

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

November 9, 2018

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

Ref: 17OD-083

OAHU

Denial of Petition for Contested-Case Hearing filed by David Kimo Frankel; September 14, 2018, with respect to Agenda Items D-13 and D-17, only with respect to Revocable Permit No. 7849 to Resorttrust Hawaii, LLC

D-13: Issuance of Right-of-Entry Permits for Beach Activities to be held on October 16 and 17, 2018; and Issuance of Revocable Permit for Recreational and Maintenance Purposes; Resorttrust Hawaii, LLC, Applicant; Waialae, Honolulu, Oahu, Tax Map Key: (1) 3-5-023:041; and

D-17: Annual Renewal of Revocable Permits on the Island of Oahu. See Exhibit 2 for list of Revocable Permits

INTRODUCTION:

On September 14, 2018, the petitioner, Mr. David Kimo Frankel, orally requested a contested-case hearing concerning the above-referenced actions regarding Agenda Items D-13 and D-17, only with respect to Revocable Permit No. 7849 ("RP No. 7849") to Resorttrust Hawaii, LLC ("RTH"). On September 24, 2018, Mr. Frankel filed a Petition for a Contested Case Hearing ("Petition"). **Exhibit 1.** Both Mr. Frankel and attorneys for RTH submitted legal briefs at the invitation of the Department of the Attorney General on the subject of whether a contested-case hearing is required by law. Based upon the following, we recommend that the Board deny the Petition.

BACKGROUND:

Both subject agenda items concern an area of State land located makai of the Kahala Hotel and Resort (the "Makai Property"). The Makai Property is currently encumbered with RP No. 7849, which grants RTH the right to occupy the premises for recreational and maintenance purposes only. **Exhibit 2.** RP No. 7849 is scheduled to expire on December 31, 2018, unless otherwise renewed by the Board pursuant to HRS § 171-55.

Agenda Item D-17 was the annual renewal of revocable permits for the Island of Oahu. **Exhibit 3.**¹ Among the permits agendized for renewal was RP No. 7849. If renewed, RP No. 7849 would be continued through December 31, 2019.

Agenda Item D-13 was a request for the issuance of a right-of-entry permit to RTH for beach activities to be held on October 16 and 17, 2018, and for the issuance of a new revocable permit for recreational and maintenance purposes. **Exhibit 4.** One of the primary purposes of a recommendation to issue a new revocable permit was to clarify the character of use of the Makai Property: “recreational and maintenance purposes limited to storage area, cabana hale, cabana tent, beach shower, tower caddy, outside seating area, hammock, trash can, beach chair storage, clam shell lounge, beach chair set up for 4 or 6, and outrigger canoes storage[.]” **Exhibit 4 at 2.**

Mr. Frankel submitted written testimony in opposition to Agenda Item D-13 and Agenda Item D-17, as it concerned RP No. 7849. **Exhibit 5.**

On September 14, 2018, the Board received several hours of testimony from the public on Agenda Item D-13, including oral testimony from Mr. Frankel. As he was concluding his testimony, Mr. Frankel made an oral request for a contested-case hearing on Agenda Items D-13 and D-17, as it concerned RP No. 7849. In making his request, Mr. Frankel stated that he used the Makai Property his whole life and that he visited the Makai Property on average at least once per year. Mr. Frankel stated that approximately a year before, the Kahala Hotel attempted to physically prevent him from crossing the Makai Property. Mr. Frankel stated that he used the Makai Property for recreational use, an aesthetic interest in keeping the area uncluttered, and a historic preservation interest. After a discussion with Member Yuen, Mr. Frankel withdrew his oral request for a contested-case hearing pending decision-making.

After the close of public testimony, during the Board’s decision-making, Mr. Frankel renewed his oral request for a contested-case hearing. Mr. Frankel stated that he was basing his request on the Hawai’i Supreme Court’s decision of *In re Maui Electric Co. Ltd.*

With respect to Agenda Item D-13, the Board voted to authorize the issuance of a right-of-entry permit to RTH for beach-activities purposes for the October 16 and 17, 2018 events, and deferred on the issuance of a new revocable permit pending receipt of Mr. Frankel’s petition for a contested-case hearing.

With respect to Agenda Item D-17, the Board approved the item as submitted, except that it deferred on the renewal of RP No. 7849, pending receipt of Mr. Frankel’s petition for a contested-case hearing.

On September 24, 2018, Mr. Frankel filed the Petition. **Exhibit 1.**

¹ Exhibits 3 and 4 herein are only the report section of the prior submittals, excluding the exhibits attached therein. For full set of Exhibits 3 and 4, please download from <http://dlnr.hawaii.gov/meetings/blnr-meetings-2018/land-board-submittals-091418/>

The Department of the Attorney General invited RTH to file a legal brief on whether a contested-case hearing is required by law. That brief is attached hereto as **Exhibit 6**.

The Department of the Attorney General invited Mr. Frankel to file a legal brief in response to RTH's brief. Mr. Frankel's brief is attached hereto as **Exhibit 7**.

DISCUSSION:

When looked at from a bird's eye point of view, the analysis of whether a contested-case hearing is required by law appears simple enough. An administrative agency must only hold a contested-case hearing when it is required by law, which means that the contested-case hearing is required by (1) statute, (2) administrative rule, or (3) constitutional due process. *Mauna Kea Anaina Hou v. BLNR*, 136 Hawai'i 376, 390, 363 P.3d 224, 238 (2015). When a contested-case hearing is required by statute or administrative rule, the analysis is simple. Whether a contested-case hearing is required by constitutional due process is a much more complicated analysis.

Mr. Frankel has not identified any statute or administrative rule that requires that a contested-case hearing be held. Instead, Mr. Frankel relies upon constitutional due process.

Constitutional Due-Process Framework

There is a two-step process in determining whether a person is entitled to a contested-case hearing. First, a court must consider "whether the particular interest which claimant seeks to protect by a hearing is 'property' within the meaning of the due process clauses of the federal and state constitutions." *Flores v. BLNR*, No. SCAP-17-59, 2018 WL 3751294, at *11 (Haw. Aug. 8, 2018) (citation and internal brackets omitted). Second, if a court "concludes that the interest is 'property,' th[e] court analyzes what specific procedures are required to protect it." *Id.*

Step one merely requires the court to determine whether an appellant seeks to protect a constitutionally cognizable property interest. *Flores*, 2018 WL 3751294, at *12. To have such a property interest, a person "must clearly have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Sandy Beach Def. Fund v. City & Cnty. of Honolulu*, 70 Haw. 361, 377, 773 P.2d 250, 260 (1989). Legitimate claims of entitlement that constitute property interests "are not created by the due process clause itself. Instead, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law[.]" *Flores*, 2018 WL 3751294, at *11 (citation and internal brackets omitted).

If step one of the analysis is satisfied, then step two analyzes how the government action would affect that interest with and without procedural safeguards. With respect to the step two, the Hawai'i Supreme Court has been careful to emphasize that "[d]ue process is not a fixed concept requiring a specific procedural course in every situation." *Sandy Beach*, 70 Haw. at 378, 773 P.2d at 261. Due process "is flexible and calls for such procedural protections as the particular situation demands." *Id.* (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). The touchstone of due process is "notice and an opportunity to be heard

at a meaningful time and in a meaningful manner before governmental deprivation of a significant property interest.” *Id.*

In determining what procedures are necessary to satisfy due process, the administrative agency must examine and balance three factors:

- (1) the private interest which will be affected; (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards; and (3) the governmental interest, including the burden that additional procedural safeguards would entail.

Flores, 2018 WL 3751294, at *12.

Step One: Mr. Frankel Fails to Identify a Constitutionally Cognizable Property Interest

HAR § 13-1-29(b) provides that a formal petition for a contested-case hearing must include, among other things, a statement of “[t]he nature and extent of the requestor’s interest that may be affected by board action on the subject matter that entitles the requestor to participate in a contested case[.]”

In his Petition, Mr. Frankel states: “I have recreational, aesthetic, environmental and public trust interests, which are all described in the attached declaration. . . I also have a demonstrated interest in seeing that our state’s environmental laws are enforced and properly implemented.” **Exhibit 1 at 2.** In his attached declaration, Mr. Frankel avers that, among other things, that he has used the beach in front of the Kahala Hotel his whole life, and over the course of his life, has gone to that beach “once or twice a year on average.” He goes there to “swim in the ocean; to snorkel; to read on shore; to relax; and to admire the view of Koko Head, the coastline and the surf.” Mr. Frankel avers that he enjoys less crowded beaches and open space, and that the clutter on the Makai Property disturbs his enjoyment. Mr. Frankel avers that on one instance approximately a year ago, Kahala Hotel staff attempted to stop him from traversing the Makai Property. Mr. Frankel states that he has observed a waitress serving beers to a man on the beach. Mr. Frankel avers that he has an interest in making sure the Department of Land and Natural Resources is adequately funded and that as a beneficiary of the ceded-lands trust, the deprivation of funds causes harm to his interests. Finally, Mr. Frankel contends that from his years as a public-interest litigator, he has a specific interest in ensuring that environmental laws are enforced and properly implemented.

Recreational, aesthetic, and environmental interests, standing alone, are not constitutionally cognizable property interests. *Sandy Beach*, 70 Haw. at 377, 773 P.2d 250 (1989) (aesthetic and environmental interests do not rise to the level of ‘property’ within the meaning of the due process clause). This falls squarely into the *Sandy Beach* category of interests that merely express an abstract need or desire of the claimant.

Being the beneficiary of the public trust and/or the ceded-land trust is not a constitutionally cognizable property interest. *Wille v. BLNR*, No. CAAP-12-496, 2013 WL 1729711, at *5

(App. Apr. 22, 2013), *cert. denied*, No. SCWC-12-496, 2013 WL 4779500 (Haw. Sept. 4, 2013) (“[O]ur courts have never held that an individual’s status as the beneficiary of the “public trust” constitutes a cognizable property interest warranting due process protection.”); *Keahole Def. Coalition, Inc. v. BLNR*, 110 Hawai‘i 419, 432, 124 P.3d 585, 598 (2006) (economic interests are not a constitutionally protected property interest).

The only interest asserted by Mr. Frankel that requires substantial analysis is his claim that he has a property interest in a clean and healthful environment pursuant to Article XI, Section 9 of the Hawai‘i Constitution. However, based upon the specific issues in this case, and Mr. Frankel’s specific claims of injury, Mr. Frankel does not have a property interest in a clean and healthful environment in this instance and, indeed, does not even assert an actual claim seeking to vindicate that interest.

In the fairly recent Hawai‘i Supreme Court case of *In re Application of Maui Electric Company, Ltd.*, 141 Hawai‘i 249, 408 P.3d 1 (2017), the Public Utilities Commission (“PUC”) denied the Sierra Club’s motion to intervene in a proceeding concerning a power purchase agreement based upon the Sierra Club’s argument that the proceedings impacted the amount of coal that a power plant could burn and air quality. The Supreme Court considered article XI, section 9 of the Hawai‘i Constitution, which states: “Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection, and enhancement of natural resources.” The Supreme Court held that the Sierra Club had a substantive right to a clean and healthful environment because, in that particular instance, the right was defined by a law relating to environmental quality: that, pursuant to HRS § 269-6, the PUC was required to consider the impact of the State’s reliance on fossil fuels on the level of greenhouse gas emissions and the need to reduce reliance on fossil fuels in its decision-making:

We therefore conclude that HRS Chapter 269 is a law relating to environmental quality that defines the right to a clean and healthful environment under article XI, section 9 by providing that express consideration be given to reduction of greenhouse gas emissions in the decision-making of the Commission. Accordingly, we hold that Sierra Club has established a legitimate claim of entitlement to a clean and healthful environment under article XI, section 9 and HRS Chapter 269.

Id. at 264, 408 P.3d at 16.

Here, the two agenda items that Mr. Frankel contests relate to revocable permits over the Makai Land, which are granted pursuant to HRS § 171-55. Chapter 171, HRS, is entitled: “Public Lands, Management and Disposition of.” Looking at the provisions of Chapter 171, it is clear that its provisions relate to the internal management of the Department of Land and Natural Resources, the technical methods of encumbering lands, and appraisal processes. Chapter 171 is not a chapter concerning the control of pollution or the conservation, protection, and enhancement of natural resources—a law relating to “environmental quality.”

Looking closely at the actual statute at issue here, HRS § 171-55 provides the Board with the power to issue permits for the temporary occupancy of state lands or an interest therein on a month-to-month basis for no more than one year and the authority to continue permits for additional one-year periods. This is a statute relating to technical land management, not environmental quality.

A contrary result cannot be what the Hawai‘i Supreme Court intended. The Supreme Court justices in *Maui Electric* split three-to-two. In his dissent, Chief Justice Recktenwald concluded that the majority’s holding “will create uncertainty regarding what constitutes a property interest, and may have unintended consequences.” 141 Hawai‘i at 278, 408 P.3d at 30 (Recktenwald, C.J., dissenting). If *Maui Electric* were to be read as broadly as Mr. Frankel suggests, it is not inconceivable that virtually everything that the Department of Land and Natural Resources does would be the subject of a contested-case hearing. We do not believe that the Hawai‘i Supreme Court could have intended such a draconian result that would severely hamstring the ability of the Department of Land and Natural Resources to accomplish any action without a contested-case hearing—from the mundane to the controversial—if any single member of the public would seek to object to a given action.

But even if, assuming for the sake of argument, that a constitutionally cognizable property interest exists with respect to a challenge to a revocable permit, Mr. Frankel has not—in fact—asserted such a claim in his Petition. Nowhere in his Petition does Mr. Frankel assert anything resembling a claim that he is seeking to vindicate an interest in a “clean and healthful environment.” Mr. Frankel asserts that it is his preference for the Makai Land to be uncluttered of chairs and other objects and that the Makai Land should not be used for commercial activities by the Kahala Hotel, he does not claim that the proposed actions are negatively impacting a clean and healthful environment.

Staff recommends that the Board adopt the foregoing analysis and find that Mr. Frankel failed to assert a constitutionally protected property interest and, therefore, a contested-case hearing is not required by law.

Step Two: Even if Mr. Frankel Identified a Constitutionally Cognizable Property Interest, Mr. Frankel is Not Entitled to a Contested-Case Hearing Based Upon the Specific Factual Situation at Issue

For the sake of argument, even if Mr. Frankel established that he is seeking to vindicate a constitutionally cognizable property interest, he is not entitled to a contested-case hearing. Again, if a petitioner asserts a constitutionally cognizable property interest, that is not the end of the inquiry as to whether a contested-case hearing is required. The touchstone of due process is “notice and an opportunity to be heard at a meaningful time and in a meaningful manner before governmental deprivation of a significant property interest.” *Sandy Beach*, 70 Haw. at 378, 773 P.2d at 261. To determine what process is due, the administrative agency must examine and balance three factors:

(1) the private interest which will be affected; (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards; and (3) the governmental interest, including the burden that additional procedural safeguards would entail.

Flores, 2018 WL 3751294, at *12.

With respect to the private interest which will be affected, assuming that Mr. Frankel has an established property interest in a clean and healthful environment, Mr. Frankel's interest here is not substantial. First, the revocable-permit agenda items are not substantial in character compared to more significant actions. A revocable permit is a month-to-month permit for temporary use of land. The revocable permits here do not propose to allow the permanent alteration of the land and are for recreational and maintenance purposes. Staff is recommending that the Board declare the actions exempt from the preparation of an Environmental Assessment. Second, Mr. Frankel's hypothetical interest here is limited. Mr. Frankel himself avers that he only visits the Makai Land once or twice a year on average for recreational purposes but is bothered by the commercial uses and "clutter." Again, any link to environmental protection is, at very best, highly attenuated. Staff recommends that the Board find that the private interest which would hypothetically be affected is not significant or substantial in character.

Second, staff recommends that the Board find that the risk of an erroneous deprivation of such an interest through Sunshine Law procedures is minimal and that a contested-case hearing would not add significant value. At the Sunshine meeting of the Board, Mr. Frankel was provided notice of the meeting and submitted substantial testimony in opposition to the two agenda items. He testified in person at the meeting and was not prevented from making any point. This is substantial process.

It is significant that in *Maui Electric*, the issue was whether the Sierra Club should be permitted to *intervene* or participate in an *ongoing hearing*. In other words, if not permitted to intervene, the Sierra Club would not be given an opportunity to be heard. In this case, Mr. Frankel has been given a substantial opportunity to be heard by providing written and oral testimony. It is improbable that Mr. Frankel would gain significant value in being allowed to participate in a full contested-case hearing.

Third, staff recommends that the Board find that the governmental interest, including the burden that holding a contested-case hearing would entail, weighs very heavily in favor of rejecting the contested-case petition. Contested-case hearings are expensive and time-consuming endeavors for the staff of the Department of Land and Natural Resources and the Board. The Thirty Meter Telescope contested-case hearing obviously sets the standard for time and expense, as it took many weeks and cost over \$500,000 in direct costs, including fees, travel costs, transcripts, meals, venue, and lodging, not counting the time spent by staff of Land Division, OCCL, DOCARE, and the Department of the Attorney General. The cost for retaining hearing officers and court reporters can be thousands of dollars for even one-day contested-case hearings and may go into the many tens-of-

thousands of dollars, once again not counting staff and attorney time. Even in this one instance, Mr. Frankel has failed to justify why the Department of Land and Natural Resources should bear such costs and spend many hours of staff time on a contested-case hearing of relatively limited import.

There are also larger considerations. Contested-case hearings, as a general matter, absorb a great deal of staff's time and attention. Even just with respect to revocable permits, Land Division continues approximately 300 revocable permits each year. If contested-case hearings were to be held on revocable permits based upon petitions of similar merit as Mr. Frankel's, any one individual in opposition to a board action could derail the action for an extended period of time. Multiply this several times over, and this would lead to a substantial drain on state resources where the only issue is the issuance or continuation of month-to-month permits for temporary occupancy.

Therefore, staff recommends that the Board find that even if Mr. Frankel asserted a constitutionally protected property interest that, after examining and balancing the three *Sandy Beach* factors, Mr. Frankel is not entitled to a contested-case hearing.

RECOMMENDATION:

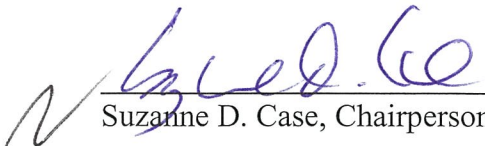
- (1) That the Board deny the Petition for a Contested-Case Hearing, filed by David Kimo Frankel on September 24, 2018; and
- (2) That the Board adopt the findings and legal analysis above in full.

Respectfully submitted,



Russell Tsuji
Administrator

APPROVED FOR SUBMITTAL:



Suzanne D. Case, Chairperson

EXHIBIT 1



STATE OF HAWAII

BOARD OF LAND AND NATURAL RESOURCES

RECEIVED
LAND DIVISION

2010 SEP 24 PM 1:00

PETITION FOR A CONTESTED CASE HEARING

DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

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

INSTRUCTIONS:

- File (deliver, mail or fax) this form within ten (10) days of the Board Action Date
Department of Land and Natural Resources
Administrative Proceedings Office
1151 Punchbowl Street, Room 130
Honolulu, Hawaii 96813
Phone: (808) 587-1496, Fax: (808) 587-0390
- DLNR's contested case hearing rules are listed under Chapter 13-1, HAR, and can be obtained from the DLNR Administrative Proceedings Office or at its website (<http://dlnr.hawaii.gov/forms/contested-case-form/>). Please review these rules before filing a petition.
- If you use the electronic version of this form, note that the boxes are expandable to fit in your statements. If you use the hardcopy form and need more space, you may attach additional sheets.
- Pursuant to §13-1-30, HAR, a petition that involves a Conservation District Use Permit must be accompanied with a \$100.00 non-refundable filing fee (payable to "DLNR") or a request for waiver of this fee. A waiver may be granted by the Chairperson based on a petitioner's financial hardship.
- All materials, including this form, shall be submitted in three (3) photocopies.

