

1638-A Mikahala Way
Honolulu, HI 96816

October 25, 2019

David Kimo Frankel's Testimony in Opposition to the renewal of revocable permit S-7915, the issuance of a new revocable permit for the Kahala Hotel, Item D-7

Chair Case and members of the board,

There is no question that the Kāhala Hotel's use of public beachfront land (what is referred to as Lot 41) has decreased significantly over the past 18 months. The illegal weddings have stopped. The illegal cabanas have been removed. As have the clamshell chairs.¹ Although things are much better than they were, problems persist. Here is what things looked like near sunrise on July 4:



¹ The better conditions are not a result of the goodness of the hotel's heart. Given that these uses had been going on for a few years, it is fairly obvious that these activities stopped because (a) community members raised these issues to DLNR staff and this board (b) the City ordered the hotel to stop many of its activities and (c) I sued. On January 7, 2019, I emailed Bill Wynhoff:

I don't know if you can get out of your office during the week, but maybe on Saturday I can show you what is going on over there. After removing a lot of its commercial things off of the state parcel by November 1, some time in mid-December, the hotel re-installed the rental clamshell lounge chairs — with ads for drinks. Waiters and waitresses provide drinks through out the area — as they had been doing.

In response to a request for admissions, the hotel admitted that “from January 1, 2019 through January 9, 2019, as part of the busy holiday season and in response to customer requests and complaints, RTH made on a temporary basis ‘clamshell’ lounge chairs available to rent on the State Parcel for those staying at the Hotel. Limited food and drink service was provided to those using the ‘clamshell’ lounge chairs during that time period.” The hotel also admitted that it generated revenue from activities on the State Parcel. My lawsuit, my email to Bill Wynhoff and DLNR's subsequent follow-up brought these activities to a halt.



The first photo is of the center/Diamondhead side of Lot 41 (and the chairs in the back are on hotel property). The second photo is on the Koko Head side. No guests were in the mood to use any of these preset chairs that early in the morning.

This board should be aware of the following facts:

I. The Origins and Purpose of Lot 41

In the early 1960s, the Kāhala Hilton Hotel Company, Inc., Bishop Estate and others wanted the City Council to rezone property to allow for resort use. To convince the Honolulu City Council to rezone the property, the trustees of Bishop Estate issued a statement in which they pledged to “create a good beach.” Honolulu Star Bulletin, August 9, 1960. The trustees pledged:

In front of the hotel and indeed extending westward past the golf clubhouse and the public park to Kapakahi Stream, the developer would create a good beach. The beach will be designed to improve conditions due to the Kapakahi Stream and must have the approval of State officials. **All the beach seaward from the Estate’s land court makai boundary would belong to the State and the public would have free access to it across the park and enjoyment of the beach area.**

See also Honolulu Advertiser, April 24, 1960 at A2. In the microfilm files in City Hall are a slew of petitions submitted by Vince Esposito, asking the Honolulu City Council to rezone the property so that the public could benefit from the beach. The re-zoning bill was vetoed, but over-ridden based, in part, on the promises that if the land was re-zoned, this new public beach would

be created.

In 1963, the hotel and others agreed “to construct such beach and swimming area for and on behalf of the State.” The Board of Land and Natural Resources entered into an agreement with them in which all the parties understood and agreed that what is now Lot 41 (and the area makai of it) “**shall be used as a public beach.**”

Please, do not think the beach was created out of the goodness of the hotel’s heart. It was created in order to obtain zoning for the hotel. And please, keep in mind that Lot 41 has been dedicated in a Land Court document, to be used a public beach.

Because Lot 41 has been dedicated to be used a public beach, there should be no exclusive use of it by a private party.

II. Prior Permits Have Limited the Hotel’s Use While Allowing for Maintenance

Between 1986 and 1993, BLNR granted a revocable permit that authorized the maintenance of Lot 41, barred commercial uses, and required public access and use. The permit stated, “The general public shall be permitted access to the sandy beach area and be permitted to use the permit premises for beach related recreational activities.” It also explicitly barred commercial activities. The 1986-1993 revocable permit demonstrates that there was no need now to allow commercial or exclusive uses of Lot 41 to ensure its maintenance.

