

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

October 27, 2017

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

PSF No.: 16OD-164

OAHU

Renewal of Revocable Permit No. 7566 for Pier Purposes; Hilton Hawaiian Village, LLC, Permittee. Waikiki, Honolulu, Oahu, Tax Map Key: (1) 2-6-008:029.

HRS CHAPTER 343 – ENVIRONMENTAL ASSESSMENT:

In accordance with the Exemption List for the Department of Land and Natural Resources, approved by the Environmental Council on June 5, 2015, the subject action is exempt from the preparation of an environmental assessment pursuant to Exemption Class 1, "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 item 51, which states, "Permits, licenses, registrations, and rights-of-entry issued by the Department that are routine in nature, involving negligible impacts beyond that previously existing." See **Exhibit A** attached.

REMARKS:

As background, following the reports and recommendations of the Revocable Permits Task Force adopted as amended by the Board at its meeting on June 24, 2016, Item D-7, Land Division ("LD") initiated the contact with various revocable permittees regarding the feasibility of converting the revocable permit ("RP") into long term disposition, if appropriate. Staff sent such a letter to Hilton Hawaiian Village, LLC ("HHV"), permittee of RP 7566, inquiring whether it would be interested in applying for an easement.

After much internal deliberations within HHV, HHV decided to apply for a 55-year non-exclusive easement and the matter was brought before the Board at its meeting of February 24, 2017, item D-9. The Board considered the matter and there was a vigorous discussion about the history of the construction of the pier improvements the ownership of such pier. A question was also raised about whether an auction (or directly issued easement) would result in at least equal to or more than the current rent paid by HHV in the amount of \$38,830.90 per month (\$465,960.00 annually) if the State is deemed to "own" the pier.¹

¹ The record indisputably shows that Hilton was authorized by the Board to construct, operate and maintain the

Certain Board members took the position that the State may own the pier, which counsel for HHV vigorously disagreed with. The matter was deferred.

Subsequent to the Board meeting, counsel for HHV submitted to Deputy Attorney General Wynhoff a letter memorandum dated April 27, 2017,² recapping the history of HHV's construction, operation and maintenance of the pier, and the various revocable permits issued by the Department. In response to a matter scheduled to go before the Board on June 9, 2017, the Office of Hawaiian Affairs ("OHA") provided a memorandum providing comments and asking the Board not to agree with HHV's claim of ownership of the pier improvements. Ultimately the June 9, 2017 matter (**Exhibit A-1**) was withdrawn amid the ongoing discussion on the ownership of the improvement. Copies of OHA's letter and HHV's response to OHA's testimony are attached as **Exhibits A-2** and **A-3** respectively.

In order for the State to issue either an auction or a direct easement for both the submerged lands and the pier improvements, the State would need clear title to ownership of the pier improvements. HHV vigorously opposes any assertion that State may own the pier. Therefore, the issue of ownership of the pier does not appear easily or quickly resolvable, and taking the position of ownership would likely result in trial court and appellate litigation.

Meanwhile, the annual renewal of the revocable permits is due, and staff presents Revocable Permit 7566 to the Board for renewal. Staff is not recommending any adjustment in the rent. Currently, HHV pays the State an annual rent of \$465,960.00,³ and staff believes this amount is fair and reasonable.⁴

Staff understands HHV allows other commercial operators to use the same pier, and such patrons are counted towards the \$1.50 per person in determining the rent payable to the State in the event the base rent is exceeded. During other canoe race events, HHV also allows the same pier be used by the participants. Thus, HHV seems to allow other ocean users to use and enjoy the pier for their respective events and missions.

RECOMMENDATION: Based on the foregoing points and authorities, staff recommends the Board approve the continuation of Revocable Permit No. 7566 on a month-to-month basis for

pier.

2 See Exhibit 1 attached to June 9, 2017 submittal which is referenced as Exhibit A-1 herein.

3 \$1.50 per passenger annually, whichever is higher. The 2016 annual passenger count was 143,604, amounting to \$215,406 which is less than the \$465,960. Passenger count to date for 2017 is 100,017.

4 The permit area is 3917 square feet, more or less, of submerged lands. The nearest comparison in rent for a resort area is the Naniloa which currently pays a base rent of \$580,270.44 for 70.125 acres of land in the Banyan Drive area.

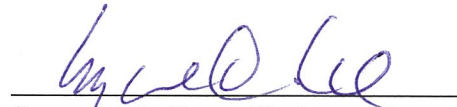
another one-year period through December 31, 2018.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Russell Y. Tsuji', written over a horizontal line.

Russell Y. Tsuji
State Lands Administrator

APPROVED FOR SUBMITTAL:

A handwritten signature in blue ink, appearing to read 'Suzanne D. Case', written over a horizontal line.

Suzanne D. Case, Chairperson

EXHIBIT A

EXEMPTION NOTIFICATION

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

Project Title: Annual Renewal of Revocable Permit for Pier Purposes.

Project / Reference No.: PSF 16OD-164

Project Location: Waikiki, Honolulu, Oahu, TMK (1) 2-6-008:029.

Project Description: Renew existing revocable permit for a term of one year.

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

Exemption Class No.: In accordance with the Exemption List for the Department of Land and Natural Resources, approved by the Environmental Council on June 5, 2015, the subject request for issuance for right-of-entry is exempt from the preparation of an environmental assessment pursuant to Exemption Class 1, "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 item 51, which states, "Permits, licenses, registrations, and rights-of-entry issued by the Department that are routine in nature, involving negligible impacts beyond that previously existing."

The annual renewal of the existing revocable permit on State lands involves the continuation of existing uses on the lands. No change in use is authorized by the renewal.

Consulted Parties: Agencies listed in submittal.

Recommendation: That the Board find 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.

EXHIBIT "A"

EXHIBIT A-1

D-10
WITHDRAWN

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

June 9, 2017

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

PSF No.: 16OD-164

OAHU

Report on and Withdrawal of Item Requesting Grant of Term, Non-Exclusive Easement to Hilton Hawaiian Village LLC for Pier Purposes; Termination of Revocable Permit No. S-7566; Waikiki, Honolulu, Oahu, Tax Map Key: (1)2-6-008:029

REMARKS:

At its meeting on February 24, 2017, under agenda item D-9, the Board deferred this item in view of issues raised by the Board on the method of disposition, appraised value, and ownership of the improvements.

Pursuant to the discussions with the Department of the Attorney General (AG), the counsel representing the applicant, Hilton Hawaiian Village LLC, and the Land Division (LD), applicant's counsel articulated his client's position that the applicant owns the pier. In closing, counsel's letter "reserves all its rights, including to sue the State, and to remove the Pier as provided in RP S-7566, if the State persists in its position." A copy of the letter is attached as **Exhibit 1**.

LD and AG are satisfied with the analysis regarding the ownership of the pier provided by the applicant's counsel as articulated in Exhibit 3. After further discussion within the Department, LD returns to the Board today to withdraw applicant's request for an easement to replace its current revocable permit, as explained in the paragraphs below. A copy of the February 24, 2017 submittal [other than the exhibits attached therein] is attached as **Exhibit 2**.

Method of Disposition

At its February 24, 2017 meeting, Board asked why the requested disposition was not going out for public auction. In view of the applicant claiming ownership of the improvements (pier) as set forth in Exhibit 3, the AG concurring with that opinion, and the applicant reserving the right to remove the pier, the real estate interest that the State could dispose by auction would be limited to the right to conduct commercial activities on portions of submerged lands. It is a reasonable assumption that authorizations from other government agencies would be required for a new pier to be placed at the subject

~~APPROVED~~ ^{Withdrawn} BY THE BOARD OF
LAND AND NATURAL RESOURCES
AT ITS MEETING HELD ON
June 9, 2017 Uo.

EXHIBIT "A-1"

D-10

location, and the process to obtain such authorizations would be lengthy. However, until a new pier is in place and begins generating revenue for the State, the State will be losing an estimated income of over \$465,000¹ per year.

In view of the uncertainty of the processing time for the proper authorizations to construct a new pier and the costs associated therewith, LD believes an auction would generate little interest among prospective bidders.

As explained at the last meeting, the public lands law does not require the Board to issue a lease or easement over submerged lands (without a pier) by public auction. The Board has authority to issue an easement by direct negotiation to applicant or to continue with the revocable permit form of disposition. It is a policy matter for the Board.

