

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

January 24, 2020

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

Ref: RP 7915

OAHU

Denial of Petition for Contested-Case Hearing filed by David Kimo Frankel on October 29, 2019; Agenda Item D-7, Revocable Permit No. 7915 to Resorttrust Hawaii, LLC; Waialae, Honolulu, Oahu, Tax Map Key (1) 3-5-023:041.

INTRODUCTION:

On October 25, 2019, the petitioner, Mr. David Kimo Frankel, orally requested a contested-case hearing concerning the above-referenced action regarding Agenda Item D-7, with respect to Revocable Permit No. 7915 ("RP No. 7915) to Resorttrust Hawaii, LLC ("RTH"). The Board denied the oral request and approved continuation of the RP. On October 29, 2019, Mr. Frankel filed a written Petition for a Contested Case Hearing ("Petition"). **Exhibit 1.** Based upon the following, we recommend that the Board deny the Petition.

BACKGROUND:

The 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. 7915, which grants RTH the right to occupy the premises for certain stated uses. **Exhibit 2.** RP No. 7915 was scheduled to expire on December 31, 2019, unless otherwise renewed by the Board pursuant to HRS § 171-55.

Agenda Item D-7 was the annual renewal of RP No. 7915. **Exhibit 3.** As renewed, RP No. 7915 is to continue through December 31, 2020.

Mr. Frankel submitted written testimony in opposition to Agenda Item D-7. **Exhibit 4.**

On October 25, 2019, the Board received public testimony on Agenda Item D-7, including oral testimony from Mr. Frankel. Later, Mr. Frankel made an oral request for a contested-case hearing on Agenda Items D-7. In making his request, Mr. Frankel stated that he used the Makai Property his whole life. Mr. Frankel stated that approximately two years ago, the Kahala Hotel attempted to physically prevent him from crossing the Makai Property. Mr. Frankel objected to renewal of the RP for 2019 when the Board considered the item last year. The Board denied the request last year.

Before addressing the merits of the renewal, the Board voted to deny Mr. Frankel's request for a contested case. The Board then voted to continue RP No. 7915.

On October 29, 2019, Mr. Frankel filed a written Petition for a contested case. **Exhibit 1.**

#### 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 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).

Mr. Frankel has not identified any statute or administrative rule that requires that a contested-case hearing be held. Staff likewise is not aware of any such statute or rule. 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. Bd. of Land & Nat. Res.*, 143 Hawai'i 114, 125, 424 P.3d 469, 480 (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 requires the court to determine whether an appellant seeks to protect a constitutionally cognizable property interest. *Id.* 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[.]" *Id.*

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, supra.*

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 greater detail 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 two years ago, Kahala Hotel staff attempted to stop him from traversing the Makai Property. 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 action that Mr. Frankel contests relates to a revocable permit over the Makai Land, 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 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 permit here does not propose to allow the permanent alteration of the land. Use of the property is even less than last year. The action is 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 item. 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.

Moreover it is highly significant that Mr. Frankel is separately challenging the Board's action in a lawsuit. He has received and will receive adequate safeguard against erroneous deprivation in that lawsuit. No additional process is required. *Flores*, 143 Hawai'i at 127, 424 P.3d at 482.

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 \$1 million in fees, travel costs, 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 is usually at least \$10,000 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 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:

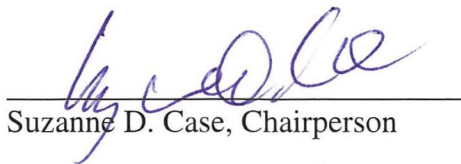
- (1) That the Board deny the Petition for a Contested-Case Hearing, filed by David Kimo Frankel on October 29, 2019; and
- (2) That the Board adopt the findings and legal analysis above in full.