III. Compare to Kaimana

Compare the Kāhala Hotel’s use of public land with the Kaimana’s. Both hotels are located in prime locations and both operate restaurants with fantastic ocean views. Kaimana does not provide beach chairs to its guests. If Kaimana can survive economically without doing so, so too can the Kāhala Hotel.

IV. Location, Location, Location

The hotel’s fixation of the percentage of space it wishes to occupy is deceptive. It is not the quantity of space (that it incorrectly calculates – ignoring the space between chairs that is empty, but that is unusable by anyone else) that is important. It is the location. Think about this: most of O’ahu is undeveloped, but have you driven on the freeway during rush-hour? A fixation on the percentage of Lot 41 that is exclusively used by the hotel is a distraction. The hotel wants its guests to have exclusive use of the best portions of Lot 41.

If the hotel wished to put some of the light-weight chairs on the Diamond Head of Lot 41, directly in front of its restaurant, it would be putting its chairs in an area which the general public does not use. Instead, it places its chairs on the most desirable parts of Lot 41.

To preserve my rights, I once again request a contested case hearing.

/s/

David Kimo Frankel

October 25, 2019

Chairperson Suzanne Case and Members of the Board of Land and Natural Resources

Re: STRONG OPPOSITION to Agenda item D 7: "Annual Renewal of Revocable Permit No. 7915; Resorttrust Hawaii, LLC, Permittee; Waialae, Honolulu, Oahu, Tax Map Key: (1) 3-5-023:041"

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

I oppose the renewal of the RP No. 7915 as requested by RTH with the conditions in the DLNR staff submittal. I am not opposed to the a renewal of an RP for RTH, if the conditions were different.

I am opposed to the renewal of that RP as there are:

1. Problems with the staff submittal
2. RTH violations with furniture
3. RTH violations with trash and cleanliness
4. RTH violations with their contracted vendor (the surf school)

RTH has violated the terms of their current RP every day during the term of the RP. I have personally witnessed their violations on most days during the first half of 2019, and have photos from a sampling of their violations, which a presented below. DOCARE and DLNR are, for whatever reason, not able or not willing, to regularly visit the parcel to cite RTH for their violations. The result of this is that while there have been hundreds of violations, there are no citations. RTH will say that lack of citations means no violations.

Renewal of an RP will only enable RTH to continue to commit these and related violations, all of which negatively affect the natural aesthetic and beauty of the area, as well as the public's experience of this natural and public area.

1. Problems with the staff submittal:

The staff submittal is again oddly biased in favor of RTH, using an illogical method for comparing space that RTH is requesting for use, with the overall size of the public parcel. For example, about two thirds of the grassy swath of beach extending from West to East and abutting the RTH property line, is largely the most reasonable space that hotel guests as well as the public access, sit, stand, and otherwise use. And of that section of the parcel, the center grassy section Makai of the pool and the Eastern grassy section are the only reasonable areas to place beach lounge chairs. Any

observer can easily see on any day, that the large majority of RTH guests and the public on the parcel don't occupy the Western grassy section, don't occupy either of the peninsulas, and almost all never make it to the island off the western peninsula. There isn't space for people to reasonably lounge on the peninsulas. Yet, the DLNR staff submittal compares the square footage of RTH's request with the whole square footage of the parcel, which is misleading and would suggest that RTH is requesting only a little space for their furniture. Instead, it would be accurate and appropriate to compare the square footage of RTH's furniture request with the square footage of the Center and Eastern grassy sections only, as those are the only areas of the parcel that are reasonably useable for lounge chairs. When considered in this more accurate manner, RTH's furniture square footage request is large and unreasonable.

The staff submittal, also once again, measures RTH's furniture request by the actual footprint of the furniture, rather than more appropriately by the footprint plus personal space around each piece of furniture. This method is both misleading and again biases the request in favor of RTH. If RTH's furniture request were more accurate to include the personal space around each piece of furniture, their request as presented in the staff submittal is again, excessively large and unreasonable.