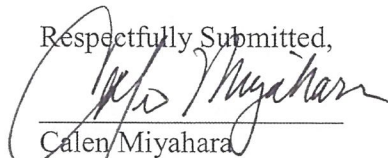
Appraised value

The current level of revenue, i.e. \$465,000+ per annum, is a substantial contribution to the Department's budget and the applicant is not disputing the rent charged for the pier. For the Board's information, a 55-year easement for seawall, steps, and filled land was appraised, in 2012, at a one-time payment of \$337,000 for 3,800 square feet in East Honolulu.

After further discussion within the Department, LD believes it is in the best interest of the State to have the subject pier remain status quo, i.e., keep the Revocable Permit No. S-7566 in place.

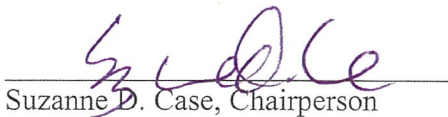
RECOMMENDATION: That the Board concur with staff recommendation to retain the disposition in the status quo with the revocable permit.

Respectfully Submitted,



Calen Miyahara
Shoreline Disposition Specialist

APPROVED FOR SUBMITTAL:



Suzanne D. Case, Chairperson

Land Board Meeting: June 9, 2017; D-10:
Withdrawn.

Withdrawn.

¹ Effective from January 1, 2017, the monthly rent from the pier is \$38,830.90.

STARN • O'TOOLE • MARCUS & FISHER

A LAW CORPORATION

April 27, 2017

VIA U.S. MAIL AND ELECTRONIC MAIL

Mr. William J. Wynhoff
Dept. of the Attorney General
Kekuanaoa Building
465 South King Street, Room 300
Honolulu, Hawaii 96813

Re: Hilton Hawaiian Village, LLC's Ownership of the Pier Located at
Waikiki, Honolulu, Oahu; TMK (1) 2-6-008-029

Dear Mr. Wynhoff:

I. INTRODUCTION

As you know, we represent Hilton Hawaiian Village, LLC ("**Hilton**"). This letter is in response to your request that Hilton explain why Hilton believes it owns the pier fronting Duke Kahanamoku Beach at the Hilton Hawaiian Village in Waikiki (the "**Pier**"). The Pier is situated on submerged lands owned by the State, located just off the beach, and currently occupied by Hilton pursuant to Revocable Permit No. S-7566.

Your request that Hilton explain its ownership of the Pier arose as a result of the assertion by one of the members of the Board of Land and Natural Resource (the "**Board**"), Mr. Stanley Roehrig, at the Board's February 24, 2017 public meeting, that he believes the State owns the Pier, and that the State should put the Pier out for public bid. We were surprised by Mr. Roehrig's position.

We remind you that the whole purpose of the February 24, 2017 meeting was to approve *the State's request* that Hilton submit an application to transition from its existing revocable permit (allowing it to locate a pier on state-owned lands) to a long-term easement. Having appeared at the meeting in response to the State's request, we were certainly not expecting the state to assert ownership of improvements that were built, paid for, insured and maintained by Hilton. Nor did we appreciate Mr. Roehrig's implication that Hilton was somehow doing something improper by applying for an extension of the existing arrangement that the State itself requested.

Mr. Roehrig asserted at the meeting that the basis for the State's ownership of the Pier is that the State "owns everything makai of the high wash of the waves." We find that assertion contrary to both the facts and applicable law. We write this letter to accommodate your request for an explanation regarding Hilton's ownership of the Pier.

Pacific Guardian Center, Makai Tower • 733 Bishop Street, Suite 1900 • Honolulu, Hawaii 96813
Telephone: (808) 537-6100 • Fax: (808) 537-5434 • Web: www.starnlaw.com

EXHIBIT " / "

II. FACTS

Barry Cheung at the Department of Land and Natural Resources (the “*DLNR*”) sent us an email with attachments that comprise what we understand to be the State’s complete file with respect to the Pier. Based on our review of the State’s documents, and our internal records, we believe the following relevant facts are largely undisputed:

- A. January 24, 1956 – The Board of Harbor Commissioners of the Territory of Hawaii approved a 5-year permit (License No. 97 / Permit No. 1124) in favor of Hilton’s predecessor in interest, Kaiser Community Homes, for the construction of a floating dock.
- B. June 24, 1958 – The Board of Harbor Commissioners granted permission to Kaiser-Burns Development Corporation, successor to Kaiser Community Homes, to replace the existing floating dock with a concrete structure / catwalk. License No. 97 was terminated and License No. 97A was issued in its place (on September 2, 1958) to allow Kaiser-Burns to locate a catwalk on the underwater area. License No. 97A contains the following language: “This license may be cancelled by the Board of Harbor Commissioners upon thirty (30) days written notice. If so cancelled, the catwalk shall be removed at no cost to the Board of Harbor Commissioners or the Territory of Hawaii.” (Paragraph 7). There is no language in License No. 97A stating or suggesting that the State owns or would own the Pier. The Pier was constructed and paid for by Kaiser-Burns Development Corporation shortly after the license was issued.
- C. July 15, 1960 – License No. 140 was issued in favor of Kaiser-Burns Development Corporation for the underwater area upon which the Pier was constructed. License No. 140 contains the following language: “The pier shall be kept in good repair by the Licensee and if found unsafe for reasonable use shall be repaired or removed on order of the Licensor at the expense of the Licensee.” (Paragraph 8). There is no language in License No. 140 stating or suggesting that the State owns or would own the Pier.
- D. September 9, 1960 – The Board of Harbor Commissioners permitted Kaiser-Burns Development Corporation to widen the Pier, but instructed the permittee to remove a building constructed thereon.
- E. June 30, 1961 – The Board of Harbor Commissioners noted that License No. 140 for the Pier was assigned from Kaiser-Burns Development Corporation to Hilton-Hawaiian Village Hotel. Revocable Permit No. 157 was issued in replacement of License No. 140. Revocable Permit No. 157 contained the following language: “The pier shall be kept in good repair by the Occupier and if the Board finds such to be unsafe for reasonable use, then, the Occupier shall repair the pier to a safe condition at its own cost and no cost to the Board.” (Paragraph 3). Again, there is no language in Revocable Permit No. 157 stating or suggesting that the State owns or would own the Pier.

F. September 1, 1964 – The DLNR issued Revocable Permit No. S-3528 in favor of Hilton-Burns Hotel Company. RP S-3528 permitted the Permittee to “enter and occupy on a month to month basis **that certain parcel of Government land** (and any improvements located thereupon) . . . being the underwater land (catwalk, catamaran pier and power boat pier) . . . containing an approximate area of 3,917 square feet **which parcel is hereinafter referred to as the ‘Premises’**” (Intro paragraph, page 1, emphasis added). Revocable Permit No. S-3528 also contains the following language: “Any major improvements erected or moved onto the Premises by the Permittee **shall remain the property of the Permittee and the Permittee shall have the right**, prior to the termination of this Permit, or within such additional period as the Board in its discretion may allow, **to remove such improvements from the Premises**; provided, however, that in the event the Permittee shall fail so to remove such improvements within thirty (30) days, after written notice to remove, the Board may elect to retain said improvements or shall remove the same and charge the cost of removal and storage if any to the Permittee.” (Paragraph 14, emphasis added). Once again, consistent with all the prior documentation, RP S-3528 contains no language stating or suggesting that the State owns or would own the Pier.

In fact, as it was clear at the time that RP S-3528 was issued, based on the previous documents referred to in paragraphs A-E above, that Hilton was the owner of the Pier, it is clear that the term “Premises” as used in RP S-3528 referred only to the “parcel” of land on which the pier and catwalk were constructed, as the State had no expectation of ownership in the improvements and could not have included them within the definition of “Premises.” For this reason, the term “major improvements erected or moved onto the Premises by the Permittee” must include all improvements constructed by Hilton and its predecessors, even those installed prior to the issuance of RP S-3528.

G. RP S-3528 continued in effect for over 45 years (except for a brief period from 1994-1997, as explained below), until it was replaced by RP S-7566 on March 4, 2010 (*See* Paragraph II.H below). During this period of several decades, the following intermittent activity / discussions regarding the Pier occurred:

1. Hilton expended approximately \$500,000 to repair and renovate the Pier after Hurricane Iniki damaged the Pier in September 1992. The State did not pay for or reimburse Hilton for these repairs.
2. In February 1994, DLNR Staff recommended, and the Board approved, assessing a \$2,000 fine relating to Hilton’s agency agreement with Atlantis Submarines, imposing an additional rental of \$11,000, terminating RP S-3528, and authorizing the Board to enter into a long term easement (25-years) with Hilton for locating the Pier on State lands.