Respectfully submitted,



Russell Tsuji  
Administrator

APPROVED FOR SUBMITTAL:

  
Suzanne D. Case, Chairperson



# EXHIBIT 1



STATE OF HAWAII  
BOARD OF LAND AND NATURAL RESOURCES

RECEIVED

2019 OCT 29 PM 3: 26

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:

1. File (deliver, mail or fax) this form within ten (10) days of the Board Action Date to:  
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
2. 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.
3. 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.
4. 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.
5. All materials, including this form, shall be submitted in **three (3)** photocopies.

A. PETITIONER		
(If there are multiple petitioners, use one form for each.)		
1. Name David Kimo Frankel	2. Contact Person	
3. Address [REDACTED] y	4. City Honolulu	5. State and ZIP HI
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	
<b>17. Board Action Being Contested</b> The proposal to renew revocable permit S-7915 and the proposal to issue a new revocable permit for the Kahala Hotel	
<b>18. Board Action Date</b> October 25, 2019	<b>19. Item No.</b> D-7
<b>20. Nature and Extent of Petitioner's Interest That May Be Affected by the Board Action</b> I have recreational, aesthetic, environmental and public trust interests, which are all described in greater detail in the attached declaration. See e.g. State v. Shigematsu, 52 Haw 604, 483 P. 2d 997 (1971); 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. Bd. of Land & Natural Res., 143 Hawai'i 114, 424 P.3d 469 (2018). I also have a demonstrated interest in seeing that our state's environmental laws are enforced and properly implemented.	
<b>21. Any Disagreement Petitioner May Have with an Application before the Board</b> 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.	
<b>22. Any Relief Petitioner Seeks or Deems Itself Entitled to</b> No RP should be granted unless: <ol style="list-style-type: none"> <li>1. uses are restricted to only maintenance and recreational uses;</li> <li>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;</li> <li>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);</li> <li>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;</li> <li>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;</li> <li>7. there is no pre-setting of beach chairs; and</li> <li>8. the lighting found on the RP parcel (and ma kai of it if applicable) complies with HRS § 205A-71.</li> </ol>	
<b>23. How Petitioner's Participation in the Proceeding Would Serve the Public Interest</b> 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. 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 October 25, 2019 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.*, 143 Hawai'i 114, 424 P.3d 469 (2018).

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. A contested case hearing is required by law when required by constitutional due process. *Id.* at 258, 408 P.3d at 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 "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. 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). 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. This right includes the right that an environmental assessment be prepared pursuant to HRS chapter 343 before state land is used. 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 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?
- 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, 2019, 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)...

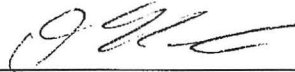
We hold, therefore, that a member of the public has standing to sue to enforce the rights of the public even though his injury is not different in kind from the public's generally, if he can show that he has suffered an injury in fact, and that the concerns of a multiplicity of suits are satisfied by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

☒ 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

October 28, 2019  
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 parcel in front of the Kahala Hotel (TMK (1) 3-5-023:041) on peaceful walks along the coastline.
8. The gazebo (moved last year), restaurant (moved last year), cabanas (moved last year), clam-shell chairs (moved some time around January 9, 2019), 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 two years 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. All things being equal, the less crowded a beach is, the more I enjoy it.

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

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

13. The multitude of beach chairs clutter open space.

14. 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.

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

16. 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.

17. 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).

18. 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).

19. 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.

20. 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.

21. 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.

22. 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, October 28, 2019.

  
\_\_\_\_\_  
David Kimo Frankel

# EXHIBIT 2



STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
LAND DIVISION

REVOCABLE PERMIT NO. S-7915

KNOW ALL MEN BY THESE PRESENTS:

This Agreement (hereinafter referred to as the "Permit") is executed this 29th day of January, 2019, 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 5000 Kahala Avenue, Honolulu, Hawaii 96816. The parties agree that commencing on the 1st day of January, 2019, ("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 as Exhibit A hereto, if any, and made a part hereof, containing an approximate area of 1.280 acres, which parcel is hereinafter referred to as the "Premises."