Furthermore, there is no logical reason to group chairs on the staff submittal printed table of requested furniture to be placed on the parcel. For example, the staff submittal lists "Beach Chair set up with 4 chairs" and lists the count as "3". This is an absurd way of listing these items that serves no purpose other than to appear to minimize what RTH is requesting, creating bias in favor of RTH.

The staff submittal supports beach chairs on the parcel for exclusive use of hotel guests. This is therefore an amenity provided for hotel guests as part of their stay at the hotel. This is inappropriate to do on public land. Hotel guests pay to stay at the hotel and if chairs on the state land are just for their use, then those chairs are paid for chairs. This is commercial use of public land. This is the hotel making income on public land at the expense of the public. It is problematic that the authors of the staff submittal do not understand this basic concept such that they would support hotel chairs on public land just for hotel guest use.

The staff submittal also states that the monthly fee of \$6300 or 3% of gross revenues to be paid as previously approved, is a moot point since the hotel has decided to no longer pursue commercial use of the property. Calling this a moot point is illogical as beach chairs are reserved for hotel guests (paying customers), and RTH is making money (albeit indirectly) in part because of those beach chairs for their guests. If the property were deemed to be an income generating property back in 2011 to increase income for the State, as mentioned in the staff submittal, then the BLNR can simply approve a much higher monthly rental fee for the property and generate a lot more revenue for the State. This is a unique, highly valuable property that the hotel needs to be paying a whole lot more for simply to have the right to maintain it so that it looks nice for their guests as they like it to look. To charge anything less than \$10,000 per month for this large 1.28 acre swath of ocean front land in Kahala, is short-changing

the State of Hawaii substantially. It would be inaccurate and inappropriate for the BLNR to consider any monies currently spent by RTH on maintenance of the parcel as somehow benefiting the state and therefore counting toward reduced rent. RTH pays to maintain it for the purpose of their guests, not for the public. RTH will say otherwise, and correctly, Board Member Downing called RTH attorneys out on this at the last BLNR hearing. How much they spend to maintain it is solely up to them. Furthermore, the State is spending very little if anything to maintain the rest of the beach along the Kahala coastline, so its a falsity that RTH's maintenance expenditures for the parcel are somehow saving the State these costs.

The previous permit, RP7849 explicitly stated that the "permittee shall not...conduct surf instruction within the public beach fronting the premises". During the BLNR hearing that led to the issuance of the current permit, RP7915, there was no discussion about removing that condition from the permit. Yet the authors of the staff submittal have apparently, at their own discretion, deleted that such that RP7915 did not have that condition. This is problematic in that someone other than the BLNR made this decision. Its also problematic in that most of the ocean lagoon does not legally allow any vessels, so omitting the prior exclusion of surf instruction on the sandy part of the beach opens the door for more violations in the lagoon, which indeed happened and will be discussed later in this testimony.

The staff submittal makes many other false or misleading statements that bias the submittal in favor of RTH, and are too numerous to address in this testimony. The staff submittal is a poorly conceptualized, heavily biased document, that is well below any standard of what the public could reasonably expect coming from a State department that is supposed to be working to protect public natural resources.

2. RTH violations with furniture

During the term of the current permit, RTH has regularly stacked and stored lounge chairs in locations on the parcel for which violated the terms of their RP. This occurred in excess of 150 days during the current permit. RTH also placed in excess of 60 lounge chairs on the premises on a daily basis for over 150 days of the term of the current RP, when neither a user was present nor when was requested by a user, as the RP stipulates. These daily actions are in violation of their RP.

DLNR Land Division (LD) reported in the staff submittal observing no violations of these sort even though the RP clearly states this is a violation and even though the LD occasionally visited the site. LD likely did not observe these numerous violations because they never visited the site in the evening or before 9 am when the violations occurred and were most recognizable. When this was clearly reported to the LD, and at which times they occurred, LD still failed to visit at the noted times of the day to observe. Instead they chose to visit the parcel between 9 and 12 noon when the chairs are spread around and some guests are using them.

Here is a photo taken on the morning of 1/28/19 showing lounge chairs stored in the center grassy section which is not approved for storage. The photo is also evidence of lounge chairs placed on the parcel without the user present and not at users request as stipulated is required in the terms of the RP. These are violations of the RP that happened every day for over 150 days.