3. RP S-3528 was cancelled on November 30, 1994 as the DLNR was set to issue Hilton a 25-year easement for the premises.
4. In February 1997, DLNR Staff reported that the long term easement documents had been prepared, but that there was a question whether the easement could be issued directly or whether public auction would be required. Staff recommended that RP S-3528 be reinstated with permission to sublet to Atlantis Submarines. Staff's recommendations were approved by the Board at a meeting in February 28, 1997.
5. During the interim between November 30, 1994 and February 28, 1997, Hilton continued to use and operate the Pier, and to pay rent to the DLNR. Although RP S-3528 was technically not in effect, the State acted as if it were. The State allowed the continued and uninterrupted use of the Pier on the terms spelled out in RP S-3528 until such time as a long-term easement could be prepared.
6. On June 24, 1997, DLNR Staff reported on the status of RP S-3528 and recommended a new monthly rent of \$2 per person who utilizes the Pier. At the June 24, 1997 Board meeting, members of the Board indicated for the first time in the almost 40-year history of the Pier that ownership of the Pier was at issue. Following testimony that Hilton built and maintained the Pier, and provided excess liability insurance for the Pier, there was significant discussion about the revenues generated by operations at the Pier. The Board elected to continue RP S-3528 in effect and approved a new minimum monthly rental of \$30,000 per month, or \$1.50 per paying customer, whichever is greater, retroactive to December 1996. This was a clear indication that RP S-3528 (and its provisions regarding ownership of the Pier) continued in effect. Had RP S-3528 truly been terminated, it would have had to be replaced with a new instrument.
7. On April 9, 1999, the Board clarified that permitted uses under RP S-3528 for the Pier include any operator that Hilton chooses to provide services to its guests and that the guests who use the Pier be included in the monthly rental calculations. At this meeting there was further discussion of the ownership of the Pier, notwithstanding the re-issuance of RP S-3528, with DLNR Staff at that time suggesting that they would like to hold a sale of a lease for the Pier at public auction. **The DLNR staff ultimately decided not to pursue the public auction because of Hilton's disputed claim of ownership of the Pier.** In fact, the Board decided to continue RP S-3528 in effect without modifying any of its substantive terms, other than updating the rental fee. We find the continuation of RP S-3528 in these circumstances dispositive on the issue of ownership.

Mr. William J. Wynhoff
Dept. of the Attorney General
April 27, 2017
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8. On October 23, 2009, the Board determined to issue new revocable permits to more than 150 tenants to update the revocable permit form.

H. On March 4, 2010, the Board and Hilton entered into Revocable Permit No. S-7566, reflecting the State's latest form for revocable permits, for the Pier. RP S-7566 contains the following language:

"Permittee is permitted to enter and occupy . . . that certain **parcel of public land** (and any improvements located thereupon) situate at Kahanamoku Beach, being the underwater land and the catwalk and catamaran pier, as indicated on the map attached hereto . . . containing an approximate area of 3,917 square feet, which parcel is hereinafter referred to as the 'Premises'" (Intro paragraph, emphasis added).

Other relevant provisions of RP S-7566 provide:

"Any major improvements, including but not limited to buildings and fences, erected on or moved onto the Premises by the Permittee **shall remain the property of the Permittee and the Permittee shall have the right, prior to the termination or revocation of this Permit, or within an additional period the Board in its discretion may allow, to remove the improvements from the Premises;** provided, however, that in the event the Permittee shall fail to remove the improvements prior to the termination or revocation of this Permit . . . **the Board may, in its sole discretion, elect to retain the improvements** or may remove the same and charge the cost of removal and storage, if any, to the Permittee." (Paragraph 6, emphasis added). This is virtually the same language that was used in Permit No. S-3528 as far back as 1964, when the Hilton's ownership of the Pier was undisputed, and should be construed to have the same meaning as in the earlier permit.

For the reasons stated in this letter, and based on the clear language of the permit, we believe the term "Premises" is clearly limited to the "parcel of public land" referred to in the permit, and that all "major improvements" located on that parcel of land, having been "erected on or moved onto" that parcel of public land solely by the Permittee, "remain the property of the Permittee."

I. In August 2016, the DLNR sent a letter to Hilton asking Hilton to elect to either remain with its revocable permit for the Pier, or to convert to a long-term easement for the Pier. Ultimately, Hilton agreed to transition to a long-term lease of easement for the Pier. The Board hearing on February 24, 2017, was supposed to be when the Board would approve the transition from RP S-7566 to the long-term lease of easement, as requested by the State. Instead, Mr. Roehrig asserted that the State owns the Pier, and you have asked us for this explanation regarding Hilton's ownership of the Pier.

III. DISCUSSION AND ANALYSIS

A. The Pier was Paid for and Constructed by Kaiser, and Hilton Succeeded to Kaiser's Interests.

There is no dispute that Pier was paid for, constructed and erected on the Premises by Kaiser-Burns Development Corporation, and that Hilton succeeded to Kaiser's interest in the hotel and the Pier. There is also no question that, since the Pier was first constructed, Hilton or its predecessor has paid for all maintenance, repairs and expansions of the Pier, and that the State has not paid anything toward the construction, maintenance or repair of the Pier.

B. The Language in both Revocable Permits Confirms Hilton's Ownership of the Pier.

From the very first permit up through and including the current permit, there is no statement in any of the permits that the State owns the Pier. On the other hand, all versions of the permits support Hilton's ownership of the Pier.

1. The earliest documentation clearly contemplated the Pier belonged to Kaiser-Burns / Hilton.
 - a. "This license may be cancelled by the Board of Harbor Commissioners upon thirty (30) days written notice. If so cancelled, the catwalk shall be removed at no cost to the Board of Harbor Commissioners or the Territory of Hawaii." (License No. 97A, Paragraph 7) (1958). The language in the preceding sentence supports the licensee's ownership of the improvements (if the State owned the improvements, then the licensee would not remove them when the license terminated), and is inconsistent with the idea that the State owned the catwalk.
 - b. "The pier shall be kept in good repair by the Licensee and if found unsafe for reasonable use shall be repaired or removed on order of the Licensor at the expense of the Licensee." (License No. 140, Paragraph 8) (1960). Once again, this language supports the Licensee's ownership and is entirely inconsistent with the idea that the State owned the pier.
 - c. RP S-3528 permitted the Permittee to "enter and occupy on a month to month basis **that certain parcel of Government land** (and any improvements located thereupon) . . . being the underwater land (catwalk, catamaran pier and power boat pier) . . . containing an approximate area of 3,917 square feet **which parcel is hereinafter referred to as the 'Premises'**" (Intro paragraph, page 1, emphasis added). This language supports the understanding that the "Premises" means the "parcel" of underwater land, as opposed to the parcel and all improvements including the Pier.

- d. Revocable Permit No. S-3528 also contains the following language: **“Any major improvements erected or moved onto the Premises by the Permittee shall remain the property of the Permittee and the Permittee shall have the right, prior to the termination of this Permit, or within such additional period as the Board in its discretion may allow, to remove such improvements from the Premises; provided, however, that in the event the Permittee shall fail so to remove such improvements within thirty (30) days, after written notice to remove, the Board may elect to retain said improvements or shall remove the same and charge the cost of removal and storage if any to the Permittee.”** (Paragraph 14, emphasis added). The terms “major improvements” and “improvements” clearly meant all improvements constructed on the underwater land by Hilton and its predecessors, including the Pier. Again, nowhere in RP S-3528 is there any statement that the State owns or would own the Pier, *unless* Hilton failed to remove such improvements within 30 days after demand to do so by the State. In the absence of such a demand to remove and failure to remove, it is clear that the improvements, including the Pier, belong to Hilton.
2. The language of the current permit, RP S-7566 (issued in 2010), further supports Hilton’s ownership of the Pier.
 - a. RP S-7566 contains the following language:

“Permittee is permitted to enter and occupy . . . that certain **parcel of public land** (and any improvements located thereupon) situate at Kahanamoku Beach, being the underwater land and the catwalk and catamaran pier, as indicated on the map attached hereto . . . containing an approximate area of 3,917 square feet, **which parcel is hereinafter referred to as the ‘Premises’**” (Intro paragraph, emphasis added).

Once again, the definition of “Premises” refers to the “parcel” of land. Black’s law dictionary defines a “parcel” as a contiguous quantity of land, and states that it may be synonymous with “lot.” If “Premises” was meant to include the improvements constructed on the “parcel,” then the definition would have explicitly included the improvements (*e.g.*, “which parcel *and all improvements thereon* are hereinafter referred to as the “Premises”). It was not so defined.

