

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

June 22, 2018

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

Ref: 18OD-057

OAHU

Amend the Grant of Non-Exclusive Easement Recorded at the Office of the Assistant Registrar, Land Court as Document No. 1943271 for Public Pedestrian Shoreline Right-of-Way Purposes, Kaluahole, Honolulu, Oahu; Tax Map Key: (1) 3-1-037: 013.

BACKGROUND:

A public easement was originally provided over the private property registered as Land Court Application No. 1582, Map 1. Around 1991, the subject private property was undergoing subdivision into Lots 1 and 2, which are currently identified as tax map key (1) 3-1-037:006 and 013 respectively. During the subdivision, the owner planned to realign and improve the easement by building a new stairway that straddled over Lots 1 and 2. See **Exhibits A1 to A2** for the location of the easement.

Pursuant to the approval on January 11, 1991, Item F-7, as amended on February 28, 1992, Item F-4 (**Exhibit B**), the Board of Land and Natural Resources accepted the Grant of Non-Exclusive Easement from the then owner of Lots 1 and 2, Kikuei Resort, Inc. The easement was recorded at the Office of the Assistant Registrar, Land Court as Document No. 1943271 on August 13, 1992 (**Exhibit C**). The easement requires the grantor [private owners] to maintain the easement area and provide liability insurance to the State.

Further, Condition 4 of the subject Easement states, "This easement or any rights granted herein shall not be sold, assigned, conveyed, leased, mortgaged, or otherwise transferred or disposed of, directly or by operation of law, except with the prior written consent of the Grantee". Based on the plain language of the condition, the State of Hawaii, as Grantee, must consent to the conveyance of its interest under the easement or any related rights. This provision appears to be redundant and confusing.

Over the years, ownership of both Lots 1 and 2 were changed multiple times. Mr. Hisanaga Tanimura, the current owner of Lot 2, through his attorney, requests to replace Condition 4 described above by "Notwithstanding the forgoing, no consent of the Grantee is required when Lot 2 is sold, assigned, conveyed, leased, mortgaged, or otherwise transferred or disposed of, directly

or by operation of law, by the Grantor or its successors and assigns.” Copy of the request is attached as **Exhibit D**.

Staff notes that the owner of Lot 1 never turned in any similar request to remove Condition 4 described above.

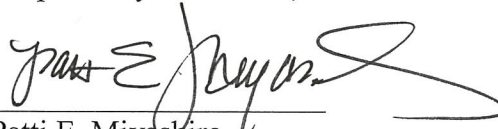
Staff believes the confusion caused by current Condition 4 can be resolved by simply removing condition 4 from the easement, instead of replacing the new language suggested by the owner's attorney described above.

Photo showing the current condition of the easement area is attached as **Exhibit E**, and there is no compliance issue.

RECOMMENDATION: That the Board authorize the amendment of the Grant of Non-Exclusive Easement recorded at the Office of the Assistant Registrar, Land Court as Document No. 1943271, by deleting the entire Condition 4 described above, further subject to the following terms and conditions:

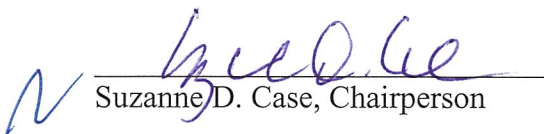
- A. The standard terms and conditions of the most current amendment of easement document form, as may be amended from time to time;
- B. Review and approval by the Department of the Attorney General; and
- C. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