Here is another photo of these violations on 5/24/2019.



Here is a photo from 1/28/2019 showing lounge chairs and tables placed on the premises without a user present and not at the request of a user, in violation of the terms of the RP. This happened every day for over 150 days.



During the term of the current permit, RTH has also reserved lounges and tables for their guests, a practice which violated the terms of their RP.

Here are photos from 7/3/2019 showing “reserved” placards, on the tables.





On every day during the term of their current RP, RTH has placed 30+ round tables, which were not allowed per the terms of the RP on the parcel thus violating the terms of their RP. Oddly, the LD inspectors chose to disregard this ongoing daily violation, and dismissed it in the staff submittal, thus providing further evidence of bias in favor of the hotel.

Here is another photo, this one taken on 7/4/2019 showing unauthorized tables on the parcel. This photo also shows no space for the public to sit on the grassy center of parcel.



During the term of the current permit, RTH has also placed large blue beach umbrellas on metal stands on the parcel for which no one was present nor when they requested them to be placed, which violated the terms of their RP.

Here is a photo, taken on 7/4/2019 just after sunrise, showing unauthorized large blue beach umbrellas on the parcel (see left of center in photo).



3. RTH violations with the trash and cleanliness

RTH has, on a daily basis, violated the terms of their RP by not keeping the premises in a clean, sanitary and orderly condition. Furthermore, there is no reason to have their towel caddy (a.k.a. dirty towel collection bin) on public land. It is a gaudy, bulky plastic, dirty receptacle for hotel guests to dispose of their used towels. It's gross, sloppy and spilling over with used towels on a daily basis. This should be moved on to RTH property.

Here is a photo taken on 8/1/2019 showing the used towel bin in a non-orderly condition, in violation of the terms of the RP.



Here is a photo taken shortly after sunrise on 5/24/2019 showing furniture and trash on the property in a manner that violates the “clean and orderly” terms of the RP. This disarray of furniture and trash can be found just about every morning on the parcel, hundreds of times during the term of the current RP. This photo shows numerous RP violations including lounges stored on the parcel for which storage is not allowed, chairs placed on the parcel when a user is not present nor requested the furniture, non-allowed tables, disorderly, and trash.



Here is another photo taken shortly after sunrise on 5/24/2019 showing furniture and trash left on the premises, in a manner that violates the “clean and orderly” terms of the RP. This is the kind of trash and disarray, left over from hotel guests the day or night before, that meets the public who simply wants to enjoy a clean and pleasant morning experience on the public parcel.



4. RTH violations with their surf school, and a Criminal Case in Court

Via their hired ocean equipment rental and instruction group (the Hans Hedemann Surf School that is based on hotel property), RTH has violated the terms of the RP on an almost daily basis. The surf school regularly conducts instruction and rental from the RP parcel, which is a violation of the terms of the RP. RTH and the surf school also has its hotel guests operate their SUPs and kayaks illegally in the restricted parts of the lagoon, every single time a guest is in the water with their rented equipment. Per Hawaii Administrative Rules (HAR) §13-256-89, the Eastern 3/4 of the lagoon (East of a line drawn straight makai from the western corner of the cafe roof, and perpendicular to the beach) is for swimming only, with no vessels including kayaks, SUPs, canoes, etc. allowed.