- b. Additionally, RP S-7566 contains the familiar language that “Any major improvements, including but not limited to buildings and fences, erected on or moved onto the Premises by the Permittee **shall remain the property of the Permittee and the Permittee shall have the right, prior to the termination or revocation of this Permit, or within an additional period the Board in its discretion may allow, to remove the improvements from the Premises;** provided, however, that in the event the Permittee shall fail to remove the improvements prior to the termination or revocation of this Permit . . . **the**

Board may, in its sole discretion, elect to retain the improvements or may remove the same and charge the cost of removal and storage, if any, to the Permittee.” (Paragraph 6, emphasis added).

This language in RP S-7566 is virtually the same language that was used in Permit No. S-3528 and therefore should be construed to have the same meaning as in the earlier permit, which was issued at a time when Hilton’s ownership of the Pier was undisputed. *See, e.g., Peerless Casualty Co. v. Mountain States Mutual Casualty Co.*, 283 F.2d 268 (Ninth Circuit, 1960) (holding that although the amended contract was ambiguous, the court “was unable to find from all of the evidence that there was any intent on the part of the contracting parties to give the words there used any different meaning than that given like words in the contract before the Amendment was effected.”) *Id.* In RP S-3528, the terms “major improvements” and “improvements” clearly meant all improvements constructed by Hilton and its predecessors, including the Pier. The use of identical language in RP S-7566 must mean the same thing that it meant in RP S-3528 and supports Hilton’s understanding that it is, and always has been, the owner of the Pier.

- c. The State issued RP S-7566 in March of 2010, *after* the State had raised questions about ownership of the Pier in 1997 and in 1999 and after the State had reissued or continued RP S-3528 without any change in the description of the Premises (which would be expected if the State had a different understanding of ownership of the Pier than it did when RP S-3528 was issued). The State did not include any language in the continuation of RP S-3528 or in RP S-7566 attempting to assert the State’s ownership of the Pier and, in fact, used language identical to the language in the original RP S-3528, which was issued some 30+ years before the State ever asserted an ownership interest in the Pier. Hilton believed the State’s use of this language in RP S-7566 was an acknowledgement by the State that Hilton owns the Pier. This is fully consistent with the course of conduct of the parties since the late 1950’s / early 1960’s, with Hilton paying for the Pier to be built, paying for renovations and expansions from time to time, paying for insurance, paying for repairs after Hurricane Iniki, etc. If the State had a different understanding of ownership of the Pier in 2010 than it did in 1964, it presumably would not have used language in 2010 that is identical to the language used in 1964, when ownership of the Pier was unquestioned.
- d. In addition, RP S-7566 requires that the Permittee provide a monthly record of “the total *number of people who utilize the pier*,” less those customers provided at no charge, to support the monthly toll calculations. (Paragraph 18, emphasis added). Notably, the language does not refer to the total number of people who utilize the “Premises,” but instead refers to the “pier.” In other words, the Pier is distinct from the Premises and not included within the definition of “Premises.”

Finally, although we think the historical record and language in the permits is clear that the Pier is not part of the "Premises," we remind you that, to the extent the State believes there is any ambiguity in RP S-7566's definition of "Premises," any such ambiguity is to be construed against the State. It is blackletter law recognized by our Hawaii Supreme Court that where a term or a clause remains open to more than one reading, any ambiguity must be construed "against the party who drafted the contract." *Luke v. Gentry Realty, Ltd.*, 105 Hawai'i 241, 249, 96 P.3d 261, 269 (2004).

C. Hilton Has Always Asserted Ownership of the Pier and Treated it as its Own Property.

For more than 50 years, Hilton has always asserted ownership of the Pier and has treated the Pier as its own property. Hilton pays to maintain the Pier, carries insurance for the Pier, and has never asked the State to contribute to any part of the Pier's maintenance. After Hurricane Iniki, Hilton expended approximately \$500,000 to repair and renovate the Pier, without any contribution from the State. Why would Hilton expend such large amounts of money unless it thought it owned the Pier? In 1997 and in 1999, when the DLNR Staff asserted that the State owned the Pier, Hilton objected to those assertions and has consistently and repeatedly made clear that it views itself as the sole owner of the Pier. In 1999, the Board declined to publicly auction the Pier because of Hilton's claim of ownership, and in RP S-7566 (issued in March 2010) the Board used language identical to the language used in RP S-3528 (issued in September 1964) confirming that all "major improvements . . . erected on or moved onto the Premises by the Permittee shall remain the property of the Permittee." The State made unsupported assertions of ownership in 1997 and 1999 but subsequently took actions inconsistent with that position, including continuing RP S-3528 without modifying the description of the Premises and later issuing RP S-7566 using the same language to describe ownership of the improvements as was used in RP S-3528 (when Hilton's ownership of the improvements was undisputed). By doing so, Hilton believed the Board had acknowledged Hilton as the owner of the Pier.

Stated simply, because all of the improvements located on the "parcel of public land" that constitutes the Premises were "erected on or moved onto the Premises" by the Permittee, we believe it is clear by the plain language of the permit that all such improvements "remain the property of the Permittee."

D. At No Point was the Pier Dedicated to the State or Condemned by the State.

At no point in time did Kaiser or Hilton dedicate the Pier to the State. Rather, from the beginning Hilton has at all times treated the Pier as its own, separate property. Moreover, at no point in time has the State condemned or otherwise exercised its powers of eminent domain to take ownership of the Pier. At no time has Hilton abandoned the Pier or disclaimed ownership of the Pier. And, at no time has the State issued an order to remove the Pier, which RP S-3528 established as a condition to the State's ability to "elect" to take ownership of the Pier. As RP S-7566 remains

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in effect, the State cannot now elect to assume ownership of the Pier (and if RP S-7566 is terminated, Hilton reserves the right to remove the Pier in lieu of handing it over to the State).

E. At No Point was the State Entitled to "Elect" to Own the Pier or Did the State Actually Elect to Own the Pier.

When I met with you and several DLNR Staff members last month, you suggested that perhaps ownership of the Pier "reverted" to the State when RP S-3528 lapsed (1994-1997). However, there are a number of reasons why that cannot be the correct conclusion:

1. The State's right to "elect" to retain the improvements under RP S-3528 would have applied only if (a) the State had provided notice to Hilton to remove the improvements and (b) Hilton had failed to do so within 30 days after receipt of such notice (or such additional period as the Board in its discretion may have allowed). The State never requested that the improvements be removed and never made an election to retain the improvements (and, in the absence of a notice to Hilton to remove the Pier, could not have made such an election). In fact, the State allowed Hilton to continue to occupy and use the Pier following the purported cancellation of RP S-3528.
2. The simple cancellation of the permit, without a demand that Hilton vacate the Pier and remove it, cannot effect a transfer of title. The rules for transferring title to the Pier were clearly set out in RP S-3528, and the State failed to follow those rules. Asserting title to the Pier without providing the notice and opportunity to remove the improvements contemplated by RP S-3528 would have amounted to an impermissible taking of property without compensation and without the due process contemplated by the permit.
3. The reason for termination of RP S-3258 was not to remove Hilton from the Premises, but instead to shift from a revocable permit to a long term easement for the Pier, which the State indicated it would issue at some future time, but never did. "Cancelling" the permit while continuing to allow Hilton to occupy the Premises, and continuing to collect fees as if RP S-3528 remained in effect, is not really a cancellation. That RP S-3528 was not really cancelled is underscored by the fact that the State simply continued it in 1997 rather than replacing it with a new instrument. By allowing Hilton to remain in possession of the Pier, the State failed to take any action that would indicate an assertion of ownership. Even if the State had asserted ownership at the time, the assertion would have been ineffective. The express language of RP S-3258 required the State first to give notice to the Permittee to remove that Pier and allowed the State to "elect" to retain the improvements only if the Permittee failed to do so within a 30-day period after demand. No such demand or election was ever made. As none of the terms of occupancy changed, no change in ownership could have occurred.