Respectfully Submitted,



Patti E. Miyashiro
Land Agent

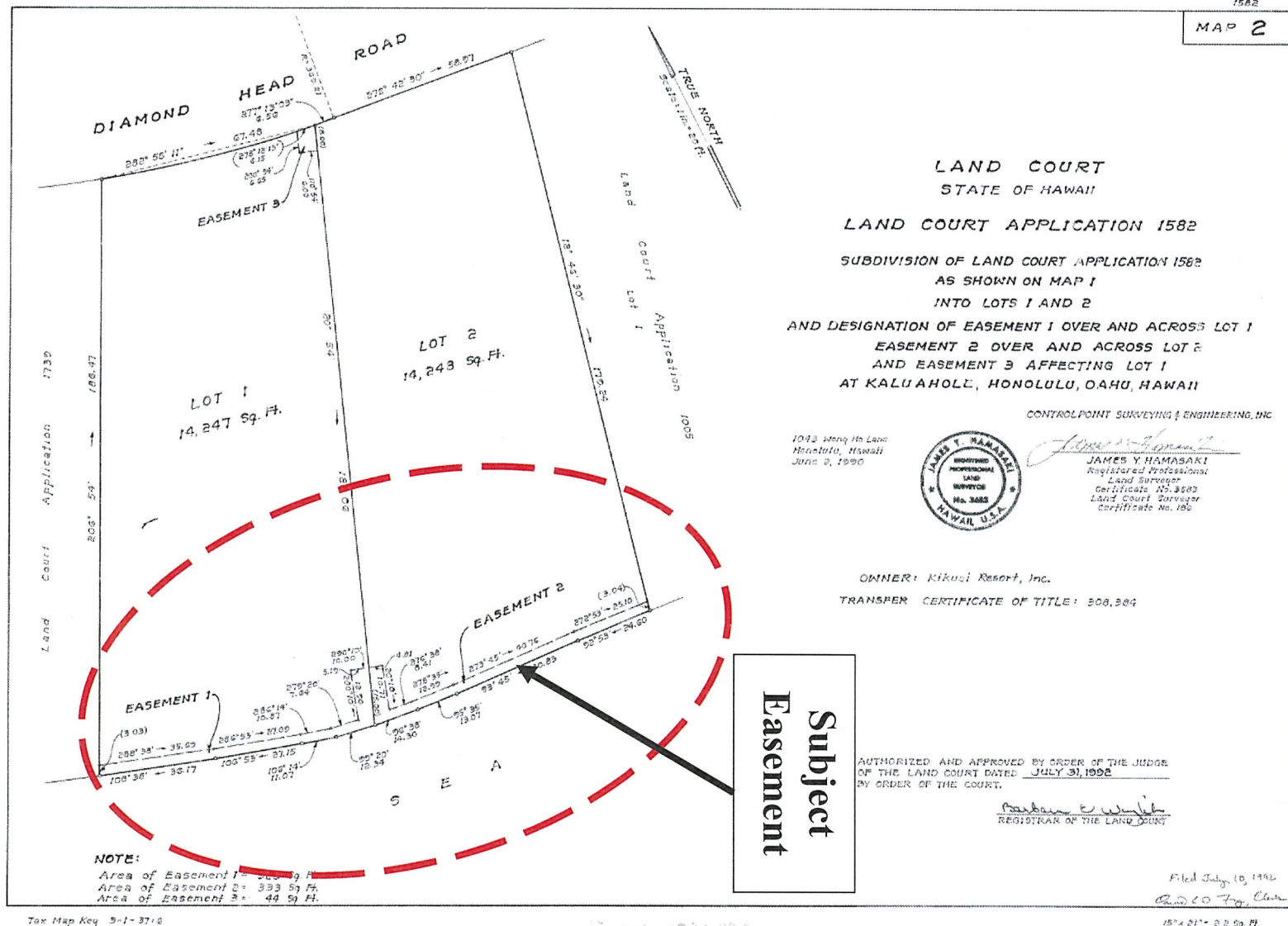
APPROVED FOR SUBMITTAL

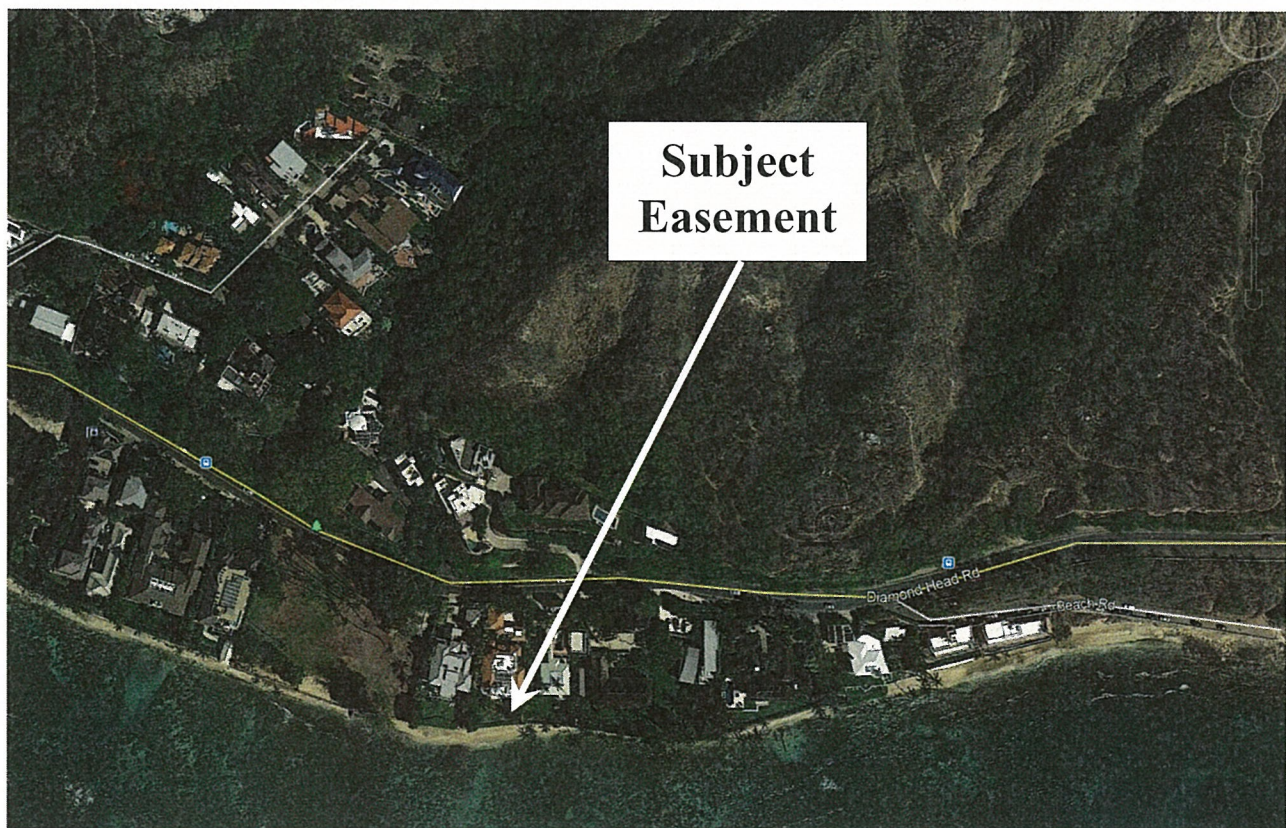
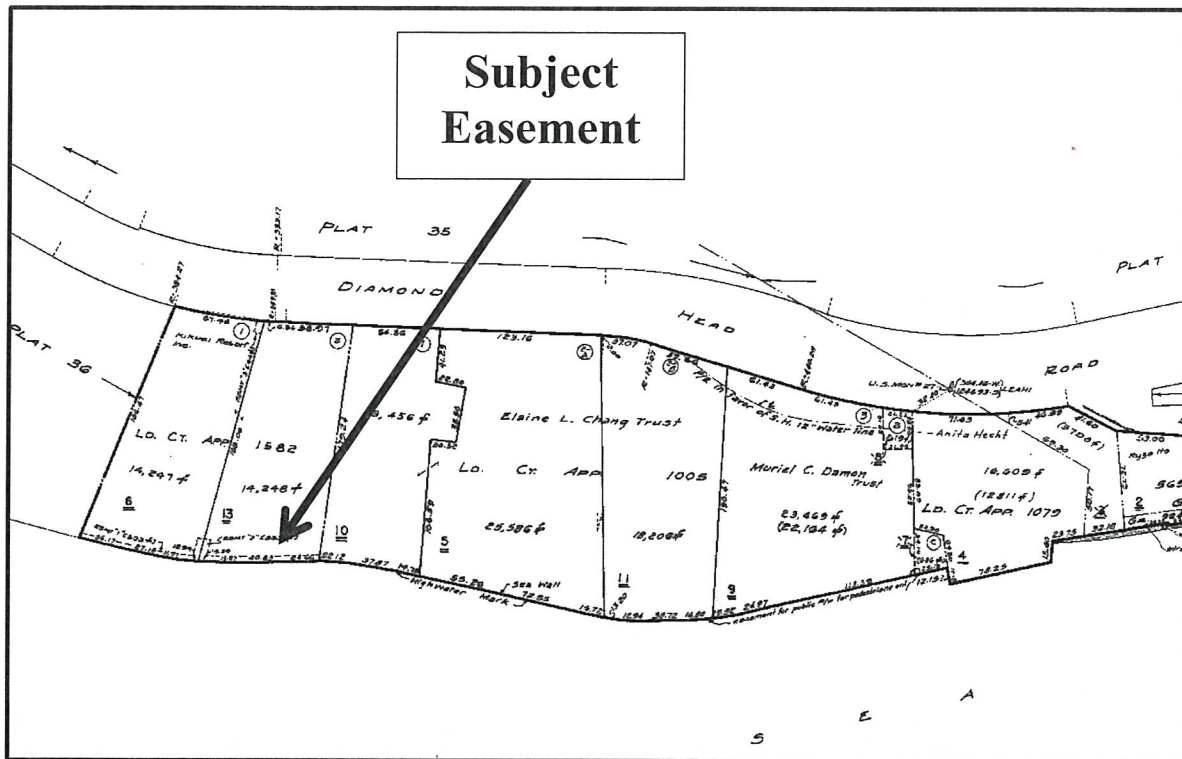


Suzanne D. Case, Chairperson

TMK (1) 3-1-037:013

EXHIBIT A1





TMK (1) 3-1-037:013

EXHIBIT A2

JOHN WAIHEE
GOVERNOR OF HAWAII



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
DIVISION OF LAND MANAGEMENT
P. O. BOX 821
HONOLULU, HAWAII 96809

AQUACULTURE DEVELOPMENT
PROGRAM
AQUATIC RESOURCES
CONSERVATION AND
ENVIRONMENTAL AFFAIRS
CONSERVATION AND
RESOURCES ENFORCEMENT
CONVEYANCES
FORESTRY AND WILDLIFE
LAND MANAGEMENT
STATE PARKS
WATER AND LAND DEVELOPMENT

February 28, 1992

Board of Land and
Natural Resources
Honolulu, Hawaii

OAHU

Subject: Amendment to Prior Board Action of January 11, 1991
(Agenda Item F-7) Authorizing Realignment of
Easement on Land Court Application No. 1582,
Kaluahole, Honolulu, Oahu, TMK: 3-1-37:6

At its meeting of January 11, 1991, under agenda Item F-7
(copy attached), the Board of Land and Natural Resources
authorized realignment of easement of a public pedestrian
shoreline right-of-way easement on Land Court Application No.
1582.