RECEIVED
2010 SEP 24 AM 10:13
DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

A. PETITIONER		
(If there are multiple petitioners, use one form for each.)		
1. Name David Kimo Frankel	2. Contact Person	
3. Address [REDACTED]	4. City [REDACTED]	5. State and ZIP [REDACTED]
6. Email [REDACTED]	7. Phone [REDACTED]	8. Fax

B. ATTORNEY (if represented)		
9. Attorney Name	10. Firm Name	
11. Address	12. City	13. State and ZIP
14. Email	15. Phone	16. Fax

C. SUBJECT MATTER	
17. Board Action Being Contested The proposal to renew revocable permit S-7849 and the proposal to issue a new revocable permit for the Kahala Hotel	
18. Board Action Date September 14, 2018	19. Item No. D-13 and D-17
20. Nature and Extent of Petitioner's Interest That May Be Affected by the Board Action I have recreational, aesthetic, environmental and public trust interests, which are all described in greater detail in the attached declaration. See e.g. Akau v. Olohana Corp., 65 Haw. 383, 390, 652 P.2d 1130, 1135 (1982); Ka Pa'akai O Ka 'Aina v. Land Use Comm'n, 94 Hawai'i 31, 43-4, 7 P.3d 1068, 1080-1 (2000); Citizens for the Prot. of the N. Kohala Coastline v. Cnty. of Haw., 91 Hawai'i 94, 101, 979 P.2d 1120, 1127 (1999); Life of the Land, Inc. v. Land Use Commission, 61 Haw. 3, 8, 594 P.2d 1079, 1082 (1979); Kilakila 'O Haleakalā v. Bd of Land & Natural Res., 131 Hawai'i 193, 204-5, 317 P.3d 27, 38-39 (2013); Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp., 121 Hawai'i 324, 331, 219 P.3d 1111, 1118 (2009); Kapiolani Park Preservation Soc'y v. Honolulu, 69 Hawai'i 569, 751 P.2d 1022 (1988); In re Maui Elec. Co., 141 Haw. 249, 408 P.3d 1 (2017); Flores v BLNR, 2018 WL 3751294, 2018 Haw. LEXIS 168. I also have a demonstrated interest in seeing that our state's environmental laws are enforced and properly implemented.	
21. Any Disagreement Petitioner May Have with an Application before the Board Unfortunately, the BLNR has not enacted rules that would provide standards for decisionmaking on land dispositions such as this one. Cf. Aluli v. Lewin, 73 Haw. 56, 828 P.2d 802 (1992). Nevertheless, the proposed uses should not be approved because they are inconsistent with HRS chapters 205A, 343, 171 and the BLNR's trust responsibilities. The applicant has violated the terms of its revocable permit (RP S-7849) as well as HRS chapters 205A, 343 and 342D and HAR §§ 13-256-89 and 13-221-14.	
22. Any Relief Petitioner Seeks or Deems Itself Entitled to No RP should be granted unless: <ol style="list-style-type: none"> 1. uses are restricted to only maintenance and recreational uses; 2. commercial use (as that term is defined by HAR § 13-221-2) of the RP area -- and of the ma kai beach area -- is explicitly prohibited; 3. public access and use of the RP area (and the ma kai beach) is explicitly authorized and the applicant is explicitly prohibited from discouraging and impeding such use and access; see e.g. HRS §§ 205A-2(b)(1)(A), -2(b)(3)(A), -2(b)(9)(A), -2(c)(1)(B)(i), -2(c)(1)(B)(iii) -2(c)(1)(B)(iv), -2(c)(1)(B)(v), -2(c)(1)(B)(viii), 2(c)(3), -2(c)(9)(A), 205A-4, 205A-5(b); State by Kobayashi v. Zimring, 58 Haw. 106, 121, 566 P.2d 725, 735 (1977); 4. storage -- as the applicant uses that term -- is prohibited within the RP area and the ma kai beach area; 5. the applicant shall be prohibited from applying for any "right of entry" for additional uses of the the RP area or the ma kai beach; 6. the applicant compensates DLNR for its unauthorized and profitable commercial use of public land. See HRS §§ 171-6(14) and (15) and 171-7; 7. beach chairs (free of charge) are placed on the more ma uka portion of the parcel (rather than forming a wall that discourages public use of the parcel); and 8. the lighting found on the RP parcel (and ma kai of it if applicable) complies with HRS § 205A-71. <p>If commercial use of any kind is authorized:</p> <p>(1) it should be prohibited until proper and adequate completion of the processes outlined in HRS chapters 343 and 205A;</p>	

- (2) it should be clearly defined and limited;
(3) adequate parking should be provided to employees and the public so that the overflow parking does not have the practical effect of interfering with public access to coastal resources; and
(4) DLNR should be adequately compensated.

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

The petitioner's participation in a contested case hearing will allow for the deliberate consideration of a plethora of evidence and carefully review of applicable statutes, rules and cases. The public interest is served when decisions are made based on a complete record and the applicable law. Hastily-crafted and poorly-worded conditions foster confusion and are inconsistent with trust duties. It was the vigilance of members of the public -- including the petitioner -- who brought the applicant's noncompliance to the staff and BLNR's attention.

24. Any Other Information That May Assist the Board in Determining Whether Petitioner Meets the Criteria to Be a Party under Section 13-1-31, HAR

Please see the petitioner's September 14, 2018 testimony. Please carefully review In re Maui Elec. Co., 141 Haw. 249, 408 P.3d 1 (2017) and Flores v. Bd. of Land & Natural Res., 2018 Haw. LEXIS 168, 2018 WL 3751294.

Please consider this request at your next meeting for which an agenda has not yet been posted: October 12, 2018 meeting.

- ☒ Check this box if Petitioner is submitting supporting documents with this form.
- ☒ Check this box if Petitioner will submit additional supporting documents after filing this form.

David Kimo Frankel
Petitioner or Representative (Print Name)


Signature

September 24, 2018
Date

DECLARATION OF DAVID KIMO FRANKEL

I, David Kimo Frankel, under penalty of perjury hereby state the following is true and accurate to the best of my knowledge and belief:

1. The statements below are based upon my personal knowledge.
2. I have gone to and used the beach in front of the Kahala Hotel my whole life.
3. I recall going to the beach there as a small child – sitting on the Diamond Head end of the beach near the hao trees.
4. Although I lived in Volcano for about ten years, I recall taking my son to the Diamond Head end of the beach in front of the Kahala Hotel when he was quite young.
5. I estimate that over the course of my life, I have gone to the beach in front of the Kahala Hotel once or twice a year on average.
6. Usually, when I go to the beach in front of the Kahala Hotel I go to: swim in the ocean; to snorkel; to read on shore; to relax; and to admire the view of Koko Head, the coastline and the surf.
7. I have also traversed the beach in front of the Kahala Hotel as well as the revocable permit (RP S-7849) parcel in front of the Kahala Hotel (TMK (1) 3-5-023:041) on peaceful walks along the coastline.
8. The gazebo (recently moved), restaurant (recently moved), cabanas, clam-shell chairs, beach chairs, and landscaping created an impression that the revocable permit parcel was private property. The appearance of the grounds suggested that the area was resort property and not for regular public use. This appearance discouraged and deterred me from using and traversing the revocable permit parcel.

9. Approximately a year ago, while walking to the beach in front of the Kahala Hotel, staff at the hotel attempted to stop me from traversing the revocable permit parcel encompassed on the Diamond Head end.

10. This past summer, while sitting on the Koko Head end of the revocable permit parcel, I overheard a man order two Longboard Lagers while sitting on the beach from a waitress. A few minutes later, the waitress brought the man two beers.

11. On or about, September 9, 2018, while on the Koko Head end of the revocable permit parcel, I saw that the peninsula was closed to public access and use.

12. All things being equal, the less crowded a beach is, the more I enjoy it.

13. I appreciate open space, green space and natural beauty.

14. I appreciate seeing marine life, including seabirds and turtles.

15. The cabana structures constructed on the revocable permit parcel occupy and clutter open space and interfere with scenic vistas that I would otherwise enjoy. They also interfere with and block my use of those portions of the revocable permit parcel.

16. The restaurant that was operating on the revocable permit parcel occupied open space. The area looks and feels more pleasant now that the restaurant has been moved off of public land.

17. The clam-shell loungers clutter open space and block my use of those portions of the revocable permit parcel.

18. The multitude of beach chairs clutter open space.

19. The storage area, including the unauthorized fence, clutters open space and interferes with scenic vistas.

20. It is my understanding that the legislature enacted HRS § 205A-71 to protect seabirds and turtles from the adverse effects of lighting the shoreline and ocean waters. I therefore assume that the lighting along the peninsula has an adverse impact on them.

21. I would go to and use this area more frequently if there was less commercial use and less clutter on the revocable permit parcel and the ma kai beach area.

22. I have recreational, aesthetic and environmental interests in the revocable permit parcel as well as the beach and ocean areas ma kai of the parcel.

23. My recreational, aesthetic and environmental interests have been adversely affected by the Kahala Hotel's use of the revocable permit parcel (and the ma kai beach and ocean areas).

24. My recreational, aesthetic and environmental interests would be adversely affected by the Kahala Hotel's use of the revocable permit parcel (and the ma kai beach and ocean areas) if the revocable permit is renewed or a new one is issued (as described in the staff submittal).

25. I have a long-standing interest, as a taxpayer and as an environmental advocate, in ensuring that the department of land and natural resources is adequately funded.

26. I am a beneficiary of the ceded lands trust; the exploitation of which, and the deprivation of funds derived from the unauthorized use of these lands, adversely affects my interests as a beneficiary.

27. When public lands are used commercially in an unauthorized manner and the department of land and natural resources is not compensated adequately (as occurred here), my interests are adversely affected.

28. Through articles that I have written and my career in public interest litigation, I

have demonstrated my interest in ensuring that the state's environmental laws are enforced and properly implemented. This interest will be adversely affected if the BLNR rubberstamps the applicant's request without thoroughly investigating the applicant's violations of the law and taking appropriate enforcement action. This interest will also be adversely affected if the BLNR crafts vaguely worded conditions that are subject to misinterpretation and abuse.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: Honolulu Hawai'i, September 24, 2018.

A handwritten signature in black ink, appearing to read 'DK Frankel', is written above a horizontal line.

David Kimo Frankel

EXHIBIT 2

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
LAND DIVISION

REVOCABLE PERMIT NO. S-7849

KNOW ALL MEN BY THESE PRESENTS:

This Agreement (hereinafter referred to as the "Permit") is executed this 8th day of JUNE, 20 16, by and between the STATE OF HAWAII, hereinafter referred to as the "State," by its Board of Land and Natural Resources, hereinafter called the "Board," and RESORTTRUST HAWAII, LLC, a Hawaii limited liability company, hereinafter called the "Permittee," whose mailing address is c/o 1001 Bishop Street, Suite 2100, Honolulu, Hawaii 96813. The parties agree that commencing on the 1st day of JULY, 20 16, ("commencement date"), Permittee is permitted to enter and occupy, on a month-to-month basis only, pursuant to section 171-55, Hawaii Revised Statutes, that certain parcel of public land (and any improvements located thereupon) situate at Waialae, Honolulu, Oahu, Hawaii, tax map key no. (1) 3-5-023:041, as indicated on the map attached hereto, if any, and made a part hereof, containing an approximate area of 40,460 square feet, more or less, which parcel is hereinafter referred to as the "Premises."

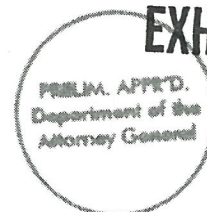
THIS PERMIT IS GRANTED UNDER THE FOLLOWING CONDITIONS:

A. The Permittee shall:

1. Occupy and use the Premises for the following specified purposes only: recreational and maintenance purposes.
2. Pay, at the Department of Land and Natural Resources Fiscal Office, P.O. Box 621, Honolulu, Hawai'i 96809, monthly rent in the sum of ONE THOUSAND TWO HUNDRED FORTY-FOUR AND NO/100 DOLLARS (\$1,244.00) payable in advance by the first of each and every month.

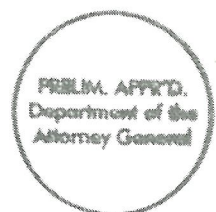
The interest rate on any unpaid or delinquent rentals shall be at one per cent (1%) per month.

If monthly rent is not received at the above address on or before the first day of the month for which it is due, then a service charge of FIFTY AND NO/100 DOLLARS (\$50.00) a month for each delinquent payment shall be assessed and payable. The service charge is in addition to interest on unpaid or delinquent rentals. Interest shall not accrue on the service charge.



Payment of such service charge shall not excuse or cure any default by Permittee under this Permit.

3. Upon execution of this Permit, deposit with the Board an amount equal to two times the monthly rental stated above in paragraph 2, as security for the faithful performance of all of these terms and conditions.
The deposit will be returned to the Permittee upon termination or revocation of this Permit, if and only if all of the terms and conditions of this Permit have been observed and performed to the satisfaction of an authorized representative of the Department of Land and Natural Resources ("DLNR"). Otherwise, the deposit may, at the option of an authorized representative of the DLNR be applied toward payment of any amounts owed hereunder, without waiving any of the Board's other rights hereunder.
4. At the Permittee's own cost and expense, keep any government-owned improvements located on the Premises insured against loss by fire and other hazards, casualties, and contingencies, for the full insurable value of those improvements. The policies shall name the State of Hawaii as an additional insured and loss payee and shall be filed with the DLNR. In the event of loss, damage, or destruction of those improvements, the DLNR shall retain from the proceeds of the policies those amounts it deems necessary to cover the loss, damage, or destruction of the government-owned improvements and the balance of those proceeds, if any, shall be delivered to the Permittee.
5. Give the Board twenty-five (25) calendar days notice, in writing, before vacating the Premises.
6. Pay all real property taxes assessed against the Premises from the commencement date of this Permit.
7. At its own cost and expense, observe, perform and comply with all laws, ordinances, rules and regulations of all governmental authorities now or at any future time during the term of this Permit applicable to the Premises, including, without limiting the generality of the foregoing, the Americans with Disabilities Act of 1990 and all regulations promulgated with respect thereto, as well as any other laws, ordinances, rules and regulations imposing any requirements that the Premises be made accessible to persons with disabilities; and, release and indemnify the State of Hawaii against all actions, suits, damages and claims by whomsoever brought or made by reason of the nonobservance or nonperformance of any of said laws, ordinances, rules and regulations or of this covenant.



8. Repair and maintain all buildings or other improvements now or hereafter on the Premises.
9. Obtain the prior written consent of the Board before making any major improvements.
10. Keep the Premises and improvements in a clean, sanitary, and orderly condition.
11. Pay all charges, assessments, or payments for water, other utilities, and the collection of garbage as may be levied, charged, or be payable with respect to the Premises.
12. Not make, permit, or suffer, any waste, strip, spoil, nuisance or unlawful, improper, or offensive use of the Premises.
13. At all times with respect to the Premises, use due care for public safety.
14. Procure and maintain, at its own cost and expense, in full force and effect throughout the term of this Permit, general liability insurance, or its equivalent, with an insurance company or companies licensed or authorized to do business in the State of Hawaii with an AM Best rating of not less than "A-" or other comparable and equivalent industry rating, in an amount of at least \$1,000,000.00 for each occurrence and \$2,000,000.00 aggregate, and with coverage terms acceptable to the Chairperson of the Board. The policy or policies of insurance shall name the State of Hawaii as an additional insured and a copy of the policy or other documentation required by the State shall be filed with the DLNR. The insurance shall cover the entire Premises, including all buildings, improvements, and grounds and all roadways or sidewalks on or adjacent to the Premises in the use or control of the Permittee.

Prior to entry and use of the Premises or within fifteen (15) days after the commencement date of this Permit, whichever is sooner, furnish the State with a policy(s) or other documentation required by the State showing the policy(s) to be initially in force, keep the policy(s) or other documentation required by the State on deposit during the entire Permit term, and furnish a like policy(s) or other documentation required by the State upon each renewal of the policy(s). This insurance shall not be cancelled, limited in scope of coverage, or nonrenewed until after thirty (30) days written notice has been given to the State. The State may at any time require the Permittee to provide the State with copies of the insurance policy(s) that are or were in effect during the permit period.

The State shall retain the right at any time to review the coverage, form, and amount of the insurance required by this Permit. If, in the opinion of

the State, the insurance provisions in this Permit do not provide adequate protection for the State, the State may require Permittee to obtain insurance sufficient in coverage, form, and amount to provide adequate protection. The State's requirements shall be reasonable but shall be designed to assure protection for and against the kind and extent of the risks which exist at the time a change in insurance is required. The State shall notify Permittee in writing of changes in the insurance requirements and Permittee shall deposit copies of acceptable insurance policy(s) or other documentation required by the State thereof, with the State incorporating the changes within thirty (30) days after receipt of the notice.

The procuring of the required policy(s) of insurance shall not be construed to limit Permittee's liability under this Permit nor to release or relieve the Permittee of the indemnification provisions and requirements of this Permit. Notwithstanding the policy(s) of insurance, Permittee shall be obligated for the full and total amount of any damage, injury, or loss caused by Permittee's negligence or neglect connected with this Permit. It is agreed that any insurance maintained by the State will apply in excess of, and not contribute with, insurance provided by Permittee's policy.

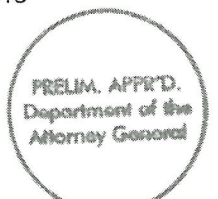
The insurance policy(s) or other documentation required by the State shall be mailed to:

State of Hawaii
Department of Land and Natural Resources
Land Division
Box 621
Honolulu, Hawaii 96809

15. In case the State shall, without any fault on its part, be made a party to any litigation commenced by or against the Permittee (other than condemnation proceedings), the Permittee shall pay all costs, including reasonable attorney's fees, and expenses incurred by or imposed on the State.
16. The Permittee shall pay all costs, including reasonable attorney's fees, and expenses which may be incurred by or paid by the State in enforcing the covenants and agreements of this Permit, in recovering possession of the Premises, or in the collection of delinquent rental, taxes, and any and all other charges.

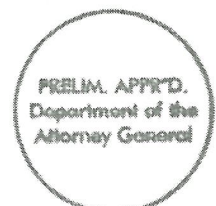
B. Additional Conditions:

1. This Permit is issued and effective on a month-to-month basis. The Permit shall automatically terminate one year from the commencement date, unless earlier revoked as provided below, provided further that the



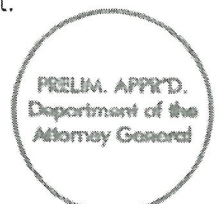
Board may allow the Permit to continue on a month-to-month basis for additional one year periods. Any such extension shall have the same terms and conditions as this Permit, except for the commencement date and any amendments to the terms, as reflected in the Board minutes of the meeting at which the Board acts. Permittee agrees to be bound by the terms and conditions of this Permit and any amendments to this Permit so long as Permittee continues to hold a permit for the Premises or continues to occupy or use the Premises.

2. The Board may revoke this Permit for any reason whatsoever, upon written notice to the Permittee at least thirty (30) calendar days prior to the revocation; provided, however, that in the event payment of rental is delinquent for a period of ten (10) calendar days or more, this Permit may be revoked upon written notice to the Permittee at least five (5) calendar days prior to the revocation.
3. If the Permittee fails to vacate the Premises upon revocation or termination of the Permit, the Permittee shall be liable for and shall pay the previously applicable monthly rent, computed and prorated on a daily basis, for each day the Permittee remains in possession.
4. If the Permittee fails to vacate the Premises upon revocation or termination of the Permit, the Board, by its agents, or representatives, may enter upon the Premises, without notice, and at Permittee's cost and expense remove and dispose of all vehicles, equipment, materials, or any personal property remaining on the Premises, and the Permittee agrees to pay for all costs and expenses of removal, disposition, or storage.
5. The Board may at any time increase or decrease the monthly rental by written notice at least thirty (30) business days prior to the date of change of rent. Upon such notice, the Permittee shall deposit with the Board any additional monies required to maintain an amount equal to two times the new monthly rental as security for the faithful performance of all of these terms and conditions.
6. 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 or within an additional period the Board in its discretion may allow, 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.



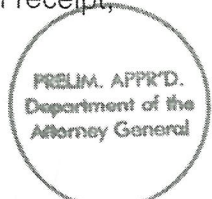
7. The Board reserves the right for its agents or representatives to enter or cross any portion of the Premises at any time.
8. This Permit or any rights hereunder shall not be sold, assigned, conveyed, leased, mortgaged, or otherwise transferred or disposed of.
9. Permittee has inspected the Premises and knows the conditions thereof and fully assumes all risks incident to its use.
10. The acceptance of rent by the Board shall not be deemed a waiver of any breach by the Permittee of any term, covenant, or condition of this Permit nor of the Board's right to declare and enforce a forfeiture for any breach, and the failure of the Board to insist upon strict performance of any term, covenant, or condition, or to exercise any option herein conferred, in any one or more instances, shall not be construed as a waiver or relinquishment of any term, covenant, condition, or option of this Permit.
11. The use and enjoyment of the Premises shall not be in support of any policy which discriminates upon any basis or in any manner that is prohibited by any applicable federal, state, or county law.
12. Permittee shall not cause or permit the escape, disposal, or release of any hazardous materials except as permitted by law. Permittee shall not allow the storage or use of such materials in any manner not sanctioned by law or by the highest standards prevailing in the industry for the storage and use of such materials, nor allow to be brought onto the Premises any such materials except to use in the ordinary course of Permittee's business, and then only after written notice is given to the Board of the identity of such materials and upon the Board's consent, which consent may be withheld at the Board's sole and absolute discretion. If any lender or governmental agency shall ever require testing to ascertain whether or not there has been any release of hazardous materials by Permittee, then the Permittee shall be responsible for the costs thereof. In addition, Permittee shall execute affidavits, representations and the like from time to time at the Board's request concerning the Permittee's best knowledge and belief regarding the presence of hazardous materials on the Premises placed or released by Permittee.