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4. By its action described in paragraph G(5) in Part II above, the Board essentially acknowledged the continued existence of RP S-3528, despite the purported cancellation of that permit in favor of a long term easement. The State promised the easement, but took 3 years to finalize the documentation. The State cannot create 3 years of delay and then assert after the fact that the delay resulted in a transfer of ownership of the Permittee's property. By continuing and not altering the terms of S-3528 after the 3-year period, the State essentially acknowledged the continued effectiveness of the permit. Hilton continued to occupy the Pier with the State's permission, even if the permission was not formally documented. Without any interruption of Hilton's use and occupancy of the Pier, no transfer of ownership of the Pier could have occurred.
 5. RP S-3258 was reinstated and contained the same language as it had since 1964 authorizing Hilton to remove the improvements (language that is entirely inconsistent with the notion that the State owns the Pier).
 6. When RP S-7566 was issued, it contained the same language as RP S-3528, which must be interpreted to mean the same thing as it did in RP S-3528—*i.e.*, that, because all of the improvements that are located on the Premises (which the permit defines as the parcel of public land on which the Pier is situated) were "erected on or moved onto" the Premises by the Permittee, all improvements "remain the "property of the Permittee" and may be removed by the Permittee if and when the permit is terminated. This language is entirely consistent with Hilton's position that it is the owner of the Pier, and is entirely inconsistent with the notion that the Pier "reverted" to the State as a result of the purported termination of RP S-3258 in 1994. This provision would be completely unnecessary if the Pier were owned by the State.
- F. The State Does Not Automatically Own Improvements Built Beyond The Highest Wash Of The Waves.

Now we turn to Board member Stanley Roehrig's assertion at the February 24, 2017 Board meeting that the State owns all of the property (both real and personal) makai of the highest wash of the waves, and therefore owns the Pier (since it is situated on the ocean). With all due respect for Mr. Roehrig and his public service, we trust you agree that his assertion is not a correct statement of the law. Both Christina Ohira from my office (for Hilton) and Russel Tsuji (DLNR Land Administrator) sought to correct Mr. Roehrig at the meeting, however, Mr. Roehrig was adamant about his views.

As you know, the lineage of shoreline boundary cases (beginning with *Application of Ashford*, 50 Haw. 314) is focused on the *location of the shoreline for purposes of determining the boundary between private property and public lands*. These cases have *nothing to do* with whether improvements constructed beyond the shoreline boundary are owned by the State or private land owner.

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Contrary to Mr. Roehrig's assertion, it has been the State's practice (as confirmed by Russel Tsuji at the February 24, 2017 BLNR meeting), that improvements built beyond the shoreline do *not* automatically become property of the State.¹ Of course, this is consistent with including the language in both RP S-3258 and PR S-7566 that the permittee may remove the improvements. In any event, we are entirely unaware of any Hawaii case that stands for the proposition asserted by Mr. Roehrig.

G. The State Is Estopped From Claiming Ownership Of The Pier.

In the late 1990's, the State asserted ownership of the Pier. Hilton publicly disputed the State's claims at that time. Thereafter, the State re-issued RP S-3528 and later replaced it with RP S-7566, which contained the same language as was contained in the original RP S-3528, which was issued at a time when Hilton's ownership of the Pier was undisputed. Had RP S-3528 truly terminated, and had there been a change in ownership of the Pier as a result, one would have expected a new instrument to have been issued in 1997 using different language to describe the Premises than had been used before. Had the State truly believed itself to be the owner of the Pier, it should have litigated the issue at the time. At no time in the nearly 18-year period since RP S-3528 was reissued in April 1999 until Mr. Roehrig's assertion in February 2017, did the State ever assert an ownership interest in the Pier. The State made no assertion of ownership of the Pier when it issued RP S-7566 in 2010. Instead, the Board used language concerning the ownership of improvements that is virtually identical to the language used in the original RP S-3258. This language, which makes clear that the Permittee owns all improvements erected or moved onto the state owned lands covered by the permits, has been virtually unchanged for more than 50 years. Mr. Roehrig cannot simply reassert ownership of the Pier in the face of this history and make it so. Hilton has expended considerable monies and resources in believing itself to be the owner of the Pier. It would be highly inequitable and inappropriate for the State to be regarded as the owner of the Pier in these circumstances. The State should be estopped² from asserting ownership of the Pier.

¹ Indeed, we would think the State would be very concerned about asserting such a position, as we believe this would open the State up to very significant possible future liability with regard to various improvements built beyond the shoreline over which the State currently exerts no control (but with regard to which the State could be liable in tort and otherwise, were the State to suddenly claim all such improvements were owned by the State).

² We recognize that the doctrine of estoppel, as applied to a state, involves additional legal issues and considerations than are involved in disputes between private parties. However, estoppel is clearly available here where it would be used to prevent manifest injustice, as opposed to preventing the State from exercising its sovereign power. *See, e.g., State v. Zimring*, 58 Haw. 106, 126, 566 P.2d 725, 738 (1977) (citing *Yamada v. Natural Disaster Claims Comm'n for the County of Hawai'i*, 54 Haw. 621, 629, 513 P.2d 1001, 1006 (1973), *abrogated on other grounds by Morgan v. Planning Dep't, County of Kauai*, 104 Hawai'i 173, 183, 86 P.3d 982, 992 (2004)).

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IV. CONCLUSION

Finally, based on our discussions with multiple members of the current DLNR Staff, we understand that the Staff agrees that Hilton owns the Pier. Given all of the foregoing, we hope that the State will acknowledge that the Pier is owned by Hilton, and therefore that it would be an unlawful act and unlawful seizure of Hilton's property, including in violation of Art. I, secs. 5, 7, and 20 of the Hawaii Constitution, and the 4th, 5th, and 14th Amendments to the United States Constitution, if the State were to attempt to auction off the Pier to the highest bidder at public auction. Hilton reserves all its rights, including to sue the State, and to remove the Pier as provided in RP S-7566, if the State persists in its position.

Very Truly Yours,

A handwritten signature in black ink, appearing to read "Duane R. Fisher". The signature is fluid and cursive, with the first name "Duane" being more prominent than the last name "Fisher".

Duane R. Fisher

c: Mr. Gerald Gibson
Mr. Nevin Kelly
Mr. Russell Tsuji
Mr. Barry Cheung

DEFERRED

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

February 24, 2017

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

PSF No.: 16OD-164

OAHU

Grant of Term, Non-Exclusive Easement to Hilton Hawaiian Village LLC for Pier Purposes; Termination of Revocable Permit No. S-7566; Waikiki, Honolulu, Oahu, Tax Map Key: (1)2-6-008:029

APPLICANT:

Hilton Hawaiian Village LLC, a foreign limited liability company

LEGAL REFERENCE:

Sections 171-6, 13, 17, 53(c), and 55, Hawaii Revised Statutes, as amended.

LOCATION:

Portion of submerged land located in Waikiki, Honolulu Oahu, identified by Tax Map Key: (1) 2-6-008:029, as shown on the maps attached as **Exhibit A-1** and **A-2**.

AREA:

3,930 square feet (more or less), subject to review and approval by the Department of Accounting and General Services, Survey Division

ZONING:

State Land Use District: Conservation
City & County of Honolulu LUO: Public Precinct

TRUST LAND STATUS:

Section 5(a) lands of the Hawaii Admission Act
DHHL 30% entitlement lands pursuant to the Hawaii State Constitution: No

~~APPROVED~~ ^{Deferred} BY THE BOARD OF
LAND AND NATURAL RESOURCES
AT ITS MEETING HELD ON
February 24, 2017 Go.

EXHIBIT " 2 "

D-9

CURRENT USE STATUS:

Encumbered by Revocable Permit No. 7566 to Hilton Hawaiian Village LLC, for recreational boating purposes at a current monthly rent of \$33,766 or \$1.50 per customer, whichever is greater. Staff notes the permit area described in the permit document is 3,917 square feet.

CHARACTER OF USE:

Right, privilege and authority to use, repair, and maintain existing pier over, under and across State-owned land.

COMMENCEMENT DATE:

To be determined by the Chairperson.

ANNUAL BASE and PERCENTAGE RENT:

To be determined by independent appraisal establishing fair market rent, subject to review and approval by the Chairperson, noting that the gross receipts for the calculation of percentage rent shall mean all income and revenue derived from, relating to, or connected with the operations, sales, and services rendered under the easement.

METHOD OF PAYMENT:

Semi-annual payments, in advance for base rent, and in arrears for percentage rent.

RENTAL REOPENINGS:

At the end of every ten (10) years of the easement, by independent appraisal.

EASEMENT TERM:

Fifty-five (55) years

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

In accordance with Hawaii Administrative Rule Sections 11-200-8 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, 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." See **Exhibit B**.

DCCA VERIFICATION:

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

APPLICANT REQUIREMENTS: Applicant shall be required to:

1. Pay for an appraisal to determine one-time payment; and
2. Obtain concurrent resolution from the Legislature pursuant to 171-53 (c), HRS.