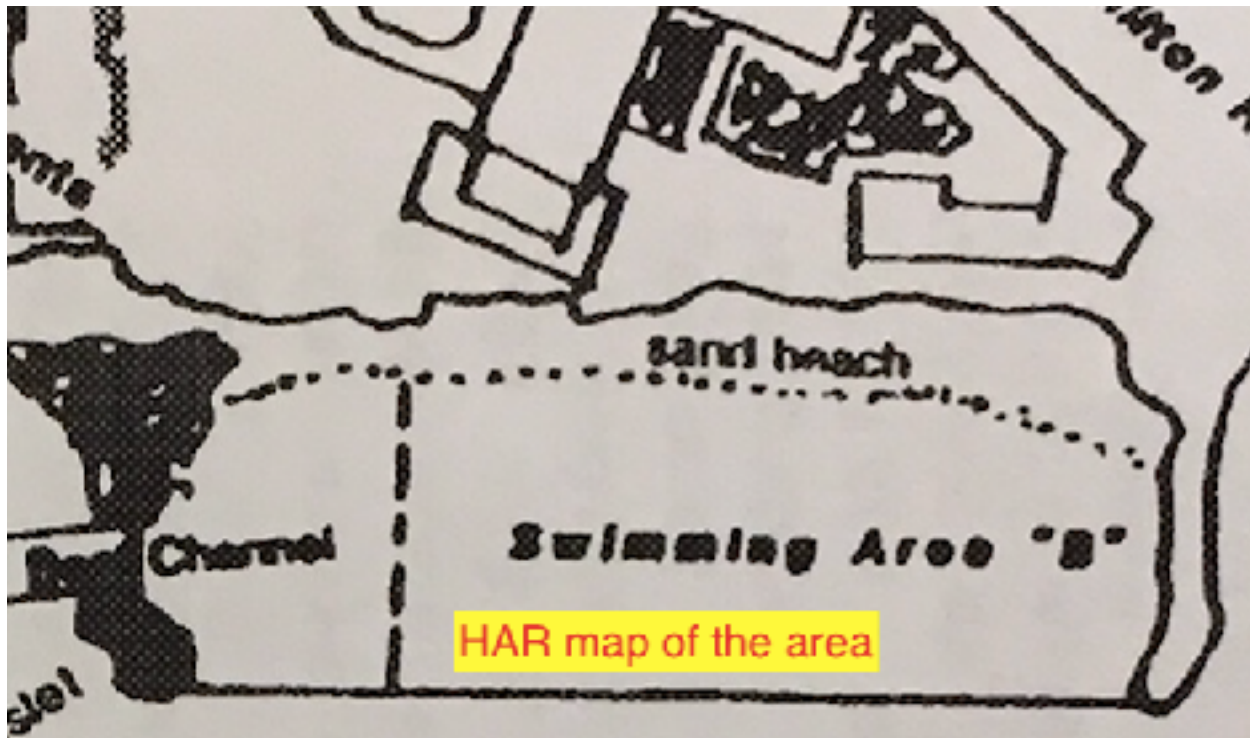
RTH eagerly announces that they (meaning RTH) offer SUP and kayak rentals and instruction for their guests. But when the surf school violates the terms of the RP and of the HAR §13-256-89, RTH is quick to distance themselves from the surf school saying “that isn’t us, thats a different business”. It does not matter what the formal contract structure is between RTH and the surf school. Whether they are employees of or a contracted vendor of the hotel, they are still hired by RTH and based on RTH property to provide for RTH guests and as such RTH is culpable when the surf school violates laws and rules for the area.

DOBOR Oahu District Manager Meghan Statts contacted the surf school several times in 2018, reminding them to comply with HAR §13-256-89. The surf school responded saying they would. The very next day, the surf school continued to violate HAR §13-256-89, while the hotel continued to have the surf school based on hotel property and continued to offer ocean related rentals and instruction to their guests via the surf school, illegally in the ocean lagoon. **On November 19, 2018, DOCARE cited the surf school for violating HAR §13-256-89, and issued a criminal summons (citation # is 6362714 LNR) to the the surf school. The surf school went to court on March 6, 2019, plead no contest, paid a minimal token fine, and the very next day continued to violate HAR §13-256-89. RTH continued to allow and even facilitate this illegal activity.**

