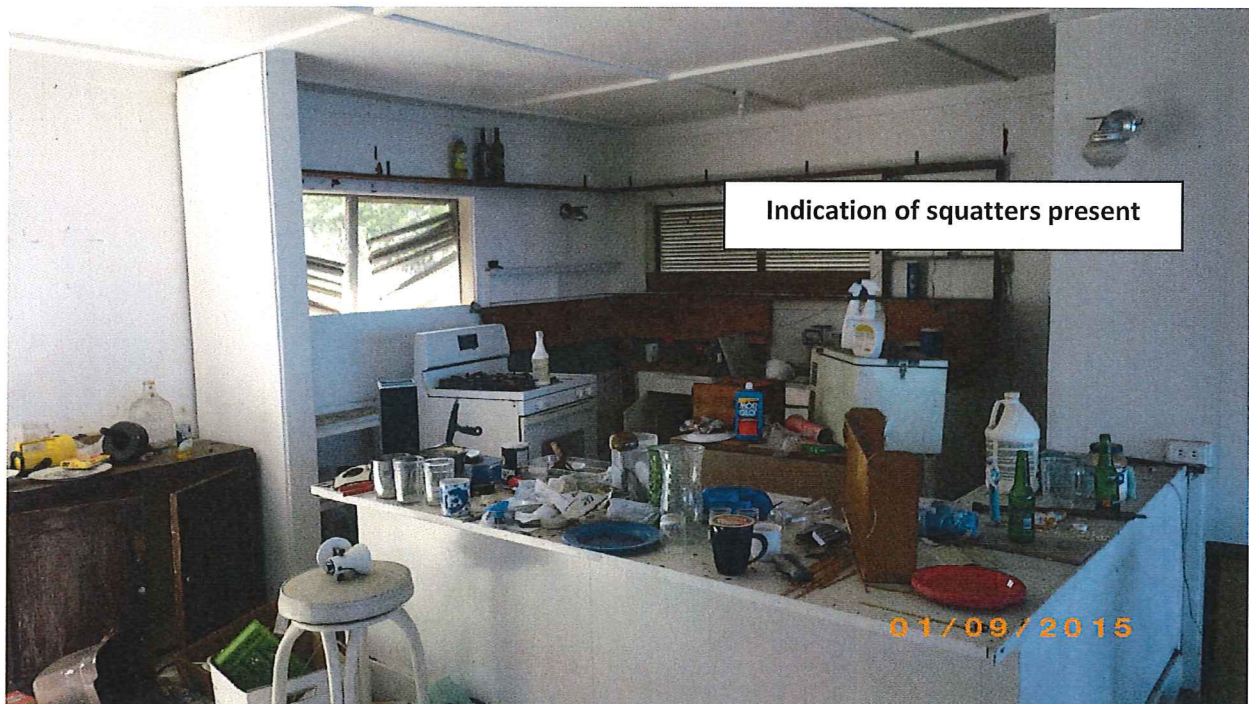
Rear View of House Structure

EXHIBIT D

Abandoned Structure on the Former Magoon RP



Interior - Kitchen



Interior - Kitchen

EXHIBIT D

Abandoned Structure on the Former Magoon RP



Interior - Bathroom



Interior - Bedroom

EXHIBIT D

Abandoned Structure on the Former Magoon RP



Water Catchment Tank



Scattered Debris from House Structure

EXHIBIT D