Note: The requested area is mapped in Governor's Executive Order No. 4190 under CSF 24,360 dated October 13, 2006. So, the same map can be used for the subject easement with some minor revisions, if necessary.

REMARKS:

Starting in 1956, the Board of Harbor Commissioners of the Territorial government (BHC) granted three (3) licenses¹ to the owner/developer of the adjacent hotel property for the use of a strip of underwater area to construct a boat dock, concrete catwalk, and catamaran pier. **Exhibit C** shows the respective areas under the various licenses.

On September 1, 1964, the Board of Land and Natural Resources approved the issuance of Revocable Permit S-3528 (RP), to the Applicant for boating purposes. The RP encompassed the concrete catwalk, catamaran pier, and boat pier shown on Exhibit C for a total area of approximately 3,917 square feet.

At its meeting on October 23, 2009, agenda item D-12, the Board authorized the re-issuance of 144 RPs to various land tenants, which included the Applicant, for the purpose of incorporating updated standard language and conditions in dated RPs. Since then, the Applicant, who owns and operates the resort complex as shown on Exhibit A-1, has been the permittee under RP S-7566.

Recently, staff sent a letter to the Applicant inquiring whether they were interested in converting the monthly revocable permit to a term easement for the same purposes. By letter dated November 15, 2016 (**Exhibit D**), Applicant, through their counsel, expressed an interest in the conversion mentioned above.

The Applicant's counsel requests the option to opt out of the easement process and remain under the RP while being responsible for any cost, e.g. appraisal fee, incurred up to that point. The subject pier engages in various commercial activities, e.g. submarine tour, as well as the annual canoe paddling race events. As such, keeping the pier, regardless of long or short-term dispositions, will continue to allow commercial vendors and the community at large the availability of the facility.

¹License Nos. 97 (1956) [superseded by 97A (1958)], 140 (1960), and 157 (1961).

In addition, the substantial amount of annual revenue (\$400,000+) currently generated via the RP helps to support the Special Land Development Fund which cover various programs/operation/staffing of the Department, for example, Office of Conservation and Coastal Lands' operation and beach restoration projects, the Commission on Water Resource Management's programs relating to stream monitoring and related studies, the Division of State Parks for lifeguard services, the Engineering Division for the Dam Safety Program and geothermal mining (such as the Puna Geothermal Venture), and the Division of Forestry and Wildlife for the Threatened and Endangered Species program, Invasive Species program, wildland fire fighting, watershed protection and restoration, and natural area reserves. Therefore, staff has no objection to the continuance of the current RP, if necessary, and recommends the termination of RP S-7566 only if the requested easement is consummated.

Upon approval of today's request, Applicant will be reminded of the requirement for concurrent resolution from both houses of the legislature under Section 171-53(c), HRS prior to the issuance of the requested easement.

The Office of Conservation and Coastal Lands, Division of Aquatic Resources, Department of Planning and Permitting, Department of Facility Maintenance, and the Board of Water Supply has no objections and/or comments.

The Office of Hawaiian Affairs did not respond to the request for comments.

At its meeting on April 9, 1999, under agenda item D-20 (**Exhibit E**), the Board clarified the user of the subject pier to include any operator that HHV chooses to provide services to its guests and the calculation of the percentage rent shall include such guests. Staff recommends the adoption of the same arrangement in the forthcoming easement. In addition, staff recommends the Board delegate the authority to the Chairperson for any waiver of such percentage rent or portion(s) thereof for good cause, e.g. government use.

There are no other pertinent issues or concerns. Staff has no objection to the request.

RECOMMENDATION: That the Board:

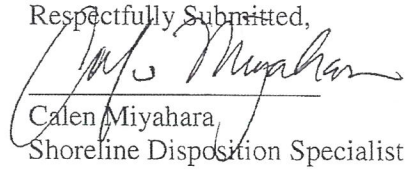
1. Declare that, after considering the potential effects of the proposed disposition as provided by Chapter 343, HRS, and Chapter 11-200, HAR, this project will probably have minimal or no significant effect on the environment and is therefore exempt from the preparation of an environmental assessment.
2. Assess a non-refundable administrative cost of \$500, under Section 171-6, HRS.
3. Authorize the subject request to be applicable in the event of a change in the ownership of the resort complex shown on Exhibit A-1, provided the succeeding owner has not had a lease, permit, easement or other disposition of State lands terminated within the last five (5) years due to non-compliance with such terms and conditions.

4. Subject to the Applicant fulfilling all of the Applicant Requirements listed above, authorize the issuance of a term, non-exclusive easement to the Hilton Hawaiian Village LLC, covering the subject area for pier 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 term shoreline encroachment easement document form, as may be amended from time to time;
 - B. The easement shall run with the land and shall inure to the benefit of the real property described as Tax Map Key: (1) 2-6-008:034², provided however: (1) it is specifically understood and agreed that the easement shall immediately cease to run with the land upon the expiration or other termination or abandonment of the easement; and (2) if and when the easement is sold, assigned, conveyed, or otherwise transferred, the Grantee shall notify the Grantor of such transaction in writing, and shall notify Grantee's successors or assigns of the insurance requirement in writing, separate and apart from the easement document;
 - C. Grantee may allow a third party to use the subject pier, provided all revenue generated shall be subject to the assessment of percentage rent and other terms and conditions of the subject easement;
 - D. Delegate the Chairperson to waive the percentage rent or portion(s) thereof for good cause.
 - E. Approval by the Governor and concurrence from the Legislature pursuant to 171-53 (c), HRS;
 - F. Review and approval by the Department of the Attorney General;
 - G. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State; and
 - H. Any shoreline hardening policy that may be adopted by the Board prior to execution of the grant of easement.

²The resort complex comprises of various tax map parcels as shown on Exhibit A-1,

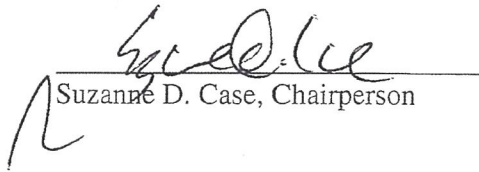
5. Termination of Revocable Permit No. S-7566 upon the issuance of the requested easement.

Respectfully Submitted,



Calen Miyahara
Shoreline Disposition Specialist

APPROVED FOR SUBMITTAL:



Suzanne D. Case, Chairperson

Land Board Meeting: February 24, 2017; D-9: Deferred.

Deferred.

EXHIBIT A-2



Administrative Testimony
Testimony of Kamanaʻopono Crabbe, Ph.D
Ka Pouhana, Chief Executive Officer

Board of Land & Natural Resources
Submittal Item D-10

REPORT ON WITHDRAWAL OF ITEM REQUESTING GRANT OF TERM, NON-
EXCLUSIVE EASEMENT TO HILTON HAWAIIAN VILLAGE LLC FOR PIER PURPOSES;
TERMINATION OF REVOCABLE PERMIT NO. S-7566; WAIKĪKĪ, HONOLULU, OʻAHU,
TAX MAP KEY: (1)2-6-008:029

June 9, 2017

9:00 a.m.

Conference Room 132

The Administration of the Office of Hawaiian Affairs (OHA) offers the following **COMMENTS** on agenda item D-10, regarding the withdrawal of a proposal to issue a long-term easement for submerged lands fronting the Hilton Hawaiian Village (Hilton) resort. OHA appreciates the Department of Land and Natural Resources' (DLNR's) need for sufficient financial support to carry out its critical responsibilities in conserving and protecting our natural and cultural resources, and has long advocated for accountability and due diligence in ensuring a fair return from the Department's revenue-generating lands; accordingly, OHA appreciates the efforts made over the past decade to ensure appropriate returns from the commercial use of this unique property. **However, OHA believes that the ownership of the subject pier is a matter meriting further discussion, and urges the Board to expressly deny conceding to the ownership claim made by Hilton, to better protect the State's and public's long-term interests.**

1. The construction and maintenance of the pier on submerged public trust lands by Hilton's predecessor in interest did not establish a perpetual right of personal ownership in Hilton.