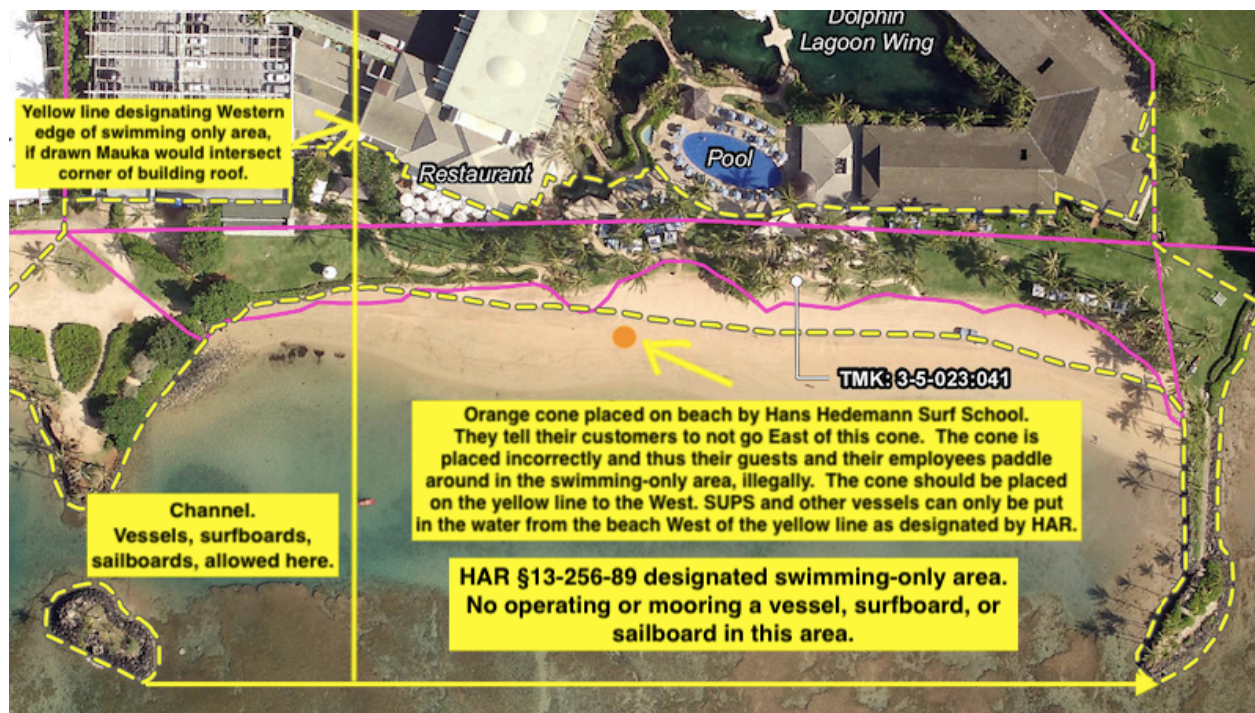
The BLNR approved storage of the Hans Hedemann surf school canoe at the far Eastern end of the RP parcel. It was brought to the Board’s attention at that time, that this will surely lead to violations of HAR §13-256-89 as the only access for the canoe to enter and be in the ocean is at the very far Western end of the beach, totally opposite where the canoe was approved for storage. Indeed, this immediately lead to the surf school violating HAR §13-256-89. There is no reasonable room for hotel guests to enter the water and operate a vessel of any sort, legally, in the ocean lagoon. The far Western quarter, while allowing vessels in the channel area per HAR §13-256-89, is not readily accessible with a SUP, kayak or other vessel and not appropriate for use in this way. There is a reason for this, and it is because the area is not for vessels. It is for swimmers. Most of the lagoon is designated for swimming only and is protected for

swimming, including public swimming. As such, it would be best if no ocean equipment rental and instruction were allowed on the RP, the sandy portion of the beach, or in the ocean lagoon fronting the hotel. Anything short of this will result in more violations of HAR §13-256-89.

Here is a map from the HAR showing the area that allows vessels in the channel to the left, and the swimming-only area to the right of the vertical dotted line.



Here is a google maps photo of the area with some notes and lines added to make it clear how HAR §13-256-89 relates to the area.



The staff submittal also notes that LD staff witnessed the surf school, hired by RTH, giving instruction from the RP premises. LD noted this in the staff submittal as contrary to the terms of the RP, but as of now, it appears that LD failed to cite RTH and / or failed to report this to DOCARE. RTH's contracted / hired surf school has been and continues to violate the terms of the RP, that the LD witnessed in person, yet failed to do anything about. LD's failure to make any citizen or take any corrective action of this clear violation that they themselves witnessed is again peculiarly biased in favor of RTH.