THIS PERMIT IS GRANTED UNDER THE FOLLOWING CONDITIONS:

A. The Permittee shall:

1.1 Occupy and use the Premises for the following specified purposes only:

Recreational and maintenance purposes limited to storage area, cabana hale, cabana tent, beach shower, tower caddy, hammock, trash can, beach chair storage, clam shell lounge, beach chair set up, and outrigger canoes storage.

1.2 Obtain appropriate authorization in writing from the City and County of Honolulu, Department of Planning and Permitting ("City") prior to occupying and using the Premises for any activities or purposes described in the Permit for which a Special Management Area permit or other authorization is required. The Permittee shall provide copy of such written authorization from the City to the State.

1.3 Ensure the specified purposes listed in paragraph A.1.1 shall not exceed their respective count and approximate dimensions as noted in the

following table, and are located as further depicted on Exhibit B attached hereto and made a part hereof; provided, however, that beach chairs may be substituted for cabana tents and clam shell loungers, but not the other way around, and as long as the total number of seating items does not exceed 71.

Item	Reference (Exhibit B)	Dimensions (ft)		Area	Count	Total Seats Provided	Area (sq ft)
KOKK Storage Area	1	14	40	560	1	N/A	560
Cabana Hale	2	8	9	72	1	0	72
Cabana Tents (1 tent = seating for 2)	3-6, 10-15	10	10	100	10	20	1,000
Beach Shower	7	8	8	64	1	N/A	64
Tower Caddy	8	2	6	12	1	N/A	12
Hammock	16	13	4.5	58.5	1	1	58.5
Trash Cans	17, 38-40	2	4	8	4	N/A	32
Beach Chair Storage	18	18	26	468	1	N/A	468
Clam Shell Loungers (1 lounge = seating for 2)	19-31	5	6	30	13	26	390
Beach Chairs Setup 4 Chairs (1 chair = seating for 1)	32,34,36	12	7	84	3	12	252
Beach Chairs Setup 6 Chairs (1 chair = seating for 1)	33,35	8	7	56	2	12	112
Outrigger Canoes Storage	37	9	24	216	1	N/A	216
					39	71	3,263.5

2.1 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 THREE HUNDRED TWENTY AND 05/100 DOLLARS (\$1,320.05) payable in advance by the first of each and every month.

2.2 Upon obtaining the written authorization from the City described in paragraph 1.2 above, the monthly rent mentioned in paragraph A.2.1, shall be adjusted to SIX THOUSAND THREE HUNDRED AND 00/100 DOLLARS (\$6,300.00) or 3% of the gross monthly revenues, whichever is



the greater. "Gross monthly revenues" means all income and revenue derived from the sale of all goods and services sold in, upon or from any part of the Premises by the Permittee.

- 2.3 Submit to the State within one month after the expiration of each full permit month period, a complete certified statement by the Permittee or an officer of the Permittee showing in all reasonable detail the amount of gross monthly revenues during said periods. Upon request by the State, the Permittee shall provide supporting records and documentations regarding the Gross monthly revenues.

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 paragraphs A.2.1 or A.2.2 as appropriate, 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- VIII" 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 certificate(s) 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 stated above in paragraphs A.2.1 or A.2.2, 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.



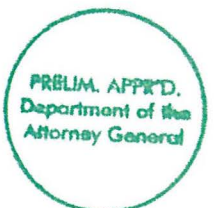
5. The Board may at any time increase or decrease the monthly rental by written notice at least thirty (30) business days prior to the date of change of rent. Upon such notice, the Permittee shall deposit with the Board any additional monies required to maintain an amount equal to two times the new monthly 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, or officers 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. 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.
18. In addition to the items listed in paragraph A.1.3, above, beach chairs, umbrellas, shade devices, mats, towels, and personal recreational equipment are permitted on the Premises as long as the user is physically present or such items have been placed on the Premises at the request of the user.
19. Public access shall be allowed on the Premises, to the extent the area is not occupied for a use allowed under the Permit.
20. The Permittee shall establish and maintain two (2) twenty-foot wide, mauka to makai, pathways for public pedestrian access on the Koko Head side of the Premises, provided, however, that the pathways shall not be located on the Koko Head boundary of the Premises. The pathways may be relocated as needed, provided there are two clearly delineated



pathways at all times. The Permittee is hereby authorized to instruct its guests and members of the public that the pathways must be kept clear to allow for public pedestrian access.