As a preliminary matter, Hilton appears to imply that the construction and maintenance of the subject pier by its predecessor in interest, pursuant to Territorial licenses, should weigh in favor of its current ownership of the pier. However, the ownership of permanent fixtures, such as a concrete pier, constructed and maintained by a licensee, does not necessarily convey perpetual personal ownership. **Such fixtures may in fact be considered part of the real property that would revert to the lessor or licensor upon the end of the lease or license term.**¹ With such an understanding, there would be

¹ See, e.g., *Apolo v. Kauo*, 7 Haw. 755, 756 (1889) ("It is undoubtedly the law by weight of authority, that where one builds a house on the land of another, the house becomes a part of the realty and the property of the owner of the land, unless there is an agreement . . . that it is removeable by the builder); *Kahinu v. Aea*, 6 Hawaii 68 (1881) (recognizing that a house affixed to the land became part of the realty); Rev'd Laws of

no need for express clarification as to the government's eventual ownership of the pier, contrary to Hilton's suggestions; instead, an express grant of ownership from the government would appear necessary to convey ownership of the pier to subsequent permittees.

Notably, per Hilton's own memo, the revocable permits issued to it well after the completion of the pier expressly define the permitted "parcel" as "being the underwater land (catwalk, catamaran pier and power boat pier)" (emphasis added). This description of the catwalk and piers as part of the "underwater land" parcel is consistent with the understanding that the pier itself should be considered part of the realty of the submerged lands owned by the State.

2. Conditions requiring the maintenance and removal of the subject pier do not preclude potential state ownership and are consistent with the special privileges afforded to Hilton and its predecessors.

Hilton suggests that its maintenance of the pier, which appears to have been a consistent express or implied² license and revocable permit condition, somehow confirms its ongoing title to a fixture that would otherwise be considered part of the realty owned by the State. However, conditions requiring the maintenance of government property by a licensee or permittee of such property may merely reflect the contractual consideration that would be reasonably expected of the licensee or permittee to perform, particularly given the special benefits realized from the use of such property. The original license provisions requiring the continuous "good repair" of the pier also support the pier's public nature, and the government's interest in ensuring future government ownership and public use.

Similarly, license conditions requiring that the licensee remove a structure that has fallen into disrepair is a prudent commercial land management measure, to ensure that the landowner is not left with the costly burden of removing what could be a dilapidated or otherwise unwanted fixture. Such conditions do not necessarily express any intent as to the present or future ownership of the fixture. In this case, the government's ability to control the fate of the pier, as described in license provisions requiring the removal of the pier "if found unsafe . . . on order of the Licensor," appears less reflective as to the contemplated future ownership of the pier, as to enforce the maintenance provisions described above. Similar provisions in certain other state leases and subleases also are not interpreted to preclude eventual state ownership of improvements, but to ensure that lessees maintain the condition of real property they may be vacating.

Haw. 128-1 (1955) ("Property" or "real property" means and includes all land and appurtenances thereof and the buildings, structures, fences and improvements erected on or affixed to the same").

² While the actual revocable permit language is not immediately available, the implicit duty to maintain the Premises is likely to be either express, or inferred through standard indemnification provisions invariably included in State permits.

Given the particularly unique privileges and benefits afforded to Hilton and its predecessor, conditions requiring the maintenance of the pier as government real property would indeed appear more than reasonable. As consistently confirmed by Hawai'i courts for over a century, under the public trust doctrine, submerged lands are "different in character" from other lands held by the government; title to such lands are held in trust and inalienable, and "the control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining" (emphasis added).³ It is unclear whether Hilton's and its predecessor's control of the subject submerged lands have "promot[ed] the interest of the public therein," although it is clear that the private commercial use of this area has, to some degree, impaired public use. Hilton's private commercial use of state submerged lands in itself is therefore a singularly unique benefit under the public trust doctrine and a long and continuous line of Hawai'i case law. Moreover, this private commercial use has also provided significant substantial benefit to Hilton, particularly in the decades preceding the current revocable permit; as reported in the Honolulu Star-Bulletin, "Land records show Hilton was paid a total of \$1.3 million during 1995 and 1996 for the Atlantis sublease, but paid the state less than \$60,000 in rent during the same period."⁴ **Accordingly, conditions requiring the maintenance and, if necessary, clean-up of the pier at the Hilton's expense are a reasonable consideration for the substantial and particular benefits Hilton has enjoyed, not an indication of Hilton's perpetual property ownership of the fixture.**

3. The "Premises" described in the revocable permits explicitly include the pre-existing pier.

Hilton also argues that its ownership is confirmed by language found in the past and current revocable permits, based on a misreading of the permits' otherwise clear description of the permitted "Premises." Again, per Hilton's own memo, both the immediate and past revocable permits describe the permitted "parcel of public land" as "being the underwater land (catwalk, catamaran pier and power boat pier)" (emphasis added)—clearly describing the pre-existing fixtures (the "catwalk, catamaran pier and power boat pier") as part of the public parcel. **Accordingly, arguing that the covered "Premises" excludes the pre-existing pier fixtures is clearly contrary to the express and unambiguous language of the permits, as well as the common understanding that permanent fixtures generally become part of the realty of a parcel.**

4. The "Improvements" that Hilton claims to have a right to remove, do not include an immovable, pre-existing pier that Hilton did not construct and that was expressly contemplated as part of the permitted property.

³ *King v. Oahu Railway*, 11 Haw. 717, 1899 WL 1502 (1899); see also *In re Water Use Permit Applications*, 94, Haw. 97, 9 P.3d 409 (2000) (The public trust doctrine "traditionally preserv[ed] public rights of navigation, commerce, and fishing"); *Hawaii County v. Sotomura*, 55 Haw. 176, 182-184 (1973).

⁴ Ian Lind, *Hilton pays up: The sweetheart lease deal ends for the pier fronting the hotel*, HONOLULU STAR-BULLETIN, Sept. 24, 1997.

Staff's acquiescence to Hilton's ownership claim appears largely based on its threat to exercise its right to "remove the improvements from the Premises," with respect to the pier. However, this right extends only to "major improvements . . . erected on or moved onto the Premises by the Permittee." For the reasons below, this right to remove does not extend to the pier.

First, as noted above, the "Premises" described in the permit explicitly include the "catwalk, catamaran pier and power boat pier" affixed to the lands at issue. As a matter of definition, Hilton could not have "erected on or moved onto the Premises," fixtures which were already an explicit part of the "Premises."

Second, even if "Premises" were defined as the submerged lands without any fixtures, the pier was not "erected on or moved onto the Premises by the Permittee" (emphasis added). By Hilton's own timeline description, the pier was constructed and expanded by Kaiser-Burns Development, well before it held any interest in the subject parcel. Hilton therefore cannot be considered to have erected or moved onto the pier on to the "Premises" under its revocable permits, and therefore does not have a right to remove the pier under the cited revocable permit language.

Finally, the cited permit language appears to operate prospectively, applying only to "major improvements" subsequently moved onto the Premises by Hilton. There is no reason to believe that the permits granted a retroactive property interest to government-owned improvements that existed well before the permits existed.

Therefore, the language of the revocable permits clearly indicate that the pier should not be considered the "major improvements" to which Hilton's discretionary right to remove may apply, and any action by Hilton to remove the pier without State consent should be construed as an unauthorized action under its revocable permit.

5. The State's failure to elect to retain "improvements" pursuant to the revocable permit is inapplicable to the ownership of the pier.

Hilton further contends that the State did not elect to acquire the pier as a "major improvement" under the current revocable permit's provisions. However, as stated above, the pier should not be considered a "major improvement . . . erected on or moved onto the Premises by the Permittee," and should instead be considered as part of the parcel of public land inalienably owned by the State. Accordingly, the failure of the State to elect to acquire the pier is irrelevant to Hilton's claim of ownership.

6. Any estoppel claim is unsupported by Hilton's own continuous maintenance activities and investments well before the State acknowledged the dispute in ownership of the pier.

Hilton claims that the State should be estopped from claiming ownership of the pier, due to its investments made in pier maintenance after the State acknowledged a dispute in ownership. However, it isn't clear whether the State even conceded to Hilton's ownership at that time, and the cited record suggests that the State merely acknowledged

the potential ownership dispute, and declined to litigate the matter. Notably, the State continued to include the above-cited language in the new revocable permit it subsequently issued to Hilton, which explicitly contemplated the pier as an integral part of the "parcel of public land" to which it was granting Hilton a right of occupancy.

Moreover, Hilton's own assertions do not suggest any reliance on the State's actions, as necessary for an estoppel claim. Rather, they instead indicate a long history of maintenance and investment in the pier, well prior to the late 1990's ownership dispute it uses as the basis of its estoppel claim. Hilton's investments after this time appear to merely continue its decades-long, status quo actions of maintaining the pier, from which it directly and substantially benefited, and continues to benefit. In addition, such maintenance actions may have already been an express or implied requirement under its revocable permit terms and conditions, precluding any claim of discretionary reliance on the actions of the State.