Permittee agrees to release, indemnify, defend, and hold the State of Hawaii, the Board, and their officers, employees, and agents harmless from and against all liability, loss, damage, cost, and expense, including all attorneys' fees, and all claims, suits, and demands therefor, arising out of or resulting from the use or release of hazardous materials on the Premises occurring while Permittee is in possession, or elsewhere if caused by Permittee or persons acting under Permittee. These covenants shall survive the expiration, revocation, or termination of the Permit.



For the purpose of this Permit "hazardous material" shall mean any pollutant, toxic substance, hazardous waste, hazardous material, hazardous substance, or oil as defined in or pursuant to the Resource Conservation and Recovery Act, as amended, the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, the Federal Clean Water Act, or any other federal, state, or local environmental law, regulation, ordinance, rule, or bylaw, whether existing as of the date hereof, previously enforced, or subsequently enacted.

13. Prior to termination or revocation of the subject Permit, Permittee shall conduct a Phase I environmental site assessment and conduct a complete abatement and disposal, if necessary, satisfactory to the standards required by the Federal Environmental Protection Agency, the Department of Health, and the DLNR. Failure to comply with the provisions of this paragraph shall not extend the term of this Permit or automatically prevent termination or revocation of the Permit. The Board, at its sole option, may refuse to approve termination or revocation unless this evaluation and abatement provision has been performed. In addition or in the alternative, the Board may, at its sole option if Permittee does not do so, arrange for performance of the provisions of this paragraph, all costs and expenses of such performance to be charged to and paid by Permittee.
14. Permittee shall release, indemnify, defend, and hold harmless the State of Hawaii, its officers, agents, and employees from and against all liability, loss, damage, cost, and expense, including all attorneys' fees, and all claims, suits, and demands therefor, arising out of or resulting from the acts or omissions of the Permittee or the Permittee's employees, agents, officers, or invitees under this Permit. The provisions of this paragraph shall remain in full force and effect notwithstanding the revocation, expiration, or termination of this Permit. The purchase of liability insurance shall not relieve Permittee of the obligations described herein.
15. Unless otherwise agreed by the Board in its sole discretion, payments received will be applied first to attorneys' fees, costs, assessments, real property taxes, or other costs incurred or paid by the Board with respect to the Premises, next to service charges or interest, next to any other charges due or owing under the Permit, next to delinquent monthly rent, and next to current rent.
16. Any notice required or permitted to be given hereunder shall be in writing, given by personal delivery or by first class mail, postage prepaid. Notice to Permittee shall be delivered or addressed to the address stated above. Notice to State of Hawai'i shall be delivered or addressed to the Chairperson of the Board at 1151 Punchbowl Street, Room 130, Honolulu, Hawai'i 96813. Mailed notices shall be deemed given upon actual receipt.



or two business days following deposit in the mail, postage prepaid, whichever occurs first. Either party may by notice to the other specify a different address for notice purposes, provided that Permittee's mailing address shall at all times be the same for both billing and notice. In the event there are multiple Permittees hereunder, notice to one Permittee shall be deemed notice to all Permittees.

17. Permittee shall not, without the prior written approval of the Chairperson of the Board place improvements within the Premises, and/or preset beach equipment or conduct surf instruction within the public beach fronting the Premises.
18. Unless the text indicates otherwise, the use of any gender shall include all genders and, if the Permittee includes more than one person, the singular shall signify the plural and this Permit shall bind the persons, and each of them jointly and severally.

IN WITNESS WHEREOF, the STATE OF HAWAII, by its Board of Land and Natural Resources, has caused the seal of the Department of Land and Natural Resources to be hereunto affixed and the parties hereto have caused these presents to be executed the day, month and year first above written.

STATE OF HAWAII

By



SUZANNE D. CASE

Chairperson of the Board of Land and Natural Resources

Approved by the Board of Land and Natural Resources at its meeting held on October 10, 2014, as amended.

STATE

RESORTTRUST HAWAII, LLC, a Hawaii limited liability company

APPROVED AS TO FORM:

By



Daisuke Ueda

Its Vice-President

CINDY Y. YOUNG

Deputy Attorney General

Dated: 5/23/16

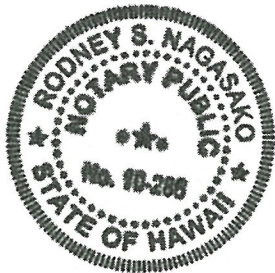
And by

Its

PERMITTEE

STATE OF HAWAII)
) SS.
CITY AND COUNTY OF HONOLULU)

On this 3rd day of June, 2014, before me personally appeared
DAISUKE UEDA, to me personally known,
who, being by me duly sworn or affirmed, did say that such person executed the
foregoing instrument as the free act and deed of such person, and if applicable in the
capacity shown, having been duly authorized to execute such instrument in such
capacity.



Rodney S. Nagasako
Notary Public, State of Hawaii

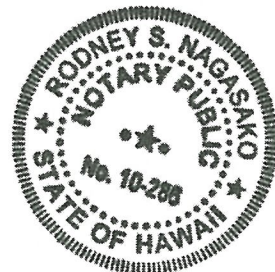
Rodney S. Nagasako

My commission expires: SEP 05 2018

NOTARY PUBLIC CERTIFICATION
Rodney S. Nagasako FIRST Judicial Circuit
Doc. Description: REVOCABLE PERMIT
No. S-7849 (INCLUDING EXHIBIT A2)

No. of Pages: 12 Date of Doc. undated at time of notarization

Rodney S. Nagasako JUN 03 2016
Notary Signature Date

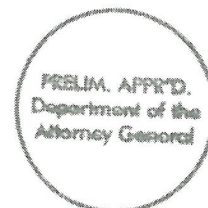


STATE OF HAWAII)
) SS.
CITY AND COUNTY OF HONOLULU)

On this _____ day of _____, 20____, before me personally appeared _____, to me personally known, who, being by me duly sworn or affirmed, did say that such person executed the foregoing instrument as the free act and deed of such person, and if applicable in the capacity shown, having been duly authorized to execute such instrument in such capacity.

Notary Public, State of Hawaii

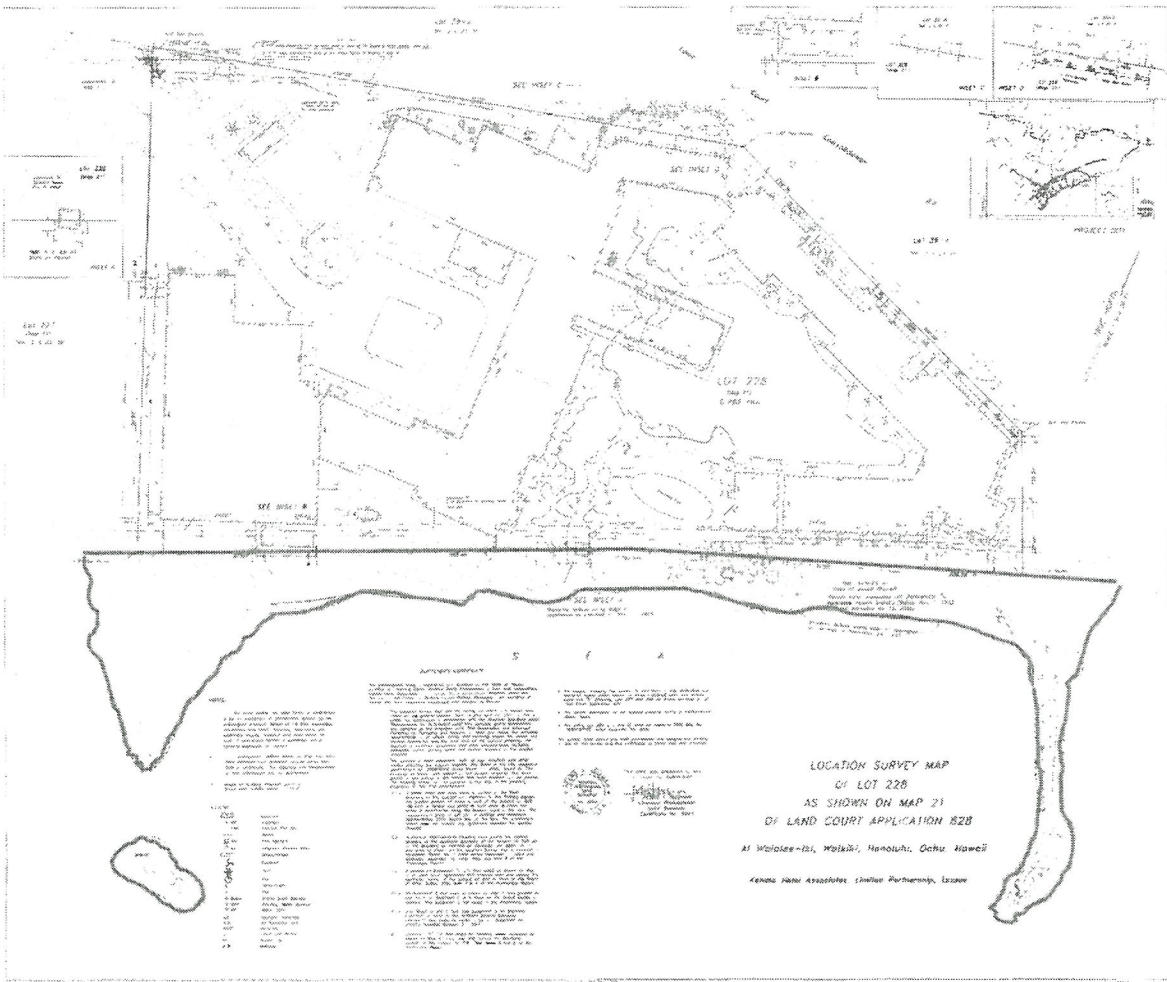
My commission expires: _____



BLNR - Issuance of RP to
Resorttrust, LLC

October 10, 2014

~~EXHIBIT A~~



~~EXHIBIT A~~

PRELIM. APP'D.
Department of the
Attorney General

EXHIBIT "A2"

EXHIBIT 3

AMENDED

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

September 14, 2018

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

Oahu

Annual Renewal of Revocable Permits on the Island of Oahu. See Exhibit 2 for list of Revocable Permits.

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." See Exhibit 1 attached.

BACKGROUND:

At the end of each calendar year, Land Division reviews its list of current revocable permits issued statewide and determines which ones to recommend to the Board of Land and Natural Resources for renewal for the upcoming year. Generally, those revocable permits in good standing will be recommended for renewal, unless the Board has approved a different disposition for the land covered by a particular permit.

In the past, staff has brought all revocable permits to the Board for renewal in one submittal. At its meeting on December 11, 2015, Item D-14, as amended, the Board directed staff to submit revocable permit renewals by county over four meetings, with an explanation of why a revocable permit is the appropriate disposition and how the rent was set. At its meeting on June 24, 2016, Item D-7, the Board further approved the recommendations of the Department of Land and Natural Resources Revocable Permit Task Force, as amended, requesting all divisions notate any non-compliance issues and pending litigation in the renewal template. In accordance with these directives, staff is submitting the Oahu revocable permits, including the additional information the Board requested.

as amended
APPROVED BY THE BOARD OF
LAND AND NATURAL RESOURCES
AT ITS MEETING HELD ON
September 14, 2018 9:10

EXHIBIT "3"
D-17

REMARKS:

The list of revocable permits for Oahu that staff recommends be renewed for 2019 is attached as Exhibit 2. Included in the exhibit are the revocable permit number, permittee names, tax map keys, original commencement date of the permit, character of use, land area, annual rent, method by which staff set the rent and the rationale behind the issuance of a revocable permit. General location maps of the revocable permits to be renewed are attached as Exhibit 3.

At its meeting on August 26, 2016, agenda item D-11, the Board approved interim rents for the annual renewal of the revocable permits on Oahu for calendar year 2017. Through this submittal, staff recommends making the interim rents permanent.

Staff procured a contract with James Hallstrom of The Hallstrom Group/CBRE, Inc. (Appraiser) for appraisal services to assist in valuing the rent to charge for the use of State lands underlying revocable permits statewide as of January 1, 2018, and ground rent discounts for tenancy and use restriction, if any, for 34 of the 63 Oahu revocable permits. The Portfolio Appraisal Report (PAR) was completed on May 9, 2018.

The Appraiser recommends increasing 2019's rents by 2-3%, depending upon demand for the properties, over those indicated in the PAR. Staff recommends setting the 2019 Oahu revocable permit annual rents by the following categories (see Exhibit 2 for further details):

- Category A: Revocable permits (RPs) valued by the PAR indicating an increase in the annual rent. Staff recommends increasing the 2018 Indicated Annual Market Rent by 10% for 2019.
- Category B: RPs valued by the PAR indicating a decrease in the annual rent. Staff recommends increasing the annual rent by 3% over the PAR's Indicated Annual Market Rent.
- Category C: RPs not valued by the PAR: Staff recommends increasing the 2019 annual rent by 3% over 2018's annual rent.
- Category D: RPs where the PAR's Indicated Annual Market Rent increased by less than 10% over 2018's annual rent. Staff recommends a 3% increase.
- Category E: For special cases, regardless of whether included in the PAR or otherwise. Staff's recommendations for this category are discussed further in Exhibit 2.

With respect to the revocable permits in Category A, the Indicated Annual Market Rents from the PAR increased from a low of 7% to a high of 1,000%. Staff feels that immediately implementing these rents would cause some permittees to cancel their permits, resulting not only in the loss of revenue, but also forcing the Division to expend resources to maintain these lands. Staff views the 10% annual increases for these permits as a means for the Division to achieve rents closer to market over a short period of time, without causing a major disruption to the occupancy of and revenue generated from these

lands.

The following State and City & County of Honolulu agencies were consulted on this action with the results indicated:

Agency:	Comment:
Division of Forestry and Wildlife	No response by suspense date
Office of Conservation and Coastal Lands	See Exhibit 4 (staffs responses appear in Exhibit 2)
State Parks	No response by suspense date
Historic Preservation	No response by suspense date
Engineering	No comments
Oahu District Land Office	Comments incorporated into Exhibit 2
Commission on Water Resource Management	No response by suspense date
Division of Conservation and Resources Enforcement	No response by suspense date
Department of Hawaiian Home Lands	No response by suspense date
Department of Agriculture	No comments
Agribusiness Development Corporation	No response by suspense date
Office of Hawaiian Affairs	See Exhibit 5
C&C Department of Planning and Permitting	No comments
C&C Department of Facility Maintenance	No comments
C&C Department of Parks and Recreation	No comments
Board of Water Supply	No comments

Since the last renewal of the Oahu revocable permits on August 25, 2017, the following permits have been cancelled:

RP#	Permittee	Area	TMK	Monthly Rent	Cancelled on	Uses	Remarks
rp7056	Kapolei People's Inc. dba. Kapolei Golf Course	0.826	(1) 9-1-016:120-0000	728.31	2/8/2018	Parking	Land owned by UH
rp7082	Honolulu Community Action Program, Inc.	2	(1) 4-1-013:031-0000	20.62	2/28/2018	Community Use	Voluntarily cancelled
rp7402	Larry Jeffs dba Sugarland Farms, Inc.	142.149	(1) 9-1-16:8, 9-1-18:5,8	1,752.30	6/30/2017	Agriculture	Replaced by new RP
rp7469	Cheryl McConnell and Wesley Furtado	6.86	(1) 4-1-013:022-0000	160.29	11/30/2017	Pasture	Replaced by new permittee
rp7544	Kwock Nam Lau	0	(1) 2-2-010:033-0000	121.17	12/31/2017	Parking	Replaced by new RP
rp7610	Hawaiian Electric Company, Inc. and Hawaiian Telecom, Inc.	0	(1) 4-1-010:088-0000	16.76	6/5/2018	Utility	Changed into perpetual easemtn
rp7713	Dale Hardinger and Carla Hardinger	0.8	(1) 4-1-018:049-0000	16.96	8/29/2017	Pasture	Transferred to DOA
rp7825	Anitilose Unga and Meliane Unga	2.164	(1) 5-8-001:038-0000	43.65	8/29/2017	Agriculture	Transferred to DOA
rp7843	Tactical Airgun Games Hawaii LLP	13.09	(1) 1-1-3:3,204 - 207,212	1,122.19	11/30/2017	Recreational	Voluntarily cancelled
rp7889	Kazuto Yamada	14.387	(1) 4-1-8:71, 72 por.	139.22	8/29/2017	Agriculture	Transferred to DOA

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. Approve the continuation of the revocable permits listed in Exhibit 2 on a month-to-month basis for another one-year period through December 31, 2019, except for permits that are in arrears of rental payment for more than 60 days and/or have been approved for forfeiture by a separate Board action. Permits in arrears of rental for 60 days or more and/or approved by the Board for forfeiture shall not be renewed; and
3. Approve no immediate change in current monthly rent for revocable permits as listed in Exhibit 2, provided however, that the Land Board reserves and Delegates to the Chairperson the right authority at any time to review and implement new rental charges for the revocable permits listed in Exhibit 2, effective any time from and after January 1, 2019.

Respectfully Submitted,



Richard T. Howard
Land Agent

APPROVED FOR SUBMITTAL:


Suzanne D. Case, Chairperson

Land Board Meeting: September 14, 2018; D-17: Approved as amended.

Approved as amended. See attached page.

Land Board Meeting: September 14, 2018; D-17: Approved as amended.

Approved as amended. Approved the renewal of the Oahu group of revocable permits through December 31, 2019, except for Revocable Permit 7849 to ResortTrust Hawaii LLC. See decision on D-13.

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 Permits on the Island of Oahu.

Project / Reference No.: Not applicable

Project Location: Various locations on the Island of Oahu

Project Description: Renew existing revocable permits 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."

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

Cumulative Impact of
Planned Successive
Actions in Same Place
Significant?

No, the requested locations have been used for same uses since the permits were granted.

Action May Have
Significant Impact on
Particularly Sensitive
Environment?

No.

Analysis:

The request pertains to renewing the revocable permits for Oahu. Staff believes that the request would involve negligible or no expansion or change in use of the subject location beyond that previously existing.

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 1

EXHIBIT 4

AMENDED

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

September 14, 2018

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

PSF No.: 17OD-083

OAHU

Issuance of Right-of-Entry Permits for Beach Activities to be held on October 16 and 17, 2018; and Issuance of Revocable Permit for Recreational and Maintenance Purposes; Resorttrust Hawaii, LLC, Applicant; Waialae, Honolulu, Oahu, Tax Map Key: (1) 3-5-023:041.

APPLICANT:

Resorttrust Hawaii, LLC ("RTH"), a domestic limited liability company.

LEGAL REFERENCE:

Section 171-55, Hawaii Revised Statutes ("HRS"), as amended.

LOCATION:

Portion of Government lands situated Waialae, Honolulu, Oahu, identified by Tax Map Key: (1) 3-5-023:041 (the hatched area) and the beach situated makai of such hatched area as shown on the map labelled as **Exhibit 1**.

AREA:

Right-of-Entry ("ROE")

October 16, 2018	2,309 square feet
October 17, 2018	7,651 square feet
Total:	9,960 square feet

Revocable Permit ("RP")

The hatched area shown on Exhibit 1, which is 1,280 acres, more or less¹, including 5,153.5 square feet thereof allowing placement of improvements and equipment described below.

ZONING:

State Land Use District: Urban
City and County of Honolulu LUO: Resort (for abutting property)

¹The area was generated from a computer program, and it did not go through any land survey process.

as amended
APPROVED BY THE BOARD OF
LAND AND NATURAL RESOURCES
AT ITS MEETING HELD ON
September 14, 2018

EXHIBIT "4"

TRUST LAND STATUS:

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

CURRENT USE STATUS:

Encumbered by Revocable Permit No. S-7849, Resorttrust Hawaii, LLC, Permittee, for recreational and maintenance purposes at a monthly rental of \$1,281.60 effective from January 1, 2018.

CHARACTER OF USE:

ROE Corporate event purposes.

RP Recreational and maintenance purposes limited to storage area, cabana hale, cabana tent, beach shower, tower caddy, outside seating area, hammock, trash can, beach chair storage, clam shell lounge, beach chair set up for 4 or 6, and outrigger canoes storage, as described in Applicant's request letter described below.

COMMENCEMENT DATE/TERM:

ROE

- (a) From 3:00 p.m. to 12:00 a.m. on October 16, 2018 (Tuesday).
- (b) From 6:00 a.m. to 9:00 p.m. on October 17, 2018 (Wednesday).