The Board submittal stated that the petition for the
subdivision and designation of easement 1 and 2 is Kikuei
Corporation, a Japan Corporation.

Our office was informed that 1. Kikuei Corporation has
changed their name to Kikuei Resorts, Inc., a Japan Corporation
and 2. are including an Easement No. 3 to be designated in Land
Court Application No. 1852 for sewer purposes.

RECOMMENDATION:

That the Board:

1. Amend the action of January 11, 1991, under agenda Item
F-7 by changing the name of the application from Kikuei
Corporation, Ltd. to Kikuei Resort, Inc., a Japan
Corporation.
2. Authorize the insertion in Land Court Application of
Easement "3" for sewer purposes for the Chairperson's
signature.

Respectfully submitted,

W. Mason Young
W. MASON YOUNG

Land Management Administrator

APPROVED FOR SUBMITTAL:

John P. Keppeler
for WILLIAM W. PATY Chairperson

EXHIBIT "B"

ITEM F-4

JOHN WAIHEE
GOVERNOR OF HAWAII



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
DIVISION OF LAND MANAGEMENT
P. O. BOX 621
HONOLULU, HAWAII 96809

AQUACULTURE DEVELOPMENT
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January 11, 1991

Board of Land and
Natural Resources
Honolulu, Hawaii

OAHU

Subject: Long and Associates on Behalf of Kikuei Corporation
Request Alignment of a Public Pedestrian Shoreline
Right-of-Way Easement at Diamond Head, Oahu

STATUTE: Chapter 171, Hawaii Revised Statutes

APPLICANT: LONG AND ASSOCIATES on behalf of Landowner: Kikuei
Corporation, Ltd.

FOR: Realignment of a public pedestrian shoreline right-
of-way easement on Land Court Application No. 1582
on TMK: 3-1-37:6 as shown on Land Board Exhibits
"A" and "B" appended to the basic file.

STATUS: Private property with a public pedestrian easement

ZONING: State Land Use Commission: Urban
City & County of Honolulu: R-5

REMARKS: The parcel identified by Tax Map Key: 3-1-37:6 was
comprised of 28,495 sq. ft. before subdivision.
The parcel previously contained the
Adams/Dillingham residences and garden. The
structures have since been demolished, and the
parcel subdivided into two lots. Lot 1, on the
west, is comprised of 14,247 sq. ft. and Lot 2, on
the east, is comprised of 14,248 sq. ft.

The two new lots are located on the makai slopes of
Diamond Head Crater, seaward of Diamond Head Road.
The lots are moderately steep, rising from
elevations of about eight feet above mean sea level
(msl) near the shoreline to about 16 to 22 feet
(msl) near Diamond Head Road, and have slopes of
about seven to eight percent. Most of the other
lots in this area are occupied by single-family
detached dwellings.

An "easement for a public right-of-way for
pedestrians only over, along and across the stone
wall along the highwater mark at the seashore" is
part of the property deed for the two lots.

ITE1 F-7

January 11, 1991

REMARKS: Approximately 92 feet of the seawall is located in Lot 2. A portion of the existing CRM sideyard wall on the west edge of Lot 1 and a portion of the existing wooden sideyard fence on the east edge of Lot 2 block the public easement along the stone seawall established in the deed.

Lot 1 is bordered by Diamond Head Access Park on its western edge; and a single-family residence borders Lot 2 on its eastern edge. Single-family residential structures are under construction on both Lots 1 and 2. Diamond Head Beach Park is located about 1000 feet to the east of the two lots.

The applicant now proposes to construct a new beach access between Lots 1 and 2 consisting of a concrete stairway which will straddle the property line dividing the two properties. An opening will be made into the existing seawall to accommodate the four-foot wide stairway to the shoreline. The stairway will be flanked by a pair of two-foot wide CRM walls, one on each side of the stairway. Each wall will be approximately fifteen feet long, and rise approximately five feet above the finished grade. These two walls will rise approximately 11 feet above the toe of the seawall. Two iron gates at the upper level will provide access to the stairway from each property.

In order to accommodate this construction, the applicant proposes to realign the public easement around (mauka) of the stairs.

Staff has had an opportunity to discuss this proposal with the applicant and our Department of Attorney General. The applicant has agreed to maintain and take the liability on the entire seawall, easement area, and stairway open to the public as a condition of approving the realignment of the public easement. We find this to be a win-win situation for both the private property owner and the State because the private property owner may now have direct access to the beach and the State is relieved of its maintenance responsibility on the seawall/public access easement.