As an aside, RTH has yet to recognize and embrace the immense value of the low-key, tranquil, solitude that an uncluttered parcel, lagoon, and ocean absent of SUPs, kayaks, another surf school active, has to offer their guests. This is a potential that is unique to this hotel on the island of O'ahu, and increasingly rare in most parts of urban Honolulu. Its something that hotels in Waikiki cannot offer their guests. Its an increasingly rare can valuable commodity. The uncluttered tranquility and solitude of experience in the area is an asset that is only going to increase in value over time, particularly as Waikiki continues to increase in crowd on land and water. The hotel

would thus do well for itself, the community, and the natural environment if it were to shift its stance by embracing, protecting, and marketing themselves as offering, a visually uncluttered, tranquil experience of visual solitude for their guests. This is valuable and busy people will pay for it.

An acceptable compromise / solution

Given the lengthy BLNR hearing that lead to the current RP, the numerous RTH problems previously raised by the community, and RTH's own stated desire to comply with laws and the terms of their RP, it is very telling that RTH has continued to violate the terms of their RP hundreds of times, in numerous ways, and on a daily basis during the term of their most recent and current RP.

Because of the continued pattern of violations and RTH's demonstrated disregard for the terms of their RP as well as BLNR's instruction, it would be inappropriate for BLNR to issue a permit with the terms suggested in the staff submittal. I strongly OPPOSE an RP issued to RTH with the terms as listed in the staff submittal.

However, a solution that I would support, is the issuance of an RP that includes the following:

1. Does not allow any ocean equipment (SUP, kayak, surf board, canoe, boat, etc.) rental, tours, or instruction from the RP premises, from the sandy beach, or in the ocean lagoon from the cement wall extending into the ocean from the Waialae beach park to the Eastern rock peninsula fronting the hotel. This is very important to protect the area and by itself would take a lot of pressure off RTH by the public.
2. Allows RTH the privilege to maintain the premises at their own expense, as they like to do for the enjoyment of their guests.
3. Does not allow presetting of any lounges, other furniture, items of any sort, including the used towel collection bin on the premises.
4. Allows for up to 40 traditional aluminum framed vinyl strapped lounges and 20 small round tables to be placed on the parcel only upon request by a hotel guest who is present on the parcel and will use the furniture at that time, or person from the public who is present.
5. Lounges and tables are neither reserved for anyone including hotel guests, nor for the exclusive use of hotel guests.
6. Requires the placed lounges and tables to be removed from the premises by 6 pm or sunset, whichever comes earlier, and not placed on the premises under any circumstance before 9 am.
7. Requires all lounges and tables to be stored off premises, on hotel property.

8. Does not allow for any commercial or income making activity of any kind, either directly or indirectly.
9. Does not allow any exclusivity on the parcel for hotel guests in any form other than an ROE event.
10. Allows for no more than two ROE events in any calendar year. ROE events to not take up more than 1000 square feet.
11. Does not allow for weddings or any fireworks or other loud activities that disrupt the peace and tranquillity of the area or exclude the public.
12. Requires the premises to be kept clean, neat, and orderly.
13. Allows for another way to have citations issued if the public can reasonably show via photos, videos and report that violations are or have occurred, when the LD or DOCARE are not acting quickly, accurately, or frequently enough to catch the violations and cite.
14. Requires BLNR to cancel the RP if 3 violations with citations happen.
15. Defines the word “recreational” in the RP to only mean lounging on the premises without any furniture or with lounges and tables as allowed and mentioned above.
16. Increases the monthly RP fee to \$10,000, to more accurately capture the value of this very valuable 1.28 acre public parcel with very long beach frontage in Kahala.

Sincerely,

Tyler Ralston

Cc: Senator Stanley Chang
Representative Calvin Say
Senator Laura Thielen
Mayor Kirk Caldwell
Tommy Waters, Honolulu City Council Member
Meghan Statts, DLNR DOBOR O’ahu District Manager
Katia Balassiano, C&C Honolulu, Chief Planner, LUPD