RP

The requested revocable permit shall commence upon the termination of RP 7849, as described below.

MONTHLY RENTAL for RP:

To be determined by an independent appraiser at the cost of the applicant, subject to review and approval by the Chairperson.

COLLATERAL SECURITY DEPOSIT for RP:

Twice the monthly rental.

RENTAL for ROE:

\$996 (One-time payment, based on 10¢ per square foot per day.)

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

In accordance with Hawaii Administrative Rule ("HAR") Section 11-200-8 and the Exemption List for the Department of Land and Natural Resources reviewed and concurred on 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, "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", Item 51, which states the "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 2**.

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

JUSTIFICATION FOR REVOCABLE PERMIT:

A land disposition is needed to regulate the hotel's improvements and activities at the subject location, and a revocable permit is able to meet this objective as supported by the following justifications.

- A. Site issues make property unsuitable for public auction lease:
- No legal vehicular access.
 - Irregular shape.
 - The requested location and other portions of State unencumbered lands in the vicinity are not legally subdivided lots.
- B. Since RTH became the owner of the hotel around 2014, its representative approached the Land Division discussing the possibility of obtaining an easement for some of the hotel's activities and improvements. RTH published a draft environmental assessment ("DEA") pursuant to Chapter 343, HRS in the summer of 2017, but decided to withdraw the DEA in August 2017 due to community concerns and maintain the current revocable permit.

REMARKS:

Location

The subject beach area was built at the cost of the private property owners and tenants around 1963 pursuant to Permit No. 1164 dated August 13, 1962 issued by the Department of Transportation, Harbors Commissioners.

At its meeting on January 25, 1963, under agenda item F-23, the Board approved the request from the private property owners and tenants to create the beach. Subsequently, an agreement dated February 15, 1963 between the Board of Land and Natural Resources and the private parties, was signed and recorded at the Bureau of Conveyances on January

27, 1967 in Book 5568, page 249.

Since 1968, revocable permits were issued to the adjoining hotel owners and they are shown in the table below.

RP No.	Date	Area (sq. ft.)	Purposes
4220	October 1, 1968	6,250	Recreational
6317	March 1, 1986	32,860	Recreational purposes and maintenance of State land
6903	November 1, 1993	40,460	Recreational purposes and maintenance of State land
7430	May 1, 2007	40,460	Recreational and maintenance purposes
7849	July 1, 2016	40,460	Recreational and maintenance purposes

Staff notes that when the Board considered the request for a revocable permit to Kahala Hilton Co., Inc. at its meeting on February 28, 1986, item F-1-d (**Exhibit 3**), the board submittal noted that “[t]he area requested by the applicant is entirely above the shoreline which is indicated by the growth of existing vegetation. Makai of the shoreline or vegetation line is a wide, sandy beach area which is extremely used by the general public on a regular basis.” Eventually, RP 6903 was issued to Kahala Hilton Co., Inc.

For the purpose of discussion, staff would like to divide the subject State lands, further identified as TMK (1) 2-5-023:041 into two portions.

1. The RP Area, i.e. the hatched area on Exhibit 1, which is the portion of State lands between the makai boundary of the hotel and mauka of the shoreline certified in 2016. Majority of the RP area is presently landscaped;
2. Kahala Beach, which is the sandy beach area makai of the 2016 certified shoreline described above.

Staff believes a clarification of the subject area is significant in view of the community’s concerns described in the following paragraphs.

Community’s Concerns

In the past few months, the Department received multiple complaints from the community through emails, letters, or phone calls regarding unauthorized commercial activities at the Kahala Beach. Per the complainants, these unauthorized commercial activities are not permissible under the terms and conditions of RP 7849 currently held by RTH. Therefore, the Board should not renew RP 7849 and authorize enforcement actions, e.g. fines, termination of RP. Letter dated June 23, 2018 from Sierra Club of Hawaii is attached as **Exhibit 4**, with the following issues raised by the community:

- Surfing and stand-up paddle lessons;
- Presetting beach chairs

- Reducing public access to the beach
- Unauthorized improvements on the beach
- Wedding ceremonies on the beach
- Serving alcohol on State lands
- Illegal mooring of catamaran in the water

Upon receipt of the complaints, multiple staff of the Land Division inspected the Kahala Beach on different dates, and the following is a summary of the outcome of those site inspections.

- In one occasion, staff noticed that there was an employee of the beach concession talking to a couple, believed to be the guests of the hotel, on the sandy beach. Staff was not sure if the exchange was pertaining to any surfing lesson or solicitation for such lesson. Nevertheless, we informed the hotel through its counsel, and we were told that the hotel stopped any beach activities involving its beach concessionaires and its employees on the sandy beach.
- During those site visits, there was no sighting of presetting beach chairs on the Kahala Beach, but there were beach chairs with umbrellas and the cabanas placed on the RP area.
- Previously, there was a sandy path over portions of the RP area. RTH recently modified the landscaping of the RP area by, among other improvements, converting the sandy path into grassy area. However, staff did not experience any blocking or reducing of public access onto the RP Area and the Kahala Beach during the site visits.
- Regarding serving alcohol on State lands, staff contacted the investigator of the Liquor Commission and confirmed that the investigator's office has visited the location and did not find any violation under the liquor license. However, the investigator will continue to monitor the situation.
- In the complaints, there were photos showing wedding planner(s) preparing portions of the RP Area for a wedding ceremony. Staff brought this issue to RTH and reiterated that a wedding ceremony without prior approval is not permissible. For the Board's reference, RTH is currently asking for a beach right-of-entry for wedding and corporate receptions on the RP Area. Staff will discuss this request later in this submittal.
- Staff brought to the RTH's attention the mooring of the catamaran in the water off the hotel. We were told that the hotel does not own the catamaran. Staff will coordinate with the Division of Boating and Ocean Recreation for any appropriate follow-up action.

In addition to the concerns raised in Exhibit 4, Land Division also received a copy of a letter dated August 2, 2018 (**Exhibit 5**) from the Department of Health, Clean Water Branch regarding a damaged discharge pipe releasing cooling water near the shoreline. Before the receipt of the letter from DOH, staff also received a phone call on August 10, 2018 from the Chief Engineer of the hotel inquiring steps and process required to conduct the repair work. The hotel was requested by DOH to respond within 30 calendar days to provide a response. Staff understands the discharge pipe is a component of the facilities

that house the dolphin and other fishes on the hotel's property, and staff is planning to work with the hotel on process/authorization for the forthcoming repair.

The community also wants to share with the Board a violation by a company running the canoe and surfboard activity through the swimming zone designated by the §13-256-89, HAR. "Waialae-Kahala Restricted Area". Emails between the DOBOR and the company are attached as **Exhibit 6**.

RTH Request for RP

RTH, through its counsel, has prepared a detailed letter (**Exhibit 7**) with photos explaining the different aspects of the situation at the subject location. RTH is requesting the Board's clarification of the purpose of the RP which would allow placing of 40 items on the RP Area and their particulars are tabulated below.

Item	Reference on the map	Dimensions (ft)		Area	Count	Total Area (sq ft)
KOKK Storage Area	1	14	40	560	1	560
Cabana Hale	2	8	9	72	1	72
Cabana Tent	3-6, 10-15	10	10	100	10	1000
Beach Shower	7	8	8	64	1	64
Tower Caddy	8	2	6	12	1	12
SSG Seating Area	9	71	27	1917	1	1917
Hammock	16	13	4.5	58.5	1	58.5
Trash Can	17, 38-40	2	4	8	4	32
Beach Chair Storage	18	18	26	468	1	468
Clam Shell Lounges	19-31	5	6	30	13	390
Beach Chairs Setup 4 Chairs	32,34,36	12	7	84	3	252
Beach Chairs Setup 6 Chairs	33,35	8	7	56	2	112
Outrigger Canoes Storage	37	9	24	216	1	216
					40	5153.5

RTH's counsel also agreed with the Division's comment that the character of use in the revocable permits at the subject location, which "recreational and maintenance" is too vague. It creates ambiguity in terms of possible enforcement actions. Therefore, RTH requests the Board agree to amend the permissible use of RP 7849 to include the specific items described on map marked as Exhibit I-A of Exhibit 7.

The area [5,000+ square feet] noted above is relatively small comparing to the total acreage of the RP Area, which is about 1.28 acres. Public access over the area was always required in the previous revocable permits issued to the respective hotel owners. Staff notes from previous revocable permit files that there were some past incidents when public access was challenged or even blocked. Nevertheless, RTH is fully aware of the significance of this

requirement and promise to continue to comply with this requirement in the requested revocable permit, if approved by the Board.

On the ground, there is a continuous stretch of landscaped area along the Kahala Beach from Diamond Head side to Koko Head direction maintained by RTH. As a result, depending on the exact location, it may be difficult to distinguish whether an individual is physically standing on the hotel property or the State land [RP Area]. RTH has installed some signs showing the public access, for example, see Exhibit G of the Exhibit 7. As mentioned in the same Exhibit 7, a representative of RTH has been attending the neighborhood board meetings to share the available information from the hotel side.

Currently, RTH maintains the RP Area as well as the Kahala Beach as part of its operations. RTH agrees to continue maintaining the Kahala Beach pursuant to the requested RP, if approved. Staff supports the continuance by RTH in the maintenance of the Kahala Beach, as it is technically considered as unencumbered State lands and the Division's limited land maintenance resources are largely devoted to the stream maintenance and overgrown vegetation.

Land Division does not have any objection to the requested RP, subject to an appraisal procured at RTH's cost to determine the monthly rental.

Right-of-Entry

RTH advised the staff that they had stopped taking reservations for events planned on State lands, immediately after they were advised by the State about the prohibition of such events without prior approval. However, there were two reservations booked prior to RTH stopping the practice of taking reservations. RTH is asking the Board to authorize two (2) right-of-entry permits for the periods mentioned above, for corporate events. The request together with maps for the respective locations are attached as **Exhibit 8**².

Staff believes these events are similar to prior approvals from the Board on beach event activities, fireworks displays etc. Therefore, staff has no objection to the requested ROE subject to the terms and conditions described above.

Applicant has not had a lease, permit, easement or other disposition of State lands terminated within the last five years due to non-compliance with such terms and conditions.

Recently, Land Division asked other government agencies for comments on the renewal of Oahu RPs scheduled to take effect on January 1, 2019 upon approval from the Board under separate request on today's agenda. RP7849, the current one, is on the list. Therefore, staff did not solicit another round of comments on the requested RP.

Other materials

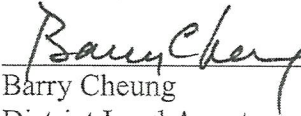
Testimonies received for August 24, 2018 Board meeting and other letters received from community regarding the subject matter are attached as **Exhibit 9**.

² By letter dated August 17, 2018, RTH amended its request by withdrawing December 29, 2018 from 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. Authorize the issuance of a revocable permit to Resorttrust Hawaii, LLC covering the subject area for recreational and maintenance purposes under the terms and conditions cited above, which are by this reference incorporated herein and further subject to the following:
 - A. The standard terms and conditions of the most current revocable permit form, as may be amended from time to time;
 - B. Permittee shall maintain, at its own costs, the beach located seaward of the revocable permit area;
 - C. Review and approval by the Department of the Attorney General; and
 - D. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.
3. Termination of RP 7849 upon issuance of the requested revocable permit.
4. Authorize the issuance of a right-of-entry permit to Resorttrust Hawaii, LLC covering the subject area for beach activities 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 right-of-entry permit form, as may be amended from time to time;
 - B. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

Respectfully Submitted,


Barry Cheung
District Land Agent

APPROVED FOR SUBMITTAL:


Suzanne D. Case, Chairperson

Land Board Meeting: September 14, 2018;
D-13: Approved as amended.

Approved as amended. See attached page.

Land Board Meeting: September 14, 2018; D-13: Approved as amended.

Approved as amended. The Board approved the Right-of-Entry Permits; deferred on the Issuance of a new or amended Revocable Permit pending receipt of David Frankel's petition for a contested case. The Board noted the current Revocable Permit shall to continue at least through December 31, 2018.

EXHIBIT 5


September 14, 2018

David Kimo Frankel's Testimony in Opposition to the renewal of revocable permit S-7489, the issuance of a new revocable permit for the Kahala Hotel, or any right of entry for the Kahala Hotel, Items D-13 and D-17 on the September 14, 2018 Agenda

Chair Case and members of the board,

There are four questions you should be asking yourself in considering the two agenda items related to the Kahala Hotel's revocable permit.¹

How will you respond to the hotel's flagrant and deliberate violations of the law?

Is commercial use of public prime beachfront land – often to the exclusion of the public – appropriate?

If commercial use is appropriate, is the rent amount sufficient?

What conditions will you impose?

I. The Kahala Hotel Has Engaged in Unauthorized Commercial Activity Within the RP Area.

RP S-7489 allows Resorttrust Hawaii LLC the right to occupy and use state owned ceded land at TMK (1) 3-5-023:041 “for the following specified purposes **only: recreational and maintenance purposes.**” (paragraph A1). The hotel suggests that there is ambiguity about what “recreational” uses entail. There is no ambiguity.² HRS § 171-10 demonstrates that recreational uses are clearly distinct from commercial uses. *See* HRS §§ 171-10 (7) and (10). This distinction is well recognized. The Land Division recently commissioned an Appraisal Report prepared by CBRE. That report notes the distinction between “recreational” uses and “commercial” uses.

Although technically applicable only to unencumbered lands, HAR § 13-221-2 provides a sound definition of commercial activity:

“commercial activity” means the use of or activity on state land for which compensation is received by any person for goods or services or both rendered to customers or participants in that use or activity. Display or merchandise or demanding or requesting gifts, money, or services, except as allowed by chapter 13-7, shall be considered commercial activity. Commercial activities include activities whose base of operations are outside the boundaries of the unencumbered state lands, or provide transportation to

¹ To the extent that the staff submittal suggests on page 1 that the area covered by the revocable permit is 1,280 acres, the submittal is inaccurate.

² To the extent that the staff submittal suggests that there is ambiguity, the submittal is inaccurate.

or from the unencumbered state lands.

The Kahala Hotel has engaged in extensive commercial activity on TMK (1) 3-5-023:041 that is encompassed by RP S-7489.³

A. The Kahala Hotel has established a restaurant on the RP parcel.

Most egregiously, the hotel expanded a restaurant onto state land without authorization.

In 1994, the City granted the hotel an SMA permit (94/SMA-22) for TMK (1) 3-5-023:39, which is the privately-owned parcel ma uka of state-owned TMK (1) 3-5-023:041. In its SMA application, the applicant stated that it would relocate the pool side snack bar, but did not discuss exporting any of its dining facilities onto the state parcel. The revised landscape plan approved on April 26, 1995 depicts the “dining terrace adjacent to snack bar” ma uka of the property line dividing state and private property.

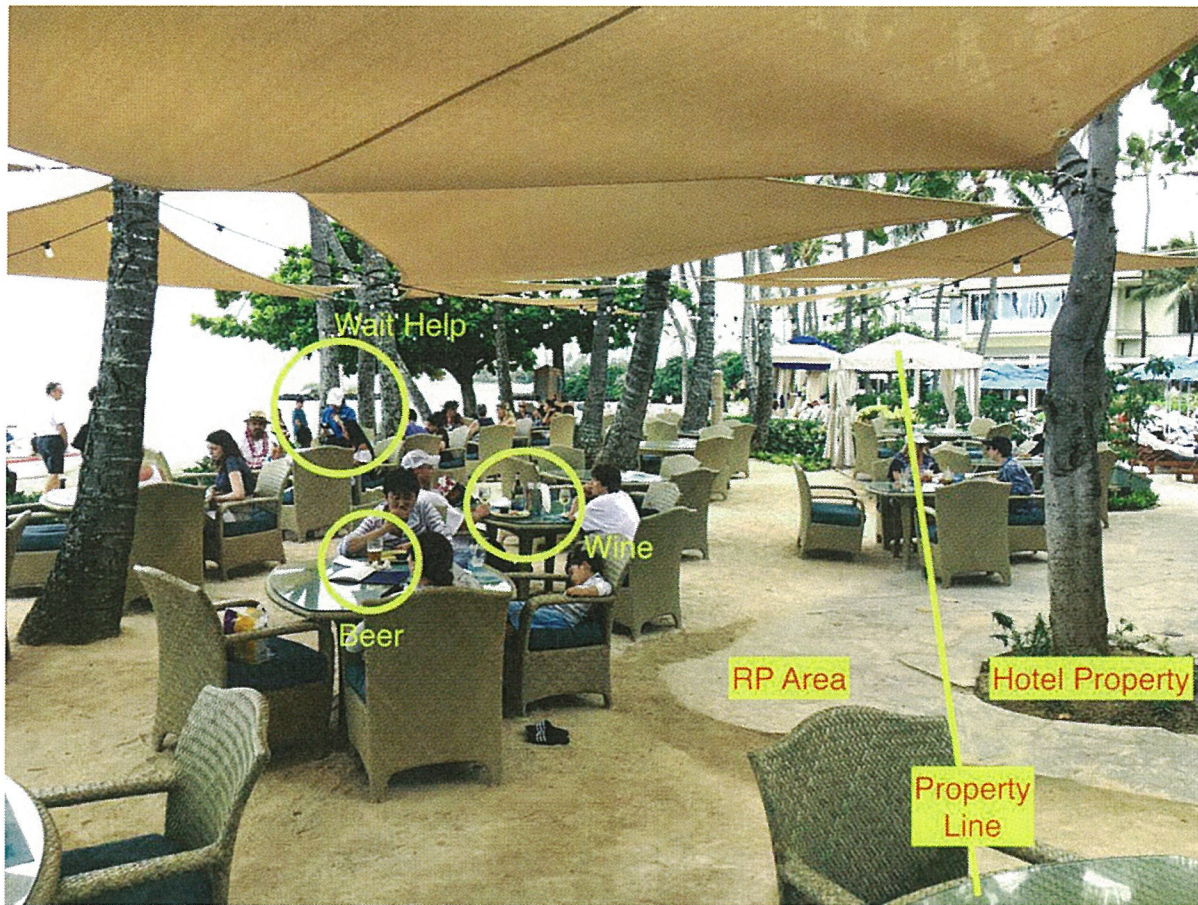
In August 2002, the City approved a June 2002 request to modify SMA permit 2001/SMA-10. The request, however, did not apply to TMK (1) 3-5-023:041. Nor did the request, or the approval, authorize the expansion of the restaurant/bar onto state land.

By 2005, the hotel installed tents on state land – without any authorization from DLNR or the City. See e.g., <http://the.honoluluadvertiser.com/article/2005/Mar/18/en/en07a.html> as well as the large November 29, 2005 location shoreline map found in DLNR’s files.

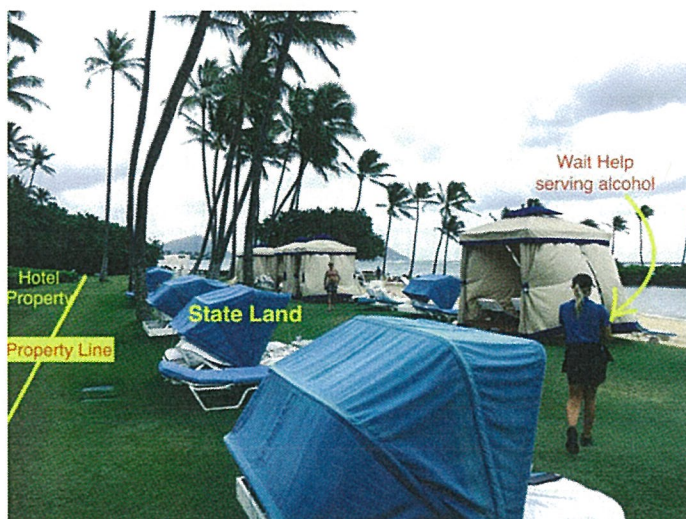
More recently, these tents were transformed into canvas awnings/canopies. In addition, the hotel significantly expanded the number of tables on state land. The Sea Side Grill restaurant blocked lateral access across the state parcel.



³ To the extent that the staff submittal suggests that the June 23, 2018 letter from the Sierra Club and members of the community focused on commercial activities ma kai of TMK (1) 3-5-023:041 (the RP parcel), it is inaccurate. The photographs depicted numerous commercial activities that are clearly on TMK (1) 3-5-023:041 – the RP parcel. See pages 3-5 of that letter.



In the last week or two, the hotel appears to have removed the Sea Side Grill restaurant seating area from public land. It has, however, left cables high up on trees to allow for the re-installation of its awnings/canopies. In addition, waiter and waitresses now deliver food and drink to the many reclining chairs that are, in effect, permanently scattered throughout the lawn area within the RP parcel.