RECOMMENDATION:

The Board authorize the realignment of the subject easement subject to the following conditions:

1. The landowner agrees to maintain the seawall and public easement area to the satisfaction of this Department.
2. The landowner, its successors and assigns shall indemnify and hold the State of Hawaii harmless from and against any loss, liability, claim or demand for property damage, personal injury and death arising out of any act or omission of the applicant, its successors, assigns, officers, employees, contractors and agents under this easement or relating to or connected with the granting of this easement.

Board of Land and
Natural Resources

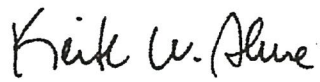

January 11, 1991

3. The public shall at all times have full and unrestricted use of the easement area.
4. Review and approval by the Department of Attorney General.
5. Other terms and conditions as may be prescribed by the Chairperson.

Respectfully submitted,


W. MASON YOUNG
Land Management Administrator *es*

APPROVED FOR SUBMITTAL:


 WILLIAM W. PATY, Chairperson

OFFICE OF THE
ASSISTANT REGISTRAR, LAND COURT
STATE OF HAWAII
(Bureau of Conveyances)

The original of this document was
recorded as follows:

DOCUMENT NO. 1943271

DATE AUG 13 1992 TIME 10:25 AM

LAND COURT SYSTEM REGULAR SYSTEM
Return by Mail () Pickup () To:

GRANT OF NON-EXCLUSIVE EASEMENT

THIS INDENTURE, made and entered into this 13th
day of August, 1992, by and between KIKUEI RESORT, INC.,
a Japan corporation, hereinafter referred to as
the "Grantor," and STATE OF HAWAII, by its Board of Land and
Natural Resources, hereinafter referred to as the "Grantee."

WITNESSETH THAT:

WHEREAS, the "LOT," situate at Kaluahole, Oahu,
Hawaii, containing an area of 28,495 square feet, as shown on
Map 1 of Land Court Application No. 1582 and described in
Transfer Certificate of Title No. 308,384, issued to Grantor,

EXHIBIT "C"

is subject to a public right-of-way for pedestrians only, over, along and across the stone wall along high-water mark at seashore; and

WHEREAS, the Grantor desires to petition the Land Court of the State of Hawaii to subdivide the LOT into two separate Lots, being identified as "LOT 1" and "LOT 2;" and

WHEREAS, the Grantor desires to realign and redesignate said public right-of-way affecting LOT 1 and LOT 2 and, also, to construct a new beach access between said LOT 1 and LOT 2 and the beach; and

WHEREAS, the Board of Land and Natural Resources, State of Hawaii, at its meeting held on January 11, 1991, approved of the realignment and redesign of said public right-of-way as well as the construction of Grantor's new beach access, subject to the terms and conditions herein;

NOW THEREFORE, the Grantor, for good and valuable consideration, the receipt of which is hereby acknowledged, and of the mutual terms, conditions, and covenants herein contained, and on the part of the Grantee to be observed and performed, does hereby grant unto the Grantee, the following non-exclusive and perpetual easement rights:

Right, privilege and authority to use the public pedestrian shoreline right-of-way, in, over, under and across those certain parcels of land situate at Kaluahole, Honolulu, Oahu, Hawaii, identified as follows:

"EASEMENT 1," containing an area of 323 square feet, being a portion of Lot 1 of Land Court Application No. 1582, and covered by Transfer Certificate of Title No. 308,384; and

"EASEMENT 2," containing an area of 333 square feet, being a portion of Lot 2 of Land Court Application No. 1582, and covered by Transfer Certificate of Title No. 308,384,

TOGETHER WITH the rights of ingress and egress to and from the easement areas for all purposes in connection with the rights hereby granted.

TO HAVE AND TO HOLD the easement rights unto the Grantee, its successors and assigns, in perpetuity, SUBJECT, HOWEVER, to the following terms, conditions and covenants:

1. The Grantor shall at all times with respect to the easement areas maintain and use due care for public safety and agrees to defend, hold harmless, and indemnify the Grantee, its officers, agents, and employees or any person acting for and on its behalf, from and against all claims or demands by the general public for damage, including claims for property damage, personal injury, or death, arising on, about or in connection with the easement areas, caused directly or proximately by any failure on the part of the Grantor to maintain and/or use due care in accordance with the terms and conditions of this Grant, or arising out of or caused by any act or omission of the Grantor.

2. The Grantor reserves unto itself, its successors and assigns, the full use and enjoyment of the easement areas and to grant to others rights and privileges for any and all purposes affecting the easement areas, provided, however, that the rights herein reserved shall not be exercised by the Grantor in a manner which interferes unreasonably with the Grantee and the general public in the use of the easement areas for the purposes for which these easements are granted.

3. Upon completion of any work performed in or upon the easement areas, the Grantor shall remove therefrom all equipment and unused or surplus materials, if any, and shall leave the easement areas in a clean and sanitary condition

satisfactory to the Grantee.