As an apparent claim of equity, Hilton also must show that it suffered detrimental impacts from the actions or representations of the State. In this case, Hilton benefitted substantially from the State's acknowledgement of its "disputed ownership," which allowed Hilton to continue operating under a revocable permit and without undergoing any costly appraisal and potential public auction process.

Accordingly, there may be serious deficiencies in any estoppel claim asserted by Hilton. **Ironically, a concession by the State to Hilton's ownership claim to the pier at this point in time may actually provide the basis of a much more credible estoppel claim in the future, should the matter of ownership be brought up once again.**

7. Conclusion.

OHA understands that the matter at hand is to simply maintain the status quo of the "temporary" revocable permit Hilton has held for the last seven years, and abandon the most recent attempt to provide a more proper and long-term disposition of the land at issue. OHA also appreciates the substantial financial support the Department currently receives from Hilton's use of this unique and one-of-kind parcel. **However, OHA strongly urges the Board to expressly reject any concession to Hilton's claim of ownership of the pier, to which the State has a strong claim for ownership, and from which it may have the opportunity to generate substantially more revenues in the future.**

Absent an express grant or recognition of ownership by the State, it seems very probable that the permanently affixed pier at issue is legally a fixture and part of the realty of submerged lands, to which the State owns inalienable title. The language in Hilton's last two revocable permits clearly contemplates this understanding, and does not convey any right to Hilton to remove any alleged "improvements" it did not construct, and which are in fact an express and definitive part of the "Premises" it is being permitted to occupy. Given the contents of the instant submittal, failing to expressly maintain a claim of ownership now may give rise to more credible legal claims in the future, to substantial

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detriment of the State's and public's future interests. **Therefore, an express denial of Hilton's claim to ownership may be critical at this juncture.**

Mahalo nui for the opportunity to comment on this matter.

EXHIBIT A-3

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A LAW CORPORATION

July 21, 2017

Mr. William J. Wynhoff
Dept. of the Attorney General
Kekuanaoa Building
465 South King Street, Room 300
Honolulu, Hawaii 96813

Re: Hilton Hawaiian Village, LLC's Ownership of the Pier Located at Waikiki,
Honolulu, Oahu; TMK (1) 2-6-008-029

Dear Mr. Wynhoff:

As you know, we represent Hilton Hawaiian Village, LLC ("**Hilton**"). Thank you for providing us with the Office of Hawaiian Affairs ("**OHA**") June 9, 2017 written testimony ("**OHA's Testimony**") asking the BLNR not to acquiesce to Hilton's claims of ownership of the pier fronting Duke Kahanamoku Beach at Hilton Hawaiian Village in Waikiki (the "**Pier**"). OHA's Testimony and analysis of Hawaii law is flawed and omits to reference controlling Hawaii case law. Hilton respectfully urges the BLNR not to be misled by OHA's Testimony.

OHA Fails to Cite Controlling Hawaii Case Law Re "Fixtures"

The thrust of OHA's Testimony is that the Pier is a fixture (*i.e.*, part of the realty), not an improvement capable of being removed. **However, OHA fails to reference the legal test for what constitutes a "fixture."** Our Hawaii Intermediate Court of Appeals has adopted and applied the traditional three-pronged test for determining whether an improvement to real property in fact becomes a fixture: (1) the actual or constructive annexation of the article to the realty, (2) the adaptation of the article to the use or purpose of that part of the realty with which it is connected, and (3) the intention of the party making the annexation to make the article a permanent accession to the freehold. *Kaheawa Wind Power, LLC v. Cty. of Maui*, 135 Haw. 202, 347 P.3d 632, 640 (Ct. App. 2014) (citing 35A Am. Jur. 2d Fixtures § 4g).

In *Kaheawa*, the Court determined that wind turbines, mounted on towers and bolted onto poured concrete foundation slabs affixed to the land, were **not** fixtures. The court focused on the second prong, and reasoned that the turbines were only necessary to the utility of the land **because of the particular business** (wind generated electrical power) that Kaheawa was currently operating and were not useful to the land "whatever business may be carried on upon it." *Id.* at 211, 347 P.3d at 641. Therefore, the Court determined the turbines were not fixtures.

Applying this test toward the Pier, under the first prong the Pier has clearly been annexed to the submerged lands. Under the second prong, the adaptation of personal property to real property occurs when an item has become an important or essential part of the land's use or enjoyment.

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EXHIBIT "A-3"

35A Am. Jur. 2d Fixtures § 11. The Pier is certainly important to Hilton's enjoyment of the land. However, just as with the wind turbines in the *Kaheawa* case, the Pier is not essential to the enjoyment of the land generally, because the submerged lands would still retain use and value, even in the absence of the Pier, as land under a navigable water way, or as land to be used by the public for swimming or other water activities. On this basis alone the Pier is not a fixture.

However, the third prong is the clincher, because it considers the *intent* of the party who is making the annexation. *See id* at § 12. In particular, the underlying contract (revocable permit in this case) must be evaluated to determine intent ("when a party improves another's property pursuant to a contractual agreement, that party's intent, for the purposes of determining whether the improvement is a fixture, is determined from the contract's provisions concerning additions or improvements.") *Id.* at § 14. **If there is doubt as to the intent, the property should be regarded as personal property rather than as a fixture.** *Id.* at § 12. Intention is ordinarily held to be the controlling test in determining a tenant's right to fixtures annexed by the tenant. *Id.* at § 13.

As you know, the current version of the permit provides that "any major improvements erected or moved onto the Premises by the Permittee shall remain the property of the Permittee and the Permittee shall have the right . . . to remove such improvements."¹ As Hilton has consistently and repeatedly asserted, Hilton understood that the intent of this language was that it owns the Pier and has the right to remove the Pier. Since the third prong is evaluated with reference to Hilton's intent, the Pier is clearly not a fixture.

OHA Conveniently Omits Dispositive Language and Misinterprets Case Law

The OHA Testimony cites *Apolo v. Kauo*, 7 Haw. 755, 756 (1889) for the proposition that the Pier should be considered a fixture. However, the OHA Testimony overlooks the dispositive language in *Apolo*. In full, the court stated:

It is undoubtedly the law by weight of authority, that where one builds a house on the land of another, the house becomes part of the realty and the property of the owner of the land, **unless there is an agreement, express or implied, between the parties that it is removable by the builder, in which case the house is personal property**"

Apolo v. Kauo, 7 Haw. 755, 756 (1889) (emphasis added). RP S-7566 contains an express agreement between the parties that the **"Permittee shall have the right . . . to remove the improvements from the Premises"** (Paragraph 6, emphasis added). Following *Apolo*, this express agreement also leads to the conclusion that the Pier is personal property, not a fixture.

¹ We think that under the current permit the definition of "Premises" clearly means the submerged "parcel" of land. However, to the extent OHA or the state feel there is any ambiguity in the definition of Premises, as pointed out in our April 27, 2017 letter, such ambiguity must be construed against the state, as the drafter of the permit.

Mr. William J. Wynhoff
Dept. of the Attorney General
July 21, 2017
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Finally, OHA also incorrectly relies on *King v. Oahu Railway*, 11 Haw. 717 (1899) and quotes an excerpt out of context to argue that Hilton's lease of submerged lands is "different in character," and should be inalienable, because private commercial use impairs public interests. In context, however, this excerpt refers to the "**abdication of the general control** of the state over lands under navigable waters **of an entire harbor . . .**" by way of condemnation. *Id.* at 724 (emphasis added). Here, there is no condemnation and Hilton is not taking title to any submerged lands. Rather, the State is merely issuing a revocable permit (or long term easement) for less than one-tenth of an acre of submerged land under the Pier. In fact the *King* Court said:

The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks, and piers thereon, for which purpose the state may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants It is grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the state.

11 Haw. at 723-24 (emphasis added). OHA conveniently omits this language (which came just before their excerpt). As the Court clearly states, however, private piers can serve as aids to commerce and do not necessarily impair public interest in the remaining waters and lands.

Hilton urges the BLNR not to be misled by OHA's Testimony.

Please let us know if we can provide any further information to assist you or the BLNR in this matter. Thank you.

Very Truly Yours,

A handwritten signature in black ink, appearing to read "Duane R. Fisher". The signature is fluid and cursive, with a large initial "D" and a stylized "F".

Duane R. Fisher

c: Nevin Kelly, Esq.