Appetizers アペタイザー

レンズ豆のナチュス
Spiced lentils and white cheddar cheese sauce
over blue corn tortilla chips and topped with
salsa fresca and green onion
トルティーヤチップスにスパイスで味付けしたレンズ豆、
ポプリト・チダーチーズソースを乗せてフレッシュな
トマトと葱をトッピングしたナチュス

Edamame エダマメ 豆
Boiled soy beans tossed with
Hawaiian salt or chili oil

Tortilla Chips トルティーヤチップス 10
Blue corn tortilla chips with salsa fresca and
guacamole
トルティーヤチップス、サングフレッシュとアボカド

Diced sashimi grade big eye tuna, tossed with Hawaiian salt, egg, green and round onions, sesame seeds, chilis, soy sauce and sesame oil

**Grilled Jumbo Prawns
& Hawaiian Tzatziki (GF) (NF) (EF) 20**

Greek yogurt, ogo,
cucumber, sweet onions,
dill, garlic, capers,
lemon & olive oil



Salads サラダ

Asian Chicken Salad (GF) (NF) (DF) 18
 アジアン チキンサラダ
 Steamed chicken breast sliced and served on
 romaine lettuce, with bean sprouts, Asian
 pears, green onions, wasabi peas, and a
 creamy wasabi dressing

Seared Ahi & Waimanalo Valley Greens 25

アヒレワイロ産マグロのたたきとワイマナに産クローンサラダ
Sashimi grade big eye tuna seared and sliced
and served with mixed greens, Ho Farms tomato,
sliced red onion and yuzu soy dressing
メリチマ産のたたき、ミックスグリーン、ホファームトマト、玉ねぎ、
柚子醤油ドレッシングのサラダ

Grilled Scottish Salmon & Soba Salad (DF) (EF) (NF) - CONTAINS SOY 16
 スコティッシュサーモンのグリル、蕎麦サラダ - 大豆を含む
 Saz Scottish salmon, Noto greens, asparagus
 if avocado, yuzu soy dressing
 スコティッシュサーモン、ナトグリーン、アスパラガス、アボカド、柚子醤油ドレッシング

Sprouted Quinoa, Fennel, Avocado & Beet Salad (GF) (DF) (EF) 16
 発芽キヌア、フェネル、アボカドとビーツのサラダ
Red onion, mint, roasted quinoa, almonds and sherry wine vinaigrette - vegan
 赤たまねぎ、ミント、ローストキヌア、アーモンド、シェリーワインビネグレット - ベーガン

Traditional Caesar Salad with
Parmesan Cheese, Caesar Dressing 14

トリアディオナルシーザーサラダ / バレメザンチーズ、
シーザードレッシング
Chopped romaine lettuce with sourdough croutons
and creamy caesar dressing
ロメインレタス、サワードウ(天然酵母)パンのクラウトンとクリー
ミーシーザードレッシング
Grilled Shrimp add 10 / Grilled Chicken add 6
グリルド海老 add 10 / グリルドチキン add 6

Kô Hana Rum from the north shore of Oahu,
Pierre Ferrand Orange Curacao, toasted
almond orgeat syrup, fresh squeezed lime
juice and pineapple juice topped with a
float of Coruba Dark Rum

オアブ島・スースシャ湾・バハ・ラム、ビエール・アラシ、オレンジ
ケルソー、オルゲートグーモン・ド・ラップ、使いたてライムジ
ース、パイナップルジュース、コルバーダー・ラム。

Trader Vic's Mai Tai 16

Appleton Reserve Rum, Kô Hana Rum from the north shore of Oahu, Pierre Ferrand Orange Curacao, fresh lime juice and a toast almond orgeat syrup "this classic version of the mai tai is based on the original Trader Vic recipe which does not contain any of the tropical fruit juices normally associated with "other" Mai Tais"

アフルトン・リザーブ・ラム、オアフ島ノースショア郡コハナ・ラム、ビニール・フェラフ・オレンジキュラソー、被けたでライムジ、ース、セルゲートビー・モンティンロップ

Low Calorie

ロ一カロリ一

**Lavender Coconut
Collins 15**

SKYY Infusions Coconut Vodka,
fresh lemon juice, housemade

lavender agave nectar, club soda
 30%インフュージョンはコナ・ンウォータ。
 フレッシュレモンジュース、ワス・メイ・ド・ラベン

Hula Moon フラムーン 16

Muddled mint with St. Germain Bombay Gin, fresh squeezed lime cucumber lace this cocktail with

ミント、サンゼルマン・エルダーフラスター、
たでライムジュース、キッパリと爽やかなハ

リロイ・スウィズル 16

El Dorado 3yr Rum infused with lilikoi tea, our homemade simple syrup, passion fruit purée and fresh squeezed lime juice

ニホドラト3味うと、ソノコイティー、
自家製シンプルソップ、
パッションフルーツピュア、
焼いたカスタードクリーム



Pineapple Vanilla Mojito 15

ハイナツブルバニラモヒート

Old Lahaina Silver Rum, lime juice, vanilla-infused agave nectar, fresh pineapple muddled with mint, coconut water

オールト・ハイッセルハイム・ライム・クーニク・海軍のアイグ
ネクター、ミントと部隊はいた。フレイノ・ハイッセル・コエナ・ワーター

Diamond Head Mule 16
ダイヤモンドヘッド・ミュール
Your choice of Banks 5 Island Rum or Maui's own

Ocean Vodka combined with our homemade ginger syrup, fresh squeezed lime juice and pineapple juice.

Kō Hana Daiquiri コハナ・ダイキリ 14

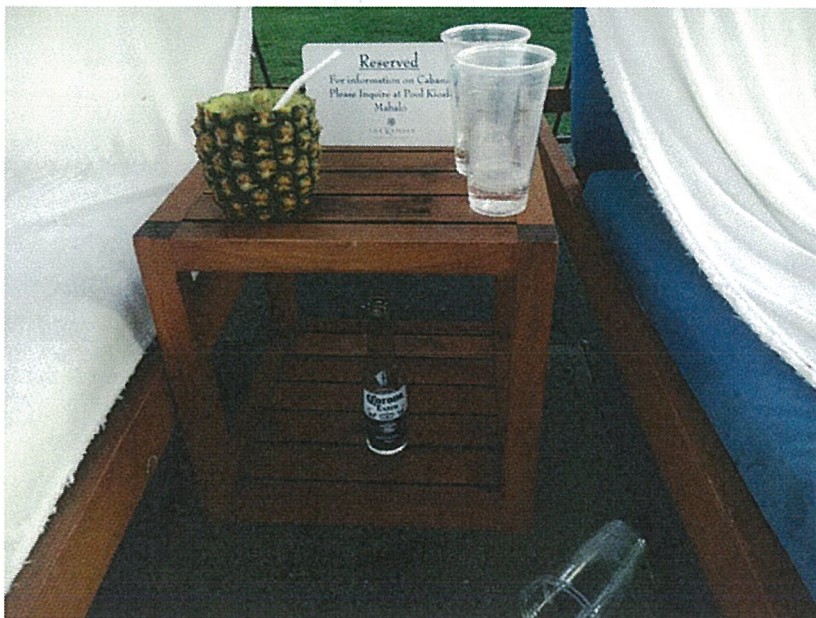
Kō Hana Rum from the north shore of Oahu,
El Dorado 3yr Rum, fresh squeezed lime juice
and our homemade simple syrup

オブノースノシアアアハナム、エルドラドアラム
院れたでタイムソース、自家製シニアアラム

B. The Kahala Hotel has built cabana structures on the RP parcel.

Not only do the cabanas for hotel guests constitute a commercial use, they are also structures that were constructed on state land without approval – despite paragraph B.17 of the revocable permit: “Permittee shall not, without the prior written approval of the Chairperson of the Board place improvements within the Premises.”

4



C. The Kahala Hotel has conducted weddings on the RP parcel.

The Kahala Hotel's website, <https://www.kahalaresort.com/Romance-Weddings/Wedding-Packages>, sells a wedding package for \$7,100, which includes an "Ocean front" ceremony, "Up to 40 Chiavari chairs" and "Amplification system" and "Exclusive use of The Kahala Hotel & Resort property for wedding photography" The "*Ceremony package includes one hour use of the ceremony site. Ceremony package does not include guest rooms. All ceremony package prices are valid through December 31, 2018.*"

These weddings took place on the RP land as recently as May 26, 2018.



II. The Kahala Hotel Has Acted in Bad Faith.

The Kahala Hotel is owned by a multinational corporation represented by highly compensated counsel and lobbyists. It has acted in bad faith.

Take the weddings for example. On July 11, 2016 Chair Case wrote to the Kahala Hotel's attorneys. She said, in no uncertain terms:

[W]eddings are not currently authorized under the subject revocable permit.

We request you to cease conducting any wedding ceremonies planned at the subject premises immediately until proper authorization is obtained from the Land Board.

The staff submittal states on page 7 that the hotel explained that "they had stopped taking reservations for events planned on State lands, immediately after they were advised by the State about the prohibition of such events without prior approval." Chair Case's letter is dated July 11, 2016. In 2017 and this year, I witnessed weddings taking place within the RP parcel. The June 23, 2018 letter from the Sierra Club documents two such weddings that took place on May 26, 2018. The hotel is being dishonest when it claims that it stopped hosting weddings on state land long ago.

Similarly, the hotel has failed to tell DLNR that it has been operating a restaurant on state land. On September 12, 2014, Restorttrust's Carlsmith attorney wrote that the hotel did not intend

to use the property for uses other [than] those currently conducted there include resort landscaping the use of portable, wooden gazebo for wedding ceremonies and for the storage of beach furniture and other recreational aquatic equipment.

He failed to mention that it operated a restaurant on state land. On July 11, 2016 Chair Case wrote to the Kahala Hotel's attorneys. She said, in no uncertain terms:

The subject parcel is encumbered by Revocable Permit No. 7849 for recreational and maintenance purposes, and **no other commercial activities shall be conducted thereon without authorization from the Land Board.**"

Yet the hotel continues to do so. In the last few days, it has temporarily removed the restaurant seating area, but it continues to serve customers occupying the expensive cabanas.⁵

Or take the example of the leaking outfall pipe (outside the area of the revocable permit). In 2016, the hotel was ordered to repair the leak and the hotel claimed that it had retained a

⁵ Instead of renewing the revocable permit, or granting a new one, the BLNR should collect rental for the unauthorized use of public land pursuant to HRS §§ 171-6(14) and (15).

When faced with protests at Mauna Kea, this board enacted emergency rules and sent law enforcement personnel to arrest Hawaiians attempting to protect public land. When a multinational corporation deliberately and flagrantly violates the law, will the board take any type of enforcement action?

consultant to repair the discharge pipe. The hotel did nothing until the Health Department warned the hotel on August 2, 2018 that its leak was a potential violation of the Clean Water Act.

III. Commercial Use of the RP Area is Inappropriate.

Commercial use of this public prime beachfront property is inappropriate. Public recreational use is the most appropriate use of this land. As the Hawai'i Supreme Court held:

Under public trust principles, the State as trustee has the duty to protect and maintain the trust property and regulate its use. Presumptively, this duty is to be implemented by devoting the land to actual public uses, *e.g.*, recreation. Sale of the property would be permissible only where the sale promotes a valid public purpose.

State by Kobayashi v. Zimring, 58 Haw. 106, 121, 566 P.2d 725, 735 (1977). The hotel has plenty of its own land to engage in commercial ventures. When commercial activities take place on public land (whether they be weddings, a restaurant and bar, or expensive cabanas), they have the effect of discouraging use by the general public. They in effect exclude members of the public.

Moreover, the commercial uses that the hotel requests violate our coastal zone management law, HRS chapter 205A. The hotel has never received an SMA permit for any of the activities they engage in within the special management area on the RP parcel.

“No development shall be allowed in any county within the special management area without obtaining a permit.” HRS §205A-28. HRS § 205A-22 defines “development” to include:

- (1) Placement or erection of **any solid material** or any gaseous, liquid, solid, or thermal waste; . . .
- (3) **Change in the density or intensity of use of land**, including but not limited to the division or subdivision of land;
- (4) **Change in the intensity of use of water**, ecology related thereto, or of access thereto; and
- (5) Construction, reconstruction, demolition, or alteration of the size of **any structure**.

In addition, structures within the shoreline setback area prohibited if they lack a variance. HRS § 205A-44(b).

There are three relevant parcels of land in the area. The beach area – the area ma kai of the certified shoreline – is owned by the state. A second piece of property ma uka of the certified shoreline is also state-owned: TMK (1) 3-5-023:041. The RP covers that parcel. A third piece of property is privately-owned parcel ma uka of the state land: TMK (1) 3-5-023:39.

Please note that on the Diamond Head side of the property, signs clearly indicate the division between hotel property and state land. But in the area ma kai of the pool, two misleading signs indicate the property line of the state parcel is much further ma kai than it actually is. This is shown on the large November 29, 2005 location shoreline map found in DLNR's files.

The Department of Planning and Permitting has no records granting an SMA permit for the construction of cabanas or a restaurant on the state-owned land (TMK (1) 3-5-023:041), which the state has allowed the hotel to use through a revocable permit for recreation and maintenance purposes only. In 1996, the City granted an SMA permit (96/SMA-022) to install lighting and an irrigation system on this parcel,⁶ but no authorization has been granted to operate a restaurant or to install cabanas on the property. There are several SMA permits for TMK (1) 3-5-023:39, but they do not authorize any development within TMK (1) 3-5-023:041, the RP parcel.

All the activities and structures that the hotel proposes require an SMA permit; and some also require a shoreline setback variance. The BLNR cannot allow any of these commercial uses to take place and cannot approve any structures until the hotel first obtains these approvals.

Nor should the BLNR renew the RP, or grant a new one, because the hotel's activities decrease recreational opportunities on public land in a manner that is inconsistent with the objectives and policies of HRS chapter 205A.

These are public trust lands. Should public recreational land be available to the public or for private commercial use? Who does our government serve: the general public or multinational corporations?

Furthermore, none of these activities and structures have been discussed in an environmental assessment or environmental impact statement pursuant to HRS chapter 343. The hotel prepared a draft environmental assessment in March 2017, but withdrew it. This board cannot credibly find that that proposed activities and structures in the shoreline area are exempt from needing to prepare an environmental assessment. The staff submittal reveals an appalling ignorance of how HRS chapter 343 works. All exempt classes of action are subject to the following caveat:

2. All exemptions under the classes in this section are inapplicable when the cumulative impact of planned successive actions in the same place, over time, is significant, or when an action that is normally insignificant in its impact on the environment may be significant in a particularly sensitive environment.

HAR § 11-200-8(b).

Thus, if you approve these commercial uses and structures on public land, you would be violating HRS chapters 205A and 343 as well as the public trust doctrine.

IV. The BLNR Should Deny the Requested Right of Entry.

There is no statutory definition of a "right of entry." Nor does DLNR have any rules that define what it means. Nor is it clear which statute authorizes the granting of a "right of entry."

In any case, the Kahala Hotel assumes that a "right of entry" gives it the right to exclude members of the public from its corporate functions. Is that what this board assumes as well?

⁶ Please note that the SMA authorized an activity that is now prohibited by state law. See HRS § 205A-30.5.

Does a right of entry – or even a revocable permit – give the hotel the right to tell members of the public to get off state land – as has happened to me?

If the BLNR is inclined to grant a right of entry, it needs to clarify the terms of approval. It also needs to charge far more than the staff proposes. The staff proposes to charge ten cents per square foot. That is unreasonably low amount. For comparison purposes, consider the commercial permits that DLNR issues for wiki permits on unencumbered state land (ten cents per square foot).

According to the FAQs for the wiki permits, these permits are only authorized for (a) a maximum of two hours of use; and (c) an event for fewer than 25 participants. *See* <http://dlnr.hawaii.gov/ld/files/2013/07/Wiki-Permits-FAQ-1601.pdf> The wiki permit provides that:

14. No accessories, structures, devices, amplified instruments, appliances, apparatus or equipment of any type whatsoever shall be placed on or within the right-of-entry area or premises, including but not limited to the following: arches; bowers; altars; **tables; chairs;** kahilis; tents and/or tarps; event signage of any type including banners, sandwich boards; kiosks or carts; stanchions, posts, ropes or similar equipment for the purpose of demarcation of the right-of-entry area; and surfboards, windsurf boards, kayaks or other ocean recreation equipment; with the exception of the following: loose flowers, leis, bouquets, corsages or boutonnieres; unamplified musical instruments, including a conch shell; doves or butterflies for releases; a limited number of chairs as strictly necessary for the support of elderly, infirm, or disabled persons attending the event(s); cameras and camera equipment; other non-obtrusive hand-carried wedding accessories; small podium or cake stand, not to exceed three (3) feet square in size; and ocean vessels/equipment used exclusively for the purpose of scattering ashes during authorized funeral services.

See <https://dlnr.hawaii.gov/permits/terms.html> In other words, DLNR is proposing to charge the Kahala Hotel the same amount that regular people are charged even though the hotel will use the area for many more people, involve a significantly longer period of time, and allow for various structures to be used which regular people cannot use. The ten cents per square foot is unreasonably low.

V. The BLNR Has Been Charging Far Too Little Rent.

The staff submittal constitutes an egregious breach of the DLNR's trust duties. The hotel has been paying less than \$1300 per month for prime beachfront property on which it engages in extensive commercial activity often to the detriment of the general public.⁷ The staff proposes to allow thousands of square feet of commercial activities on public land while increasing the hotel's rent by three percent.

The City charges \$4,000 a month from a lunch wagon at Waimea Bay Beach Park – far more than the hotel is paying for much less space.

⁷ Instead of renewing the revocable permit, or granting a new one, the BLNR should collect rental for the unauthorized use of public land pursuant to HRS §§ 171-6(14) and (15).

The revocable permit for Mount Wilson radio tower in the conservation district using .079 acres of land costs more than \$9,629 per month.

The City collects \$200,000 per month for the concessions at Hanauma Bay

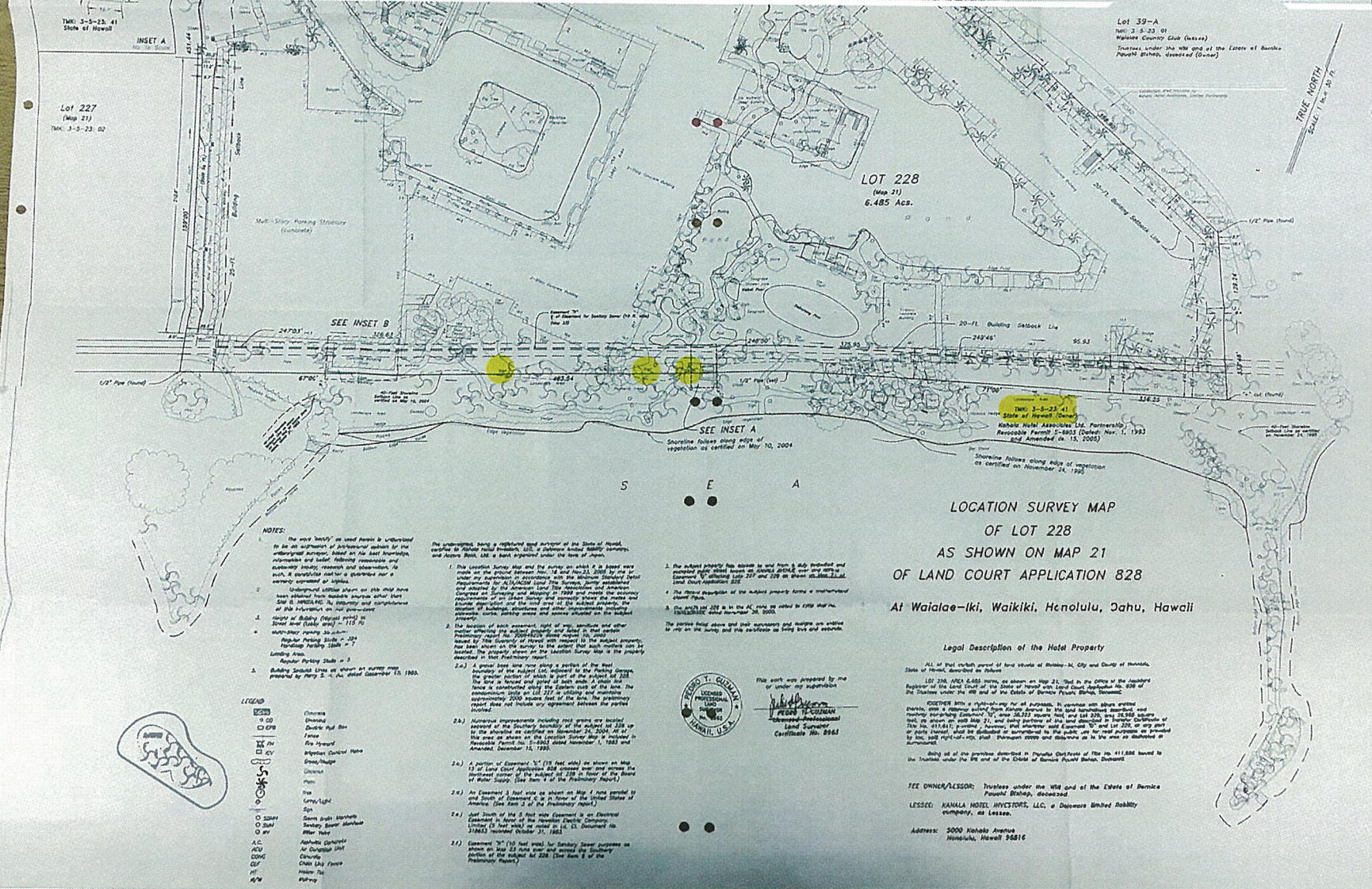
The Land Division recently received an Appraisal Report prepared by CBRE. That report notes that “For the last three decades, the commercial and industrial real estate markets on Oahu have utilized a prevailing 8% rate in establishing current ground lease rents.”