4. This easement or any rights granted herein shall not be sold, assigned, conveyed, leased, mortgaged, or otherwise transferred or disposed of, directly or by operation of law, except with the prior written consent of the Grantee.

5. The Grantor shall maintain and keep the easement areas and the improvements thereon in a safe, clean, sanitary, and orderly condition, and shall not make, permit or suffer, any waste, strip, spoil, nuisance or unlawful, improper, or offensive use of the easement areas.

6. Should future development necessitate relocation of the easements granted herein, or any portion thereof, the relocation shall be accomplished at the Grantor's own cost and expense; the Grantor will grant to the Grantee without payment of any monetary consideration, substitute easements of similar width within the reasonable vicinity of the original alignments, which substitute easements shall be subject to the same terms and conditions as that herein granted and as required by law.

7. The Grantor, in the exercise of the rights granted herein, shall comply with all of the requirements of the federal, state, and county authorities and shall observe

all county ordinances and state and federal statutes, rules and regulations, now in force or which may hereinafter be in force.

8. In case the Grantee shall, without any fault on its part, be made a party to any litigation commenced by or against the Grantor as a result of this grant of non-exclusive easement (other than condemnation proceedings), the Grantor shall pay all costs, including reasonable attorney's fees and expenses incurred by or imposed on the Grantee.

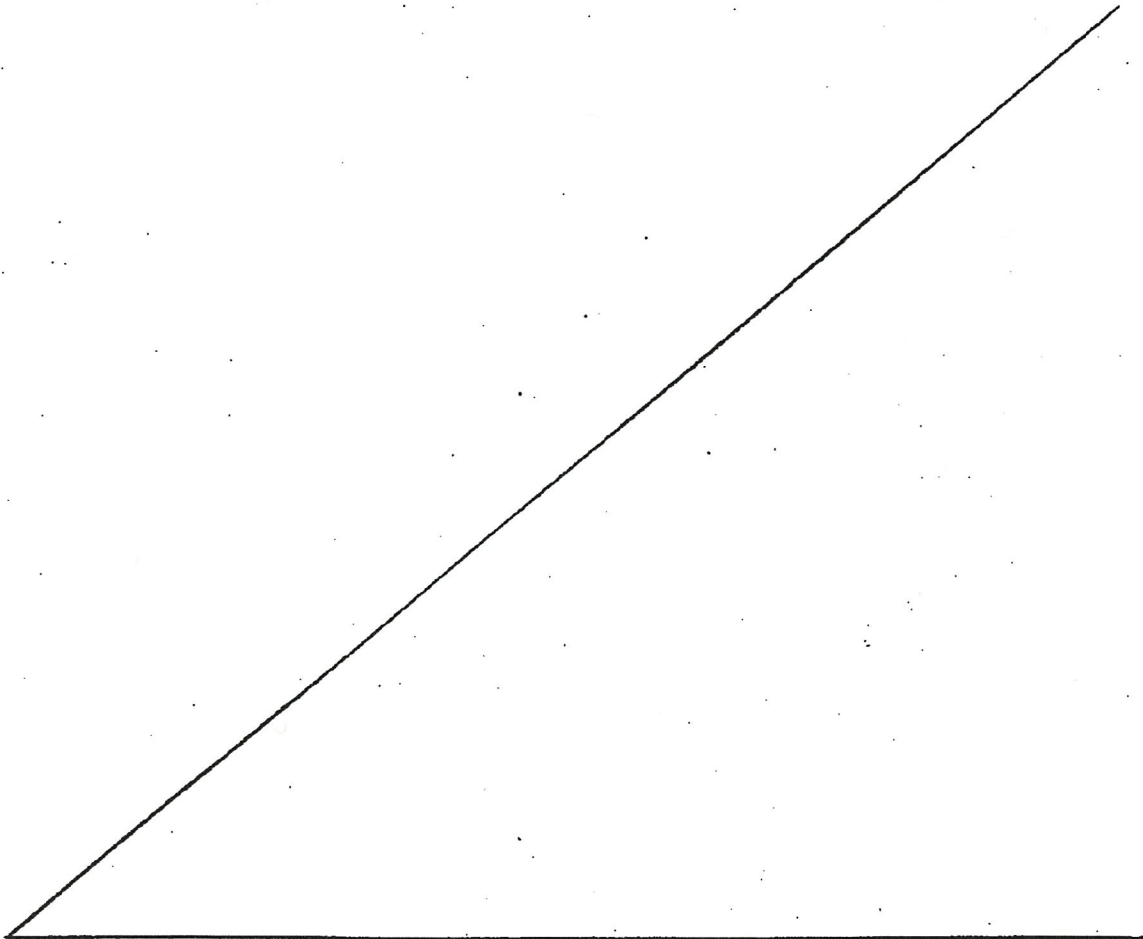
9. The Grantor shall procure and maintain, at its own cost and expense, in full force and effect throughout the perpetual easement, comprehensive general liability insurance in an amount of at least \$1,000,000.00 each occurrence and aggregate with an insurance company or companies licensed to do business in the State of Hawaii. The policy or policies of insurance shall name the State of Hawaii as an additional insured. The insurance shall cover the entire easement areas, including all grounds and all roadways or sidewalks on or adjacent to the easement in the use or control of the Grantor.