21. No weddings, surf lessons, or kayaking/boating activities are allowed on the Premises.
22. The Permittee has the authority to and shall maintain, at its own costs, the beach located seaward of the Premises, as indicated on the map attached hereto as Exhibit A.
23. Except as otherwise provided herein, the Permittee shall not engage in any presetting of any equipment on the Premises.

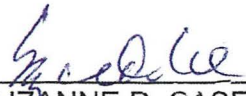




IN WITNESS WHEREOF, the STATE OF HAWAII, by its Board of Land and Natural Resources, has caused the seal of the Department of Land and Natural Resources to be hereunto affixed and the parties hereto have caused these presents to be executed the day, month and year first above written.


STATE OF HAWAII

Approved as amended by the  
Board of Land and Natural  
Resources at its meetings  
held on September 14, 2018  
and November 9, 2018.


By   
SUZANNE D. CASE  
Chairperson of the Board of Land and  
Natural Resources

APPROVED AS TO FORM:

STATE

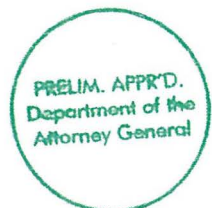
  
JULIE H. CHINA  
Deputy Attorney General  
Dated: Jan. 23, 2019

Resorttrust Hawaii, LLC, a  
Hawaii limited liability company  
By: Resorttrust, Inc.  
Its Member

By   
DAISUKE UEDA  
Its VICE PRESIDENT

By \_\_\_\_\_  
Its \_\_\_\_\_

PERMITTEE



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

On this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, before me personally appeared \_\_\_\_\_ and \_\_\_\_\_, to me personally known, who, being by me duly sworn or affirmed, did say that such person(s) executed the foregoing instrument as the free act and deed of such person(s), 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: \_\_\_\_\_

**See Attached For Notarial  
Acknowledgement or Jurat Certificate**





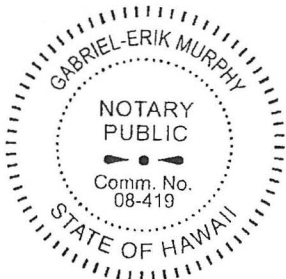
STATE OF HAWAII

CITY AND COUNTY OF HONOLULU

} SS.

**Acknowledgement Certificate for a Corporation  
Or Partnership**

On this 25<sup>th</sup> day of January, 2019, A.D.,  
before me personally appeared Daisuke Ueda,  
who proved to me on the basis of satisfactory evidence to be the person  
who appeared before me this day, being duly sworn (or affirmed), did  
say that the person is the Vice President of  
Resort trust Hawaii, LLC, and that the instrument was  
signed in behalf of the corporation (or partnership), by authority of its  
board of directors, partners or trustees, and he acknowledged the  
instrument to be the free act and deed of the corporation (or partner-  
ship).



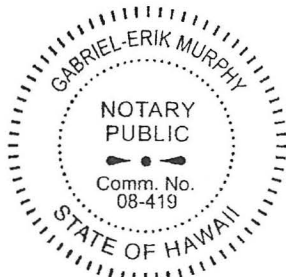
G. Murphy  
**GABRIEL-ERIK MURPHY**, Notary Public, State of Hawai'i Date 1.25.2019  
My commission expires: **September 21, 2020**

**NOTARY CERTIFICATION**