VI Conclusion

The Kahala hotel has flagrantly and deliberately violated the law. In doing so, it has impeded public access, open space and recreational opportunities. Commercial use of public prime beachfront land – often to the exclusion of the public – is inappropriate. For years, the hotel has paid very little for its uses and structures. The June 23, 2018 letter from the Sierra Club and members of the community suggests clearly written conditions that the staff has ignored. The staff submittal, the renewal of the revocable permit, the new revocable permit, and the right of entry should be rejected.

/s/

David Kimo Frankel



SEE OWNER/LESSOR: Trustees under the Will of
Pauahi Bishop, deceased.
LESSEE: KAHALA HOTEL MYSTIFICS, LLC, a Del.
company, as Lessee.
Address: 5000 Kahala Avenue
Honolulu, Hawaii 96816

SEE OWNER/LESSOR: Trustees under the Will of
Pauahi Bishop, deceased.
LESSEE: KAHALA HOTEL MYSTIFICS, LLC, a Del.
company, as Lessee.
Address: 5000 Kahala Avenue
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EXHIBIT 6

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OUR REFERENCE NO.:
067396-6

October 1, 2018

VIA HAND DELIVERY

Suzanne D. Case
Chairperson, Board of Land and Natural Resources
Members of the Board of Land and Natural Resources
Kalanimoku Building
1151 Punchbowl Street, Room 130
Honolulu, Hawai'i 96813

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DEPT. OF LAND
& NATURAL RESOURCES
STATE OF HAWAII

Re: **Resorttrust Hawaii, LLC's Opposition to David Frankel's Petition for a
Contested Case Hearing, Filed September 24, 2018**

Dear Chairperson Case and Members of the Board of Land and Natural Resources:

We represent Resorttrust Hawaii, LLC, a Hawai'i limited liability company ("RTH"). At its regular meeting on September 14, 2018 under agenda item D-13, the Board of Land and Natural Resources ("BLNR") considered RTH's August 6, 2018, request for an amendment to Revocable Permit No. S-7849 ("RP 7849") to clarify with specificity the types of uses permitted on Tax Map Key No. (1) 3-5-023: 041 ("RP Parcel"), and the permitted locations of those uses. The RP Parcel is located between the public beach and the privately-owned Kahala Hotel & Resort ("Hotel"). Per agenda item D-17 and the Department of Land and Natural Resources ("DLNR") staff submittal, the BLNR was also scheduled to consider renewal of RP 7849 without RTH's requested clarifications as part of the annual Oahu bulk revocable permit renewal process.

I. BLNR MEETING

David Frankel made an oral request for a contested case hearing related to the BLNR's considerations on RP 7849. The BLNR, after nearly five hours of consideration, including public testimony, a presentation by DLNR staff, a presentation by RTH, numerous questions from the BLNR, and an approximately 30 minute colloquy between Mr. Frankel and members of

EXHIBIT "6"

HONOLULU

HILO

KONA

MAUI

LOS ANGELES

the BLNR, deferred action on RP 7849 pending consideration of Mr. Frankel's written petition for contested case hearing.¹

At the BLNR meeting, Mr. Frankel could not identify any particular statute as the basis for his request and instead asserted that his primary basis was a constitutional one, *i.e.*, Article XI, section 9 of the Hawai'i Constitution. However, in his written petition for a contested case hearing, filed on September 24, 2018 ("**CCH Petition**"), he neglects to identify Article XI, section 9. Instead, he offers that the nature and extent of his interests are "recreational, aesthetic, environmental and public trust interests . . . [and] a demonstrated interest in seeing that our state's environmental laws are enforced and properly implemented." CCH Petition ¶ 20; *see also* Frankel Declaration, ¶¶ 22, 23, 24, 28.

Mr. Frankel is not entitled to a contested case hearing. The BLNR should deny his request and proceed to decision-making on RP 7849. "Whether any procedural protections are due depends on the extent to which an individual will be 'condemned to suffer grievous loss.'" *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972) (internal citation omitted). Mr. Frankel has not identified any "grievous loss" that he could suffer no matter what action the BLNR takes on RP 7849. His alleged "interests" are matters of personal preference. Mr. Frankel's opinions are merely an expression of his particular value preferences and do not rise to the level of a "legitimate claim of entitlement" that constitutes a property interest entitling him to a contested case hearing. *Bd. of Regents of State Colls v. Roth*, 408 U.S. 564, 577 (1972).

Even if Mr. Frankel could articulate a legally cognizable property interest in the BLNR's decision on RP 7849, due process does not require the BLNR to hold a contested case hearing in order to address Mr. Frankel's perspective. "Due process is not a fixed concept requiring a specific procedural course in every situation." *Sandy Beach Def. Fund v. City Council of the City & Cnty. of Honolulu*, 70 Haw. 361, 378, 773 P.2d 250, 261 (1989). In other words, a contested case hearing is not a one-size-fits-all solution to all grievances. "To say that the concept of due process is flexible does not mean that judges are at large to apply it to any and all relationships. Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure." *Morrissey*, 408 U.S. at 481, 92 S.Ct. at 260. Mr. Frankel has been given ample opportunity to share his views and concerns with the BLNR (and the wider Hawai'i community), and no additional process is due.

At the BLNR meeting on September 14, 2018 alone, Mr. Frankel shared his views with the BLNR for approximately 30 minutes, and responded to several questions from members of the BLNR. Mr. Frankel also supplemented that discussion with written material submitted that day (but not provided to RTH). And that's not all. Mr. Frankel claims responsibility for the ten-

¹ The BLNR did vote to authorize RTH's requested right of entry permits for two events to be held in October 2018.

page, June 23, 2018, letter from Sierra Club to the BLNR laying out complaints and allegations related to RTH.²

Mr. Frankel also spoke against RTH at the BLNR meeting on August 10, 2018 under agenda item D-4, which was a Right-of-Entry permit to a fireworks company to hold a fireworks display at the beach fronting the Hotel.³ There, notwithstanding the limited purpose of agenda item D-4, and without notice to RTH that the BLNR would entertain attacks on RTH, Mr. Frankel took the opportunity to advocate against RTH and argue against RTH's request for clarification of RP 7849 that had been filed a few days earlier. After hearing Mr. Frankel's diatribe against RTH, BLNR member Roehrig recalled having received a letter via email (along with all other BLNR members) regarding complaints about the Hotel (presumably the June 23, 2018, Sierra Club letter). Furthermore, in response to Mr. Frankel's litany of allegations against RTH, BLNR member Roehrig asked "is there anybody here from the Kahala Hotel to answer this? . . . they ought to be here to defend themselves."

Mr. Frankel has aggressively pursued his agenda against RTH before the BLNR and the DLNR. In fact, it appears he may have been given greater opportunity to be heard than RTH. There is no additional information relevant to the BLNR's decision-making that he could provide, and no value to Mr. Frankel, the BLNR, or RTH, of additional procedural safeguards. In contrast, a contested case hearing would clearly burden the BLNR, and any further delay on the BLNR's decision on RP 7849 runs the risk that RP 7849 expires in the interim, resulting in the State becoming solely responsible for the maintenance of the RP Parcel and beach, and solely responsible for any liability arising from activities on the RP Parcel or beach. A delay in decision-making also delays the determination of payments due to the State for the use of the RP Parcel.

RTH opposes the CCH Petition. In accordance with Hawai'i Administrative Rules ("HAR") § 13-1-29.1, it is clear as a matter of law that Mr. Frankel does not have a legal right, duty, or privilege entitling him to a contested case proceeding. Furthermore, the bulk of the allegations recited in the CCH Petition are not within the adjudicatory jurisdiction of the BLNR. For the reasons set forth herein, the CCH Petition should be denied, and the BLNR should proceed with its determination on RP 7849.

² Mr. Frankel did not sign that letter and has not identified himself as representing Sierra Club. However, on August 21, 2018, Mr. Frankel was interviewed by Catherine Cruz for The Conversation on Hawai'i Public Radio. Although Mr. Frankel's name does not appear on the Sierra Club letter, in that interview he claimed ownership of a letter: "We sent letter we included a photograph of the gazebo, wedding gazebo, on public land." See The Conversation, audio file at <http://www.Hawai'ipublicradio.org/post/conversation-tuesday-august-21st-2018>, 13:04 - 13:22. At that time Mr. Frankel also falsely claimed that RTH only removed the gazebo after the Sierra Club letter was sent. In fact, RTH had the gazebo removed in February 2018.

³ RTH was not listed on the agenda and had no role in the request, nor did the agenda suggest that RTH or the Hotel would be discussed. The agenda simply noted "Issuance of Right-of-Entry Permit to Hawai'i Explosives & Pyrotechnics, Inc. for Aerial Fireworks Display on September 9, 2018 at the beach fronting Kahala Hotel, Wai'alae, Honolulu, O'ahu, Tax Map Key: (1) 3-5-023:041."

II. LEGAL ARGUMENT

A. A CONTESTED CASE HEARING IS NOT REQUIRED BY LAW

The BLNR is required to hold a contested case hearing only when required by law to do so for the purpose of determining the legal rights, duties, or privileges of a party. *See* HRS § 91-1(5); HAR § 13-1-2(a); *see also* *Mauna Kea Anaina Hou v. Bd. of Land and Natural Res.*, 136 Hawai'i 376, 390, 363 P.3d 224, 238 (2015) (citations omitted). "Required by law" means mandated by statute, agency rule, or constitutional due process. *See id.* at 390, 363 P.3d at 238 (citations omitted). A contested case hearing is *not* required by law based on the facts in this case and the CCH Petition should be denied.

1. There is No Statute or Rule Requiring the Board to Hold a Contested Case Hearing on an RP

Nothing in HRS Chapter 171 or the DLNR rules requires the BLNR to hold a hearing prior to approving a revocable permit.⁴ *Accord Flores v. Bd. of Land and Natural Res.*, 143 Hawai'i 114, 424 P.3d 469 (2018) (holding that a contested case hearing was not required by statute or rule before the BLNR could consent to a sublease of State land). Rather, Chapter 171 simply states that the BLNR may issue permits for temporary use of public lands by direct negotiation and without public auction. HRS § 171-55. This is not surprising, particularly in light of the fact that revocable permits are issued on a month-to-month basis. Furthermore, the legislature clearly delegated full authority to the BLNR to issue revocable permits upon whatever terms the BLNR sees fit. *See* HRS § 171-55 (the BLNR may issue revocable permits "under conditions and rent which will serve the best interests of the State, subject, however, to those restrictions as may from time to time be expressly imposed by the board").

In contrast, the legislature has mandated that the BLNR hold hearings when taking action on certain specific matters. *See e.g.*, HRS § 171-41.5 (requiring public hearings prior to amendments to commercial, hotel, or industrial leases); HRS § 171-28, (requiring public hearing before the BLNR leases a government-owned Hawaiian fishponds); HRS § 171-58 (public hearing required prior to lease of water rights); *see also* HRS § § 171-80, 171-95.3. Nothing in Chapter 171 requires or even authorizes the BLNR to hold a hearing related to the issuance of a revocable permit. Accordingly, there is no statutory basis for requiring a contested case hearing in this case.

Nothing in the DLNR's administrative rules requires a hearing before the BLNR makes a decision on a revocable permit, in contrast to other DLNR rules that do require hearings. *See*

⁴ The authority of an administrative agency is limited by the powers expressly granted to it by the legislature. *See Morgan v. Planning Dep't, Cnty. of Kauai*, 104 Hawai'i 173, 184, 86 P.3d 982, 993 (2004) ("An administrative agency can only wield powers expressly or implicitly granted to it by statute.").

e.g., HAR § 13-1-31.1 (contested case hearing required if requested by an alleged violator in a penalty proceeding); HAR § 13-5-40 (public hearing required for conservation district use permits); HAR § 13-183-26 (public hearing required prior to revocation of a mining lease). However, there is no rule that requires a “hearing” prior to issuing, renewing, or modifying a revocable permit, and therefore no rule-based mandate for a contested case hearing.

2. Constitutional Due Process Does Not Mandate a Contested Case Hearing Under The Three-Part *Sandy Beach* Test

A three-part balancing test is applied to determine whether a contested case hearing is required by constitutional due process. *Sandy Beach*, 70 Haw. at 378, 773 P.2d at 261. The first part of the test is to determine whether the interest that the petitioner claims will be affected by the action is a “property” interest within the meaning of the state and federal due process clauses. *Id.*; see also *Pele Defense Fund v. Puna Geothermal Venture*, 77 Hawai‘i 64, 68, 881 P.2d 1210, 1214 (1994). A “property interest” is a benefit to which the petitioner is legitimately entitled, one that is more than an abstract need or desire. See *Sandy Beach*, 70 Haw. at 376, 773 P.2d at 260; *Bush v. Hawaiian Homes Comm’n*, 76 Hawai‘i 128, 136, 870 P.2d 1272, 1280 (1994). Such legitimate claims of entitlement are not created by the due process clause of the constitution. “Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.” *Int’l Bhd. of Painters & Allied Trades, Drywall Tapers, Finishers & Allied Workers Local Union 1944, AFL-CIO v. Befitel*, 104 Hawai‘i 275, 283, 88 P.3d 647, 655 (2004) (quoting *Bd. of Regents of State Colls v. Roth*, 408 U.S. 564, 577 (1972)); see also *Flores* at 114, 424 P.3d at 480.

Moreover, “the range of interests protected by procedural due process is not infinite.” *Befitel*, 104 Hawai‘i at 283, 88 P.3d at 655. Therefore, courts have generally limited this “range of interests” to entitlements relating to *basic needs*, such as housing, employment, retirement, and welfare benefits. See *Aguiar v. Hawai‘i Housing Auth.*, 555 Haw. 478, 522 P.2d 1255 (public housing); *Silver v. Castle Mem’l Hosp.*, 53 Haw. 475, 497 P.2d 564 (1972) (employment); *Mortensen v. Bd. of Trs. of the Emps.’s Ret. Sys.*, 52 Haw. 212, 473 P.2d 866 (1970) (accidental disability retirement benefits); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (welfare benefits).

Mr. Frankel’s asserted “recreational, aesthetic, environmental and public trust interests” do not constitute property interests entitled to due process protection. The Supreme Court already determined that aesthetic and environmental interests do not constitute a constitutionally protected “property interest” in Hawai‘i. *Sandy Beach*, 70 Haw. at 377, 773 P.2d at 261 (“While we have recognized the importance of aesthetic and environmental interests in determining an individual’s standing to contest the issue, we have not found that such interests rise to the level of ‘property’ within the meaning of the due process clause[.]”) (internal citation omitted). Because “recreational, aesthetic, environmental and public trust interests” do not constitute a constitutionally protected property interest, due process does not mandate a contested case hearing in this case.

Under *Sandy Beach*, should an actual “property interest” be identified, the second step is to consider the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards. *Sandy Beach*, 70 Haw. at 378, 773 P.2d at 261. Even rights of significant magnitude do not require extensive trial-like contested case hearings before administrative agencies. Social security disability payments are a statutorily created property interest, and likely the difference between life and abject destitution for recipients. *Briggs v. Sullivan*, 954 F.2d 534, 539 (9th Cir. 1992). Such rights are certainly weightier than an individual’s personal interests in recreational, aesthetic, and environmental matters. However, modifications to even these crucial disability rights have not been found to require additional procedural safeguards as long as the recipients of such payments are given “notice and an opportunity to be heard” before changes are made. *Briggs* at 539. “[T]he Constitution only requires the government to take reasonable measures, not perfect ones.” *Id.* at 540.

The third factor in the balancing test is to consider the governmental interest, including the burden that additional procedural safeguards would entail. *Sandy Beach*, 70 Haw. at 378, 773 P.2d at 261. In *Briggs*, the Ninth Circuit held that no additional governmental procedures were required because the procedures in place were reasonable. The Hawai‘i Supreme Court cited to *Briggs* with approval in *Flores*, 143 Hawai‘i 114, 424 P.3d at 482 (“plaintiffs were not entitled to more detailed, thorough procedures because the government had a significant interest in not having to bear the substantial fiscal and administrative burdens of administering the enhanced procedures when such procedures would not substantially improve the risk of erroneous deprivation”).

Contested case hearing procedures prior to the issuance of a revocable permit will put substantial burdens on the State not only in this case, but will effectively cripple the DLNR’s ability to manage its lands as authorized under HRS § 171-55. A revocable permit is a temporary authorization to use State land. Under HRS § 171-55, the term of a revocable permit is month-to-month for up to a year, at which point the revocable permit terminates unless renewed by the BLNR. A contested case hearing would likely last longer than the term of the revocable permit and cost the State a significant amount in taxpayer dollars and agency time, and by the time the contested case hearing was completed, the revocable permit would likely be up for renewal. The BLNR should reject Mr. Frankel’s efforts to put the agency and RTH onto a treadmill to nowhere merely to provide him further opportunity to expound upon matters that are either irrelevant to BLNR decision-making, or that have already been discussed *ad nauseum*.

B. IN RE APPLICATION OF MAUI ELECTRIC COMPANY LIMITED IS INAPPOSITE

Mr. Frankel asserted that he is entitled to a contested case hearing under the Hawai‘i Supreme Court’s decision in *In re Application of Maui Electric Company Limited*, 141 Hawai‘i 249, 408 P.3d 1 (2017), but he neglects to offer any analysis of how the narrow holding in *Maui*

Electric applies here.⁵ That is because he cannot. Mr. Frankel's interests in recreation and generalized environmental topics fall far short of the air pollution and greenhouse gas emissions that Sierra Club sought to address in *Maui Electric*. Unlike the statutory scheme at issue in *Maui Electric*, which demands close scrutiny of the issues raised by Sierra Club, the BLNR has no such requirements under HRS Chapter 171 when deciding upon a revocable permit. Finally, unlike the Public Utilities Commission ("PUC"), which holds no public meetings prior to taking action on most matters, the BLNR holds open meetings to allow all interested persons an opportunity to submit data, views, or arguments, in writing, on any agenda item. Mr. Frankel took several opportunities to air his views before the BLNR, and therefore has been provided a meaningful opportunity to be heard.

1. *In re Maui Electric Company Limited*

In 2015, Maui Electric sought PUC approval of a power purchase agreement ("PPA") with Hawaiian Commercial & Sugar Company. Maui Electric wanted to purchase power generated from burning coal and petroleum at the Pu'unene Plant owned by Hawaiian Commercial & Sugar Company. The PUC's approval of the PPA would extend Maui Electric's reliance on the Pu'unene Plant for three years. Just a year earlier, the Pu'unene Plant had been assessed \$1,335,000.00 in penalties by the Clean Air Branch of the State Department of Health for over 400 violations of the State's visible emissions standards. *Maui Electric*, 141 Hawai'i at 249, 408 P.3d at 6 n.7; see also Sierra Club Motion to Intervene, PUC Docket No. 2015-0094.

Sierra Club filed a motion to intervene in the PUC proceedings. Sierra Club also filed a motion to participate without intervention. The PUC denied both motions. This left Sierra Club without any meaningful opportunity to be heard. However, in addition to raising grave concerns about the effects of air pollution from the Pu'unene Plant, the fact that the PPA would result in continued heavy reliance on coal in order to meet the obligations of the PPA, and the massive penalties levied by the Department of Health due to the Pu'unene Plant's violations of air quality emission standards, the interests that Sierra Club sought to protect were manifest in HRS § 269-6(b), which requires that the PUC, in the exercise of any of its duties:

shall consider the need to reduce the State's reliance on fossil fuels through energy efficiency and increased renewable energy generation in exercising its authority and duties under this chapter. In making determinations of the reasonableness of the costs of utility system capital improvements and operations, the commission shall explicitly consider, quantitatively or qualitatively, the effect of the State's reliance on fossil fuels on price volatility, export of funds for fuel imports, fuel supply reliability risk, and greenhouse gas emissions. The commission may determine that short-term costs or direct costs that are higher

⁵ The Hawai'i Supreme Court's decision in *Maui Electric* was by a vote of 3-2, with Chief Justice Recktenwald and Justice Nakayama dissenting.

than alternatives relying more heavily on fossil fuels are reasonable, considering the impacts resulting from the use of fossil fuels.