10. No building, structure or improvements shall be placed or constructed within the easement areas without the written approval of the Board of Land and Natural Resources.

Furthermore, all improvements placed in or upon the easement areas by the Grantor shall be done without cost or expense to the Grantee.

11. The general public shall have unobstructed access over and across the easement areas at all times.

12. The Grantor shall, at its sole cost and expense, diligently maintain, repair, and/or upkeep the easement areas in a good and safe condition to the satisfaction of the Grantee.



IN WITNESS WHEREOF, said KIKUEI RESORT, INC.,

Grantor herein, has caused these presents to be executed
this 11th day of March, 19 92,
and the STATE OF HAWAII, by its Board of Land and Natural
Resources, Grantee herein, has caused the seal of the
Department of Land and Natural Resources to be hereunto
affixed, and these presents to be executed this 13th
day of August, 19 92.

KIKUEI RESORT, INC.

Approved by the Board of
Land and Natural Resources
at its meeting held on
January 11, 1991.

By H. Kikuchi
Its President
Hikoichi Kikuchi
GRANTOR

By [Signature]
Chairperson and Member
Board of Land and Natural
Resources
GRANTEE

APPROVED AS TO FORM:

[Signature]
Deputy Attorney General

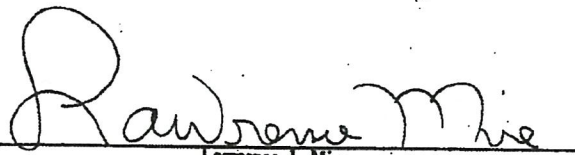
Dated: July 7, 1992

5401E

JAPAN)
CITY OF TOKYO) SS:
EMBASSY OF THE UNITED STATES OF AMERICA)

I, Lawrence J. Mire, Consul of the
United States of America, in and for Tokyo, Japan, duly
commissioned and qualified, do hereby certify that on this
11th day of March 1992, before me
personally appeared Hikoichi KIKUCHI,
to me personally known, and known to me to be the individual
described in, who, being by me duly sworn, did depose and
say that he is the President of
KIKUEI RESORT, INC., a Japan corporation,
and that foregoing instrument was signed in behalf of said
corporation by authority of its board of directors and that
said officer acknowledged said instrument to be the free act
and deed of said corporation.

IN WITNESS WHEREOF I have hereunto
set my hand and official seal the
day and year last above written.


Lawrence J. Mire
Consul of the United States of America
duly commissioned and qualified

MCCORRISTON MILLER MUKAI MACKINNON LLP
ATTORNEYS AT LAW

April 20, 2018

Suzanne D. Case
Chairperson
Department of Land and Natural Resources
Kalanimoku Building
1151 Punchbowl Street
Honolulu, Hawai'i 96813

Re: 3215 Diamond Head Road, Honolulu, Hawai'i 96815
Tax Map Key No. 3-1-037-013

2018 APR 23 AM 11:19
DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

2018 APR 20 PM 2:11

Dear Chairperson Case:

The undersigned represents Mr. Hisanaga Tanimura, the current owner of the property located at 3215 Diamond Head Road, Honolulu, Hawai'i 96815 (the "Property"). The Property is encumbered by that certain Grant of Non-Exclusive Easement, dated August 13, 1992, recorded with the Office of the Assistant Registrar of the Land Court of the State of Hawai'i as Document No. 1943271 and noted on Certificate of Title No. 308,384 (the "Grant of Easement"). The State of Hawai'i is the "Grantee" of the Grant of Easement.

The Grant of Easement grants to the Grantee the non-exclusive and perpetual "[r]ight, privilege and authority to use the public pedestrian shoreline right-of-way, in, over, under and across" Easement 1 and Easement 2. See Grant of Easement, at 3. The Property is encumbered by Easement 2, as defined in the Grant of Easement.

The Grant of Easement contains a limitation on the alienability of the easement. Section 4 states in full: "This easement or any rights granted herein shall not be sold, assigned, conveyed, leased, mortgaged, or otherwise transferred or disposed of, directly or by operation of law, except with the prior written consent of the Grantee." See Grant of Easement § 4, at 5. Based on the plain language of the provision, the State of Hawai'i, as Grantee, must consent to the conveyance of the easement or any related rights; however, this provision does not limit the alienability of the burdened property, which must be conveyed subject to the easement. We do not contest the restriction on the conveyance of the easement itself; rather, we wish to make clear that Section 4 not be confused to read that the underlying property cannot be conveyed. It would appear that Section 4 would be relevant if the grantor were the State instead of an individual property owner.