The *Maui Electric* court noted that the PUC was statutorily required to consider the hidden and long-term costs of the continued reliance on energy produced at the Pu'unene Plant, including the potential for increased air pollution as a result of greenhouse gas emissions, i.e., the very issues raised by Sierra Club. In reviewing the PPA, the PUC would have to consider the level of emissions, and therefore the potential risks to health (as raised by Sierra Club), and a determination of whether the energy charges under the PPA were reasonable required the PUC to evaluate the hidden and long-term costs of the energy from the Pu'unene Plant. The PUC's determinations of these matters would bear upon the level of emissions generated by the Pu'unene Plant, thus affecting Sierra Club's members' right to a clean and healthful environment as defined by HRS Chapter 269. *Maui Electric*, 141 Hawai'i at 266, 408 P.3d at 18.

Applying the second prong of the *Sandy Beach* test, the *Maui Electric* court determined that the risk to Sierra Club of an erroneous deprivation was high in the absence of a contested case "in light of the potential long-term impact on the air quality in the area[.]" *Id.* at 266. The court found that the air pollution and greenhouse gas emissions that would be produced could pose grave health risks to Sierra Club's members. Furthermore, in light of the health concerns at issue, participation in a contested case proceeding before the PUC was more efficient and appropriate than having Sierra Club bring an independent legal action to challenge the PPA. "This is of particular concern in the context of environmental regulations, where the damage caused by a violation is not easily reversed." *Id.* at 267, 408 P.3d at 19. A contested case hearing was also appropriate due to "the absence of other proceedings in which Sierra Club could have a meaningful opportunity to be heard." *Id.* at 266, 408 P.3d at 18.

Applying the third prong of the *Sandy Beach* test, the court noted that Sierra Club's participation would not unduly burden the PUC because the PUC was already statutorily required to consider the very issues raised by Sierra Club. Therefore, under the limited circumstances in that case, Sierra Club was entitled to a hearing before the PUC so that the PUC could exercise its obligations under HRS § 269-6(b), to determine whether the "cost of the energy under the [PPA] was reasonable in light of the potential for harmful emissions, and whether the terms of the [PPA] were prudent in light of the potential hidden and long-term consequences of the [PPA]." *Maui Electric* at 269, 408 P.3d at 21. The court also acknowledged that the PUC had the authority to set limitations on Sierra Club's participation "so long as the procedures sufficiently afford an opportunity to be heard at a meaningful time and in a meaningful manner on the issue of the [PPA's] impact on the asserted property interest." *Id.* at 270, 408 P.3d at 22.

2. Mr. Frankel's CCH Petition Fails Under *Maui Electric*

Article XI, section 9 of the Hawai'i Constitution provides no basis for a contested case hearing in this case. Article XI, section 9 of the Hawai'i Constitution provides:

Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.

As explained in *Maui Electric*, this right to a clean and healthful environment includes the right that explicit consideration be given to reduction of greenhouse gas emissions in PUC decision-making, as required under HRS Chapter 269. *Id.* at 265, 408 P.3d at 17. The holding in *Maui Electric* does not extend to BLNR decisions on revocable permits. Furthermore, Mr. Frankel has not pointed to any explicit mandate regarding environmental pollution under HRS § 171-55, which is the law governing the issuance of revocable permits.⁶

Contrary to the facts in *Maui Electric*, Mr. Frankel has been given ample opportunity to be heard. The Supreme Court held that Sierra Club was entitled to a contested case hearing because the PUC had denied Sierra Club's petition for intervention, and also denied Sierra Club's request to participate without intervention, leaving Sierra Club without any meaningful opportunity to be heard. *Id.* at 266. However, PUC proceedings to review a PPA are radically different from the current proceeding before the BLNR.

Unlike the BLNR, the PUC is not required to hold public hearings except under very limited circumstances, resulting in little to no opportunity for members of the public to express their views to the PUC. In contrast, the BLNR, under HRS § 171-5 and HAR § 13-1-5, is required to hold regular meetings or "public hearings"⁷ and those hearings must be open to the public. The public nature of these meetings is required under the Sunshine Law, HRS Chapter 92, which requires that the Board "afford all interested persons an opportunity to submit data, views, or arguments, in writing, on any agenda item. The boards shall also afford all interested persons an opportunity to present oral testimony on any agenda item." HRS § 92-2. The PUC is under no such obligation.

Only under very limited circumstances is the PUC required to hold a public hearing. For example, the PUC must hold a public hearing before it authorizes a utility company to increase the rates it charges to its consumers; after that public hearing the PUC must hold a contested case hearing on the proposed rate increases. HRS § 269-16; *see also In Re Application of Hawaiian Electric Co.*, 56 Hawai'i 260, 264 (1975) (individual members of Life of the Land who were

⁶ The generalized right to a clean and healthful environment and its activation by explicit statutory authority under HRS 269, is in stark contrast to the explicit guarantee under Article XII, section 7 of the Hawai'i Constitution to protect all traditional and customary rights of native Hawaiians. In *Flores*, the Supreme Court noted that the rights afforded under Article XII section 7 of the Hawai'i Constitution are "substantial" and "guaranteed" without the need to rely on any other laws. *Flores*, 143 Hawai'i at 114, 424 P.3d at 482.

⁷ Defined as "a hearing required by law in which members of the public generally may comment upon the subject matter of the hearing." HAR § 13-1-2.

subjected to higher utility rates through agency action held to be “a person specially, personally and adversely affected”). Unlike the BLNR, the PUC is not required to meet on any regular basis to discuss PUC matters; *contra* HRS § 171-5 (requiring the BLNR to hold regular meetings), resulting in limited opportunities for the public to express their views to the PUC. In contrast, Mr. Frankel has taken considerable opportunity to express his views to the BLNR and no additional procedures are required.

Mr. Frankel also fails under the third prong of the *Sandy Beach* test. In *Maui Electric* the Supreme Court determined that the burden to the PUC from providing a contested case would be light due to the fact that the PUC was clearly required by statute (HRS § 269-6(b)) to consider the precise issues raised by Sierra Club before the PUC could approve the PPA. *Id.* at 266, 408 P.3d at 18. This is in stark contrast to the discretion the legislature granted to the BLNR in issuing revocable permits. HRS § 171-55 provides as follows:

Notwithstanding any other law to the contrary, the board of land and natural resources may issue permits for the temporary occupancy of state lands or an interest therein on a month-to-month basis by direct negotiation without public auction, under conditions and rent which will serve the best interests of the State, subject, however, to those restrictions as may from time to time be expressly imposed by the board. A permit on a month-to-month basis may continue for a period not to exceed one year from the date of its issuance; provided that the board may allow the permit to continue on a month-to-month basis for additional one year periods.

There is simply no legislative mandate that the BLNR consider the matters of interest to Mr. Frankel prior to making a decision on a revocable permit.⁸

Mr. Frankel complains that the BLNR is lacking precise rules to address the issuance of revocable permits. Mr. Frankel's displeasure with the legislature for not mandating specific requirements to the BLNR is not the subject of a contested case hearing. Mr. Frankel should address his concerns to the legislature accordingly. “We abhor the use of courtrooms as political forums to vindicate individual value preferences.” *Hawai‘i’s Thousand Friends v. Anderson*, 70 Hawai‘i 276, 284, 768 P.2d 1293, 1299 (1989) (holding that nonprofit organization lacked taxpayer standing to challenge expenditure of City funds for housing project, even though its members paid taxes, and it lacked environmental/public interest standing to challenge alleged illegal use of public monies for housing project because proper forum to vindicate value preference is legislature). *Sharma v. State*, 66 Haw. 632, 673 P.2d 1030 (1983), is still good law,

⁸ Nor is HRS § 171-13 availing. Under HRS § 171-13, “No person shall be eligible to purchase or lease public lands, or to be granted a license, permit, or easement covering public lands, who has had during the five years preceding the date of disposition a previous sale, lease, license, permit, or easement covering public lands canceled for failure to satisfy the terms and conditions thereof.” Pursuant to BLNR authorization, RTH has held rights to use the RP Parcel since October 10, 2014, and its rights have never been canceled for failure to satisfy the terms thereof.

and under *Sharma*, as reaffirmed by *Flores*, contested case procedures are not universally required in all instances where an individual may be negatively impacted by an agency action.

C. THE BLNR HAS NO JURISDICTION TO ADDRESS THE MATTERS
RAISED BY MR. FRANKEL

Mr. Frankel appears to argue that alleged prior and/or existing violations of HRS Chapters 205A and 343 provide a basis for him to demand a contested case hearing. He is wrong as a matter of law. Under HAR § 13-1-29.1⁹, “the board without a hearing may deny a request or petition or both for a contested case when it is clear as a matter of law that the request concerns a subject that is not within the adjudicatory jurisdiction of the board[.]” Mr. Frankel’s unfounded allegations under HRS Chapters 205A and 343 are outside of the adjudicatory jurisdiction of the BLNR and the CCH Petition should be denied.

1. No Jurisdiction Under HRS Chapter 205A

Regarding HRS Chapter 205A, the Hawai‘i Supreme Court has long recognized the “general principle of law that statutory laws of general application are not applicable to the State unless the legislature in the enactment of such laws made them *explicitly applicable* to the State.” *Big Island Small Ranchers Ass’n v. State*, 60 Haw. 228, 236, 588 P.2d 430, 436 (1978) (emphasis added) (quoting *In A. C. Chock, Ltd. v. Kaneshiro*, 51 Haw. 87, 89, 451 P.2d 809, 811 (1969)); see also *Littleton v. State*, 6 Haw.App. 70, 73, 708 P.2d 829, 831, aff’d, 68 Haw. 220, 708 P.2d 824 (1985) (former version of HRS § 478-2, relating to computation of interest, inapplicable to State because it was “a statute of general application and there [wa]s nothing making it explicitly applicable to the State.”). Under this principle, “the State *will not be presumed to have waived its rights to regulate its own property* by ceding to its political subdivisions the right generally to pass ordinances of a police nature regulating property within their limits.” *Hilo Meat Co. v. Antone*, 23 Haw. 675, 680 (1917) (emphasis added).

Chapter 205A is a statutory scheme of general application that is implemented through the Counties. Nothing in HRS Chapter 205A makes its provisions “explicitly applicable to the State.”¹⁰ See *Big Island Small Ranchers Ass’n*, 60 Haw. at 236, 588 P.2d at 436. The zoning and planning powers of the City & County of Honolulu are inapplicable to State-owned property. Attorney General Opinion No. 86-3. Therefore, as a matter of settled law, the special management area (“SMA”) regulations and shoreline setback regulations under HRS Chapter 205A are inapplicable to the RP Parcel. Accordingly, any alleged violations thereof cannot serve

⁹ Determination of Entitlement to a Contested Case Hearing.

¹⁰ This includes HRS § 205A-4(b), which provides that the “objectives and policies of this chapter and any guidelines enacted by the legislature shall be binding upon actions within the coastal zone management area by all [State and County] agencies, within the scope of their authority.” This provision simply addresses the applicability of HRS Chapter 205A to certain “actions” by State agencies, not its applicability to State-owned land.

as a basis to grant Mr. Frankel's CCH Petition.¹¹

Second, even if HRS Chapter 205A is somehow applicable to State-owned land, the authority to enforce its provisions is vested with the City & County of Honolulu, and not the BLNR. Under Chapter 205A, the legislature delegated the authority to regulate the SMA and the shoreline setback area to the City & County of Honolulu. *See* HRS § 205A-27 ("The [Honolulu City Council] is designated the special management area authority and is authorized to carry out the objectives, policies and procedures of this part."); Rev. Ord. Honolulu ("ROH") § 25-1.1; HRS § 205A-43.6(a) ("The [Honolulu D]epartment [of Planning and Permitting] or an agency designated by department rules shall enforce this part and rules adopted pursuant to this part."); ROH § 23-1.1.

Indeed, even Hawai'i courts will refrain from resolving SMA disputes under the doctrine of primary jurisdiction, which is triggered "whenever enforcement of the claim requires the resolution of issues [that] . . . have been placed within the special competence of an administrative body." *See Dancil v. Arakawa*, 132 Hawai'i 472, 476, 323 P.3d 116, 120 (Ct. App. 2012); *see also id.* at 472, 323 P.3d at 121 ("The question of whether the Planning Director followed the proper procedures in issuing the permit is a question that is within the [Maui Planning Commission]'s special competence, and the Maui County Charter and SMA Rules provide a process to address this type of question."); *see also Pavsek v. Sandvold*, 127 Hawai'i 390, 279 P.3d 55 (2012) (holding that even when a judicial private right of action is provided under statute, the landowner must first bring its claim to the Planning Director, and next appeal any adverse decision of the Director to the Zoning Board of Appeals before bringing judicial action). Therefore, the BLNR should decline Mr. Frankel's invitation to usurp the City & County of Honolulu's clearly-established authority under HRS Chapter 205A and disregard its special competence in such matters, and deny the CCH Petition.

2. No Jurisdiction Under HRS Chapter 343

Regarding HRS Chapter 343, Mr. Frankel states, without explanation or support, that the clarification RTH seeks for RP 7849 is "inconsistent" with HRS Chapter 343. It is ironic that Mr. Frankel now attempts to pursue his personal interests in Chapter 343 through a contested case hearing at the BLNR when Mr. Frankel did not bother to participate in the aborted HRS Chapter 343 environmental assessment process that RTH initiated with the DLNR in 2017.

In connection with the aborted environmental assessment, RTH wanted to intensify uses of the RP Parcel and obtain a non-exclusive easement to replace the precarious, month-to-month,

¹¹ As the United States District Court for the District of Hawai'i has observed, "there is no private right of action to enforce a shoreline setback" under Chapter 205A. *W. Sunview Properties, LLC v. Federman*, 338 F.Supp.2d 1106, 1118 (D. Haw. 2004) (holding that, "because the agency or department is given exclusive power to enforce setbacks, Plaintiffs are not the appropriate party to bring an action against Defendants for an alleged violation of that setback"). It would be a truly absurd result if a private party, such as Mr. Frankel, could circumvent this rule by first demanding a contested case hearing on the grounds of a perceived shoreline setback violation and then filing an administrative appeal pursuant to HRS Chapter 91.

revocable permit. At that time, there were two pre-existing wedding sites on the RP Parcel (both of which RTH has since removed), and RTH wanted to add a third wedding venue. RTH also wanted authorization to pre-set 100 beach chairs and cabana tents on portions of the sandy beach fronting the RP Parcel, engage in sand replenishment, landscaping and the installation of stone pavers, and install tiki torches and gas lines along the shorefront. Due to RTH's stated intent to intensify uses at the RP Parcel and public beach, and to obtain a long-term easement from the BLNR, RTH initiated the environmental review process under HRS Chapter 343; the DLNR was identified as the approving agency for the environmental assessment.

The draft environmental assessment was published electronically Statewide by the State Office of Environmental Quality Control on April 23, 2017, thus starting the 30-day public review and comment period. Mr. Frankel never submitted comments on the Draft EA.¹² This is curious in light of his self-reported interest in environmental matters (*see* Frankel Declaration ¶28), and his alleged interest in the Hotel and uses on the RP Parcel. One asks why his appetite for involvement is greater now, when RTH has taken several steps to reduce its use of the RP Parcel, than when RTH was considering an intensification of uses on the RP Parcel and public beach.

In any event, matters related to HRS Chapter 343 are not subject to contested case hearing procedures. Environmental assessments and environmental impact statements are informational documents. They do not authorize an applicant to take any action. They are not permits or other agency approvals. Therefore, matters related to HRS Chapter 343 cannot be grounds for or the subject of a contested case hearing because such informational documents do not determine the "rights, duties, and privileges of specific parties." The legislature provided for an exclusive cause of action under HRS § 343-7, and that requires the initiation of a judicial proceeding, not a contested case. As such, Mr. Frankel's concerns regarding HRS Chapter 343 are not matters within the adjudicatory jurisdiction of the BLNR.

3. No Third Party Rights Under HRS § 171-6 and HAR § 13-1-31.1

RTH has not been issued a violation by the DLNR under HRS § 171-6. While Mr. Frankel alleges that RTH is in violation of RP 7849, that assertion is unfounded, and not supported by any actions of the DLNR or BLNR. However, even if RTH was the subject of a violation proceeding, Mr. Frankel would be prohibited from participating in that proceeding.

HAR § 13-1-31.1 provides:

when a violation is alleged for which an administrative remedy is provided and with respect to which the alleged violator is entitled to a contested case hearing, a contested case shall be held upon the petition of the alleged violator, provided that the petition is made

¹² The BLNR can take official notice of this fact due to DLNR being the "approving agency" for RTH's environmental assessment and therefore the party designated to receive public comments. *See* HAR § 11-200-9(b)(7).

in accordance with the provisions of section 13-1-29(a). **No person or government agency other than the department and alleged violator shall be admitted as parties in such proceedings.** (emphasis added).

As evident by HAR § 13-1-31.1, alleged violations provide Mr. Frankel no right or standing to participate in a contested case hearing.

D. ASSUMING ARGUENDO THAT A CONTESTED CASE HEARING COULD BE HELD, MR. FRANKEL FAILS ON STANDING

Even if a contested case hearing was required, Mr. Frankel would not have standing to participate in such a proceeding because he does not meet the BLNR's criteria for standing. Under HAR § 13-1-31, a person *shall* be admitted as a party in a contested case hearing if he or she (a) has some "property interest" in the land at issue, (b) lawfully resides on the land, (c) is an adjacent property owner, or (d) can demonstrate that they will be so directly and immediately affected by the requested action that their interest in the proceeding is clearly distinguishable from that of the general public. See HAR § 13-1-31(b)(2). In addition, the BLNR *may* admit a person as a party who can show a "substantial interest" in the matter if that participation will substantially assist the BLNR in its decision making. See *id.* at 13-1-31(c).

1. Mr. Frankel Does Not Have Standing Under HAR § 13-1-31(b)(2)

Mr. Frankel has no ownership interest in the RP Parcel and he does not live on or anywhere near the RP Parcel. Therefore, he would only have standing if he could demonstrate that he would be so directly and immediately affected by the BLNR's decision on RP 7849 that his interest is clearly distinguishable from that of the general public. Put another way, he would have to show that he is a person aggrieved by the action in a way that is different from the public generally. The case of *E. Diamond Head Ass'n v. Zoning Bd. of Appeals of City & Cty. of Honolulu*, 52 Hawai'i 518, 479 P.2d 796 (1971), succinctly identifies who qualifies as a person aggrieved.

[T]o be a 'person aggrieved' . . . one must be specially, personally and adversely affected as distinguished from one who is merely in the general class of a taxpayer whose only interest is to have strict enforcement of zoning regulations for the welfare of the entire community. There must be special injury or damage to one's personal or property rights as distinguished from the role of being only a champion of causes.

Id. at 522, 479 P.2d at 798 (citations omitted).

According to Mr. Frankel, he has "recreational, aesthetic, environmental and public trust interests" that could be affected by the BLNR's decision on RP 7849. CCH Petition at 2, ¶20. For the following reasons, these stated interests fail to satisfy HAR § 13-1-31(b)(2).

First and foremost, the extent of these interests is necessarily limited by Mr. Frankel's own admission that he visits the beach fronting the RP Parcel only "once or twice a year on average." Frankel Declaration ¶5. In contrast to numerous testifiers at the BLNR meeting (many of whom spoke in support of RTH's request), Mr. Frankel does not visit the beach fronting the RP Parcel on a daily, weekly, or even monthly basis.

Second, the public testimony provided the BLNR confirms that Mr. Frankel's claimed interests do not stand to be so directly and immediately affected by the BLNR's action on the RP Parcel so as to make them clearly distinguishable from those of the general public. Fifteen individuals provided public testimony over the course of several hours. While no two testifiers provided identical testimony, there was significant overlap in the issues and interests raised, including those raised by Mr. Frankel. These interests included general recreational use and enjoyment of the beach and ocean (including fishing, diving and beach walks), public access, long-term environmental concerns, and public trust issues. According to his Declaration, Mr. Frankel's recreational interests consist of swimming in the ocean, reading on the shore, relaxing, and taking beach walks. Frankel Declaration ¶¶6-7. In other words, Mr. Frankel visits the beach fronting the RP Parcel for the very same reasons that the vast majority of the public visits. There is nothing unique or distinguishable about these activities, or the frequency with which they are carried out. Moreover, Mr. Frankel has not explained how these interests would be affected any differently than the general public.