Because the easement itself can only be conveyed by the Grantee, it is redundant to require the prior written consent of the Grantee. Accordingly, we respectfully request that Section 4 of the Grant of Easement be deleted in its entirety.

EXHIBIT "D"

Suzanne D. Case
Department of Land and Natural Resources
April 20, 2018
Page 2 of 2


In the alternative, we respectfully request that the Grant of Easement be amended to include the following proposed language to clarify that no consent by the Grantee is required to convey the Property:

Notwithstanding the foregoing, no consent of the Grantee is required when Lot 2 is sold, assigned, conveyed, leased, mortgaged, or otherwise transferred or disposed of, directly or by operation of law, by the Grantor or its successors and assigns.

Thank you for your consideration of the foregoing. If you have any questions, please contact us at (808) 529-7300.

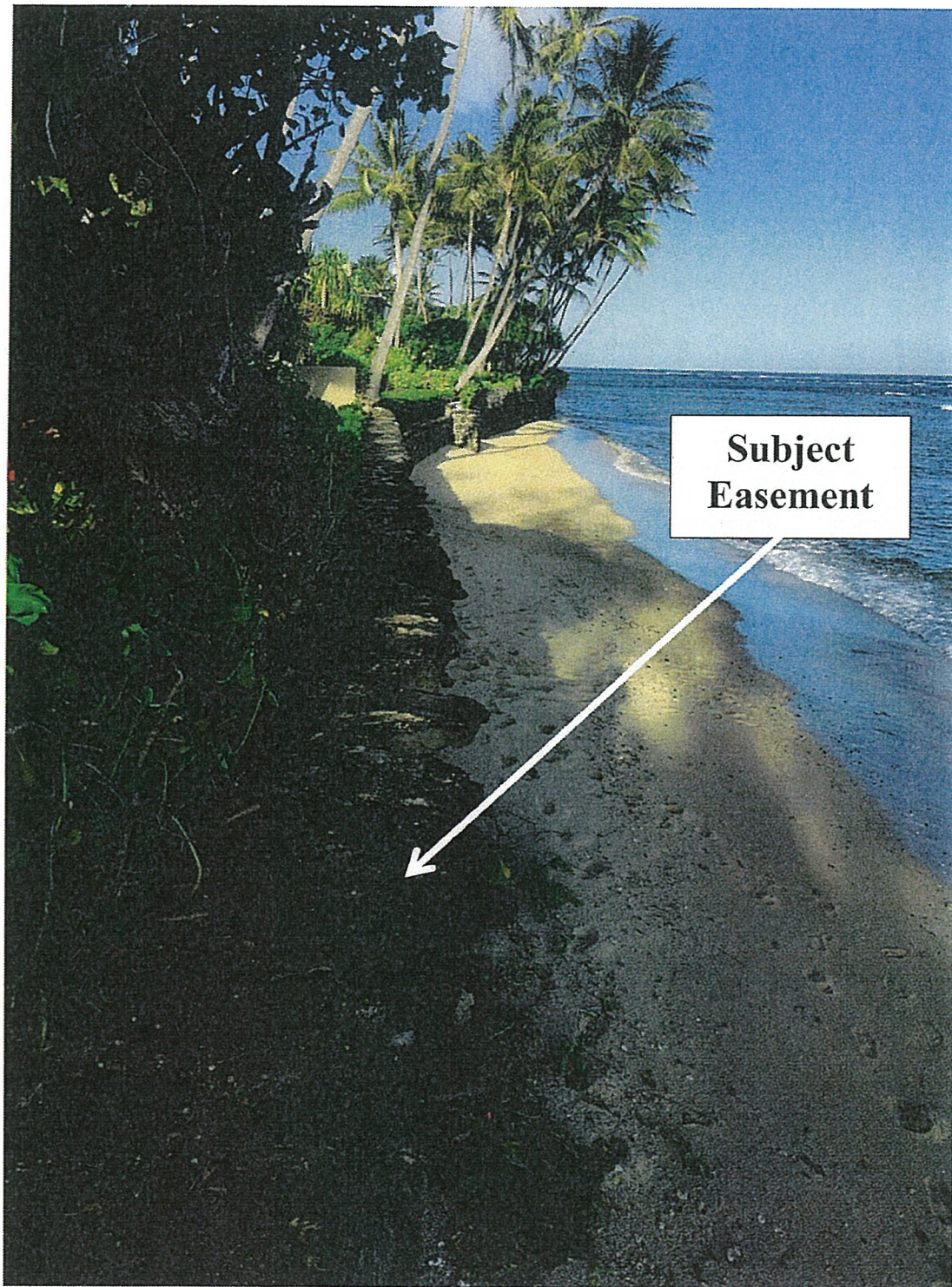
Very truly yours,

McCORRISTON MILLER MUKAI MacKINNON LLP



Eric T. Kawatani
Kelsey S. Yamaguchi

ETK/KSY:shs



TMK (1) 3-1-037:013

EXHIBIT E