Third, Mr. Frankel's claimed public trust interest is, by its very definition, shared collectively by the public at large. *See* Haw. Const. Art. XII, Sec. 4 ("The lands granted to the State of Hawai'i by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding therefrom lands defined as 'available lands' by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for native Hawaiians *and the general public.*") (emphases added). Mr. Frankel has no "public trust interest" separate and apart from the general public, as that would be anathema to the very concept of the public trust.

2. Mr. Frankel Would Not Be Granted Standing Under HAR § 13-1-31(c)

If a contested case hearing was to be held, the BLNR could grant Mr. Frankel standing if it found (i) that he had a substantial interest in the matter, and (ii) that his participation would substantially assist the BLNR in its decision-making. Mr. Frankel cannot demonstrate that he meets either requirement. As previously noted, Mr. Frankel did not participate in the environmental review process undertaken by DLNR and RTH in 2017, when RTH was considering an intensification of its uses of the RP Parcel and beach. His interest is lukewarm at best, and certainly of no greater consequence than the interest of any other member of the general public. And even if he had a genuine and substantial interest, the discussion among the BLNR members at the September 14, 2018, meeting demonstrated that the BLNR is perfectly capable of making a decision regarding RP 7849 without his participation.

October 1, 2018

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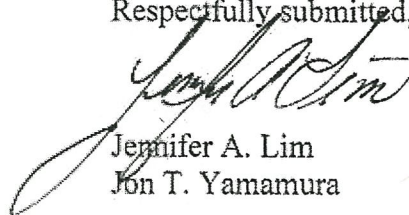
III. CONCLUSION

Mr. Frankel baldly asserts that his interests will be adversely affected "if the BLNR rubberstamps the applicant's requests" and if the "BLNR crafts vaguely worded conditions that are subject to misinterpretation and abuse." Frankel Declaration ¶28. These concerns are unfounded and insulting. As evidenced by the actions of the BLNR on September 14, where it spent over five hours addressing RP 7849, there is not a rubberstamp in sight. Furthermore, after those hours of discussion and deliberation, BLNR member Yuen offered a multi-part motion to incorporate specificity into RP 7849 (or subsequent revocable permit). Additionally, DLNR staff and RTH have been working together since late 2014 to resolve open issues related to RP 7849. RTH's August 6, 2018, letter requesting clarification to RP 7849 is evidence of RTH's interest in well-crafted language, and DLNR concurs that the character of use in RP 7849 is too vague and creates ambiguity in terms of possible enforcement actions, and therefore recommended approval of RTH's request. Mr. Frankel's interest in well-crafted language is already being addressed by BLNR, DLNR and RTH, and in fact is the purpose of RTH's request to the BLNR.

Mr. Frankel complains of inhibited access to the RP Property, interference from a past wedding, and clutter inhibiting his preference for a more secluded beach. As currently configured, public use of, and access to and through, the RP Parcel is clearly available. *See* Exhibits A and B. As explained by RTH at the BLNR meeting, RTH has removed all wedding paraphernalia from the RP Parcel. *See id.* And, as evidenced by the video RTH showed the BLNR on September 14, 2018, RTH has removed the restaurant seating that occupied a portion of the RP Parcel. No beach chairs, cabana tents or clam shell loungers are pre-set on the public beach. *See* Exhibits A, B. RTH has requested clarification from the BLNR regarding RP 7849 and the BLNR has proven itself to be well up to the task of analyzing this matter, and has already spent considerable time in its review and consideration of this matter.

For the foregoing reasons, RTH respectfully submits that a contested case hearing is not required by law or due process in this revocable permit matter, and that the CCH Petition should therefore be denied.

Respectfully submitted,



Jennifer A. Lim
Jon T. Yamamura

Exhibits A - B

cc: Resorttrust Hawaii, LLC
David Kimo Frankel [REDACTED]
David D. Day, Esq.
Bill J. Wynhoff




EXHIBIT A



EXHIBIT B

EXHIBIT 7


October 2, 2018

Suzanne Case
Chair, Board of Land and Natural Resources
1151 Punchbowl St. Room 130
Honolulu, HI 96813

RE: Contested Case Petition Filed September 24, 2018 on the Proposals to Continue
and/or Issue a New Revocable Permit for the Kahala Hotel

Dear Chair Case and members of the BLNR:

The issue before you is whether you should conduct a contested case hearing in response to the oral and written requests for a contested case hearing. It is unnecessary to answer every charge and respond each argument raised by Resorttrust in its October 1 letter – and the petitioner does not waive his¹ right to do so at the appropriate time.

The Hawai'i Supreme Court's decision in *In re Maui Elec. Co.*, 141 Hawai'i 249, 408 P.3d 1 (2017) provides the straight-forward analytical framework to determine whether the BLNR should conduct a contested case hearing.

The petitioner's right to a contested case hearing is constitutionally based.² A contested case hearing is required by law when required by constitutional due process. *Id.* at 258, 408 P.3d 10. The *Maui Elec.* court held that the protections of the due process clause apply to the right to a clean and healthful environment as defined by laws related to environmental quality.

“The right to a clean and healthful environment” is a substantive right guaranteed to each person by article XI, section 9 of the Hawai'i Constitution:

Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources.

Haw. Const. art. XI, § 9; see also *Cty. of Haw. v. Ala Loop Homeowners*, 123 Hawai'i 391, 409, 417, 235 P.3d 1103, 1121, 1127 (2010) (recognizing a substantive right to a clean and healthful environment). Article XI, section 9 is self-executing, and it

¹ For some reason, it seems more appropriate to use the third person here. Please forgive the formality.

² The BLNR's petition form for a contested case does not ask for an explanation as to the legal basis for such a request. That makes sense given that an "administrative tribunal or agency has been created in order to handle controversies arising under particular statutes. It is characteristic of these tribunals that simple and non-technical hearings take the place of court trials and informal proceedings supersede rigid and formal pleadings and processes. 1 Davis, *Administrative Law Treatise* 39-40, § 1.05 (1958)." *Cariaga v. Del Monte Corp.*, 65 Haw. 404, 652 P.2d 1143, 1147 (1982).

“establishes the right to a clean and healthful environment, ‘as defined by laws relating to environmental quality.’” *Ala Loop*, 123 Hawai‘i at 417, 235 P.3d at 1127. **This substantive right is a legitimate entitlement stemming from and shaped by independent sources of state law, and is thus a property interest protected by due process.**

Although a person's right to a clean and healthful environment is vested pursuant to article XI, section 9, the right is defined by existing law relating to environmental quality.

Id. at 260-61, 408 P.3d at 12-13.

Thus, where a source of state law — such as article XI, section 9 — grants any party a substantive right to a benefit — such as a clean and healthful environment — that party gains a legitimate entitlement to that benefit as defined by state law, and a property interest protected by due process is created. In other words, the substantive component of article XI, section 9 that we recognized in *Ala Loop* is a protectable property interest under our precedents. . . . [T]he property interest created by article XI, section 9 is shaped by all state laws relating to environmental quality.

Id. at 264, 408 P.3d at 16.

The petitioner has the right to a clean and healthful environment as defined by HRS chapters 205A, 343, 342D and 171 — just as the Sierra Club had rights pursuant to HRS chapter 269. It is obvious that each of these statutes are laws relating to environmental quality, particularly when employing the analytical approach used by the Hawai‘i Supreme Court in *Cty. of Haw. v. Ala Loop Homeowners*, 123 Hawai‘i 391, 409-10, 235 P.3d 1103, 1121-22 (2010). The Hawai‘i Supreme Court has already definitely ruled that HRS chapter 205A “is a comprehensive State regulatory scheme to protect the environment and resources of our shoreline areas.” *Morgan v. Planning Dep’t*, 104 Hawai‘i 173, 181, 86 P.3d 982, 990 (2004). HRS chapter 205A is also identified in HRS § 607-25(c), the statute that reflected “the legislature's determination that chapter 205 is an environmental quality law” in *Ala Loop*, 123 Hawai‘i at 410, 235 P.3d at 1122. Similarly, HRS chapter 343, relating to environmental impact statements, is a law relating to environmental quality. It is also identified in HRS § 607-25(c). HRS chapter 342D, relating to water quality, is also identified in HRS § 607-25(c). Finally, HRS chapter 171 that deals with public land is also specifically identified in HRS in HRS § 607-25(c). The legislative history of each of these measures demonstrates that in enacting these measures, the legislature was concerned about protecting natural resources and environmental quality. *See also* 1986 Haw. Sess. Laws Act 80, § 1 at 104-105.

In addition, the petitioner has the right to protect the integrity of the public trust as articulated in Article XII § 4 and Article XI § 1 of the Hawai‘i State Constitution.

These constitutionally-based interests are entitled to some level of protection. *See e.g. Pele Def. Fund v. Puna Geothermal Venture*, 77 Hawai‘i 64, 68, 881 P.2d 1210, 1214 (1994). Petitioner believes that a contested case hearing is the most appropriate means for these rights to be protected. The Hawai‘i Supreme Court has explained that three factors need to be balanced in

determining what procedures should be employed (and therefore whether a contested case is the appropriate procedure): “(1) the private interest which will be affected; (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards; and (3) the governmental interest, including the burden that additional procedural safeguards would entail.” *Maui Elec*, 141 Hawai‘i at 265, 408 P.3d at 17.

The first factor is the private interest to be affected.³ In this case, the private interests are the rights guaranteed by Article XII § 4 and Article XI § 1 of the Hawai‘i State Constitution (the right of a trust beneficiary to ensure that public trust principles are diligently applied, and public trust resources protected and appropriately managed) as well as “the right to a clean and healthful environment, which is a substantive right guaranteed by the Hawai‘i Constitution.” *Maui Elec*, 141 Hawai‘i at 265, 408 P.3d at 17. “This right to a clean and healthful environment includes the right that specific consideration be given to”, *id.*, the objectives and policies of HRS § 205A-2. *See* HRS § 205A-4 and 205A-5(b).⁴ That includes specific consideration of HRS §§ 205A-2(b)(1)(A), -2(b)(3)(A), -2(b)(9)(A), -2(c)(1)(B)(i), -2(c)(1)(B)(iii) -2(c)(1)(B)(iv), -2(c)(1)(B)(v), -2(c)(1)(B)(viii), 2(c)(3), and -2(c)(9)(A). It also requires that special consideration be given before development takes place within the special management area and before structures are placed within the shoreline setback area.⁵ This right includes the right that an environmental assessment be prepared pursuant to HRS chapter 343 before state land is used.⁶ This right includes the right to ensure that polluted water is not discharged into coastal waters in violation of HRS chapter 342D. This right also includes the right to ensure that public lands governed by HRS chapter 171 are appropriately managed.

The second factor to be considered the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards.

A contested case hearing is similar in many respects to a trial before a judge: the parties have the right to present evidence, testimony is taken under oath, and witnesses are subject to cross-examination. It provides a high level of procedural fairness and

³ The factual bases for the protected interests are found in the petitioner’s declaration that describes actual uses and harms. They are legally protected interests – not mere policy preferences as Resorttrust claims on page 2 of its letter.

⁴ The plain language of these provisions, and the definition of “agency” makes it clear that these provisions are binding on BLNR despite what Resorttrust argues on pages 11-12 of its letter.

⁵ Resorttrust’s predecessor in interest received a special management area minor permit on this revocable permit parcel in 1996. Resorttrust continues to benefit from this permit. A copy of the permit can be found at the end of this letter. BLNR’s Chair at the time Gil Coloma-Agaran (now Senator Keith-Agaran) signed off on the permit application. This permit belies Resorttrust’s claim on pages 11-12 that no SMA permit or SSV is necessary on state land. Furthermore, if Resorttrust’s claim were accurate, there would have been no reason for the legislature to exempt certain activities of the state department of transportation from HRS chapter 205A in Act 48 in 2017. *See* https://www.capitol.hawaii.gov/session2017/bills/GM1148_.pdf.

⁶ It is perfectly appropriate to raise an agency’s failure to comply with HRS chapter 343 in the context of a contested case hearing – despite what Resorttrust argues on page 13 of its letter. *See e.g. Pearl Ridge Estates Comm. Ass’n v. Lear*, 65 Haw. 133 (1982); *Kahana Sunset Owners Ass’n v. County of Maui*, 86 Hawai‘i 66, 947 P.2d 378 (1997); *Sierra Club v. Office of Planning*, 109 Hawai‘i 411, 126 P.3d 1098 (2006).

protections to ensure that decisions are made based on a factual record that is developed through a rigorous adversarial process.

Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res., 136 Hawai'i 376, 380, 363 P.3d 224, 228 (2015). A contested case hearing provides procedural protections to both parties. A contested case can ensure that a decision is based exclusively on evidence in the record. It precludes *ex parte* communication. It can better resolve disputed facts. For example, in its footnote 2, the hotel claims it removed the gazebo in February 2018. But the Sierra Club's June 23, 2018 letter documented two gazebos on the RP parcel on May 26, 2018. A contested case hearing can also prevent irrelevant issues from distracting decisionmakers from the pertinent issues. For example, the hotel declares on page 16 of its letter that it has removed the restaurant from public land, which is irrelevant given that it was there and it proposes to put it back for "overflow" seating – whatever that means. A contested case is an effective means of resolving disputed facts. And it allows for deliberate decisionmaking rather than hastily crafted and vague conditions.

Unlike the situation in *Flores v. Bd. of Land & Natural Res.*, 143 Hawai'i 114, 424 P.3d 469 (2018), the petitioner has not had the opportunity to cross examine any witnesses. Flores was denied the opportunity to have a contested case hearing over a land disposition because he had "already been afforded a full opportunity to participate in a contested case hearing."

The third factor is the governmental interest. The BLNR has a strong interest in making deliberate decisions when it comes to public trust land.

Under public trust principles, the State as trustee has the duty to protect and maintain the trust property and regulate its use. Presumptively, this duty is to be implemented by devoting the land to actual public uses, *e.g.*, recreation. Sale of the property would be permissible only where the sale promotes a valid public purpose.

State by Kobayashi v. Zimring, 58 Haw. 106, 121, 566 P.2d 725, 735 (1977). *See also Kelly v. 1250 Oceanside Partners*, 111 Hawai'i 205, 231 140 P.3d 985, 1011 (2006) (public trust duty requires agency to "ensure that the prescribed measures are actually being implemented"); *Mauna Kea*, 136 Hawai'i at 414, 363 P.3d at 262 (concurring opinion of J Pollack, joined by Wilson and McKenna) (trustee must "fulfill the State's affirmative constitutional obligations"). The BLNR's decision must be made "with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state." *In Re Water Use Permit Applications*, 94 Hawai'i 97, 143, 9 P.3d 409, 455 (2000). When acting as a trustee, BLNR

must make its findings reasonably clear. The parties and the court should not be left to guess, with respect to any material question of fact, or to any group of minor matters that may have cumulative significance, the precise finding of the agency. . . . Clarity in the agency's decision is all the more essential in a case such as this where the agency performs as a public trustee and is duty bound to demonstrate that it has properly exercised the discretion vested in it by the constitution and the statute.

Id. at 158-59, 9 P.3d at 469-70 (2000)(citations and internal quotation marks omitted). These values are best assured in the context of a contested case. A contested case hearing could answer questions with testimony given under oath like:

- how much revenue has the hotel been earning off of public land?
- what authorization did the hotel receive to build a restaurant and cabana structures on public land?
- what authorization did the hotel receive to place outfall pipes underground on public land?
- is there a better use of public beachfront land than to be used as storage?
- where is the best place to put beach chairs that does not inhibit public access and use?
- how much public land would the general public be effectively denied from using?
- what are the impacts of sea level rise on this parcel?
- are lights shining in a manner inconsistent with HRS § 205A-71?

The hotel diminishes the significance of a revocable permit, which lasts a year. Yet, this parcel of land has been used by the hotel (owned by various entities over the decades) pursuant to one-year revocable permits for five decades. The BLNR has never taken the time to carefully consider all the facts and all the issues such as the exclusion of the general public from portions of this beachfront property.

To be clear, if the contested case hearing proceedings last beyond December 31, 2018, the petitioner will not object – and is willing to enter into an appropriate stipulation -- that allows the hotel to use the parcel for recreational and maintenance purposes (only) provided the hotel does not engage in any commercial activity (as that term is defined by HAR§ 13-221-2) on the RP area and on the ma kai beach area until a decision is made at the conclusion of the proceedings.

Resorttrust's interpretation of standing law and the requirement that the petitioner's interest be clearly distinguished from that of the general public is an argument that was discarded into the dustbin of dead jurisprudence decades ago by the Hawai'i Supreme Court in *Akau v. Olohana Corp.*, 65 Haw. 383, 652 P.2d 1130 (1982).

The courts have also broadened standing in actions challenging administrative decisions. The U.S. Supreme Court has granted standing where plaintiffs allege environmental harm even though plaintiffs' harm is equally shared by a large segment of the public. *United States v. SCRAP*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973). In *In re Hawaiian Electric Co.*, 56 Haw. 260, 535 P.2d 1102 (1975) we granted standing to utility users who challenged a Public Utility Commission's approval of rate increases, although plaintiffs shared the additional rate with all other users. We have also broadly construed standing in other administrative law cases. See *Life of the Land v. Land Use Commission*, 63 Haw. 166, 623 P.2d 431 (1981); *Waianae Model Neighborhood Area Association, Inc. v. City and County of Honolulu*, 55 Haw. 40, 514 P.2d 861 (1973).

Claims of harm to public trust property is another area where courts are expanding standing. *Besig v. Friend*, 463 F. Supp. 1053 (N.D.Cal. 1979); *Paepcke v. Public Building Commission*, 46 Ill.2d 330, 263 N.E.2d 11 (1970). In *Marks v. Whitney*, 6

Cal.3d 251, 98 Cal. Rptr. 790, 491 P.2d 374 (1971), the California Supreme Court granted standing to an individual who sued a private property owner claiming that the owner was obstructing use of public tidelands. In an implied dedication case, *Dietz v. King*, 2 Cal.3d 29, 84 Cal. Rptr. 162, 465 P.2d 50 (1970), the court granted standing to individuals representing a class who sued a private landowner to enforce a public right to use a beach access route across his property.

This court has been in step with the trend away from the special injury rule towards the view that a plaintiff, if injured, has standing. In *Life of the Land v. Land Use Commission*, *supra*, we said:

Standing is that aspect of justiciability focusing on the party seeking a forum rather than on the issues he wants adjudicated. And the crucial inquiry in its determination is "whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of ... [the court's] jurisdiction and to justify exercise of the court's remedial powers on his behalf." [Citation omitted.]

63 Haw. at 172, 623 P.2d at 438.

We concur in this trend because we believe it is unjust to deny members of the public the ability to enforce the public's rights when they are injured. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 5 U.S. 137, 163, 2 L.Ed. 60 (1803). . . .

We hold, therefore, that a member of the public has standing to sue to enforce the rights of the public even though his injury is not different in kind from the public's generally, if he can show that he has suffered an injury in fact, and that the concerns of a multiplicity of suits are satisfied by any means, including a class action.

65 Haw. at 386-89, 65 P.2d at 1133-34. The petitioner's interest in both the beach and the RP parcel have been adversely affected by Resorttrust and would be if its proposed use is authorized.

Aloha,



David Kimo Frankel

October 2, 2018

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CITY AND COUNTY OF HONOLULU
HONOLULU, HAWAII 96813

March 25, 1996

Ms. Carolyn Allerdice
Fred N. Sutter & Associates, Inc.
Honolulu, Hawaii 96813

Dear Ms. Allerdice:

MINOR PERMIT--SPECIAL MANAGEMENT AREA
CHAPTER 25, REVISED ORDINANCES OF HONOLULU

Project : Landscape Irrigation and Landscape Lighting
within the Shoreline Setback (\$95,000)
Applicant : Kahala Hotel Associates, Limited Partnership
Location : 5000 Kahala Avenue - Kahala
Tax Map Keys: 3-5-23: 39 and 41

We have reviewed your proposal and find that it lies within the Special Management Area (SMA) established in Chapter 25. We find that your proposed development has a valuation of less than \$125,000 and will have no significant effect on the SMA. Therefore, a Minor Permit is hereby approved, subject to the following conditions:

1. The irrigation system shall be installed a minimum of 12 feet mauka of the shoreline; and
2. Lighting in the area identified by "Site Lighting Plan II", Sheet E-1.2, Phase IVB (dated 10/25/95) shall be located a minimum of 10 feet mauka of the shoreline.

A copy of this letter should accompany your application(s) for construction permits. If the accepted valuation of the proposed work exceeds \$125,000, the project will be returned to the Department of Land Utilization for further review under Chapter 25.

This approval shall not be construed as approval of a building permit application; such applications are reviewed separately and shall comply with applicable codes and regulations.

DIRECTOR OF LAND UTILIZATION

Title

3/24/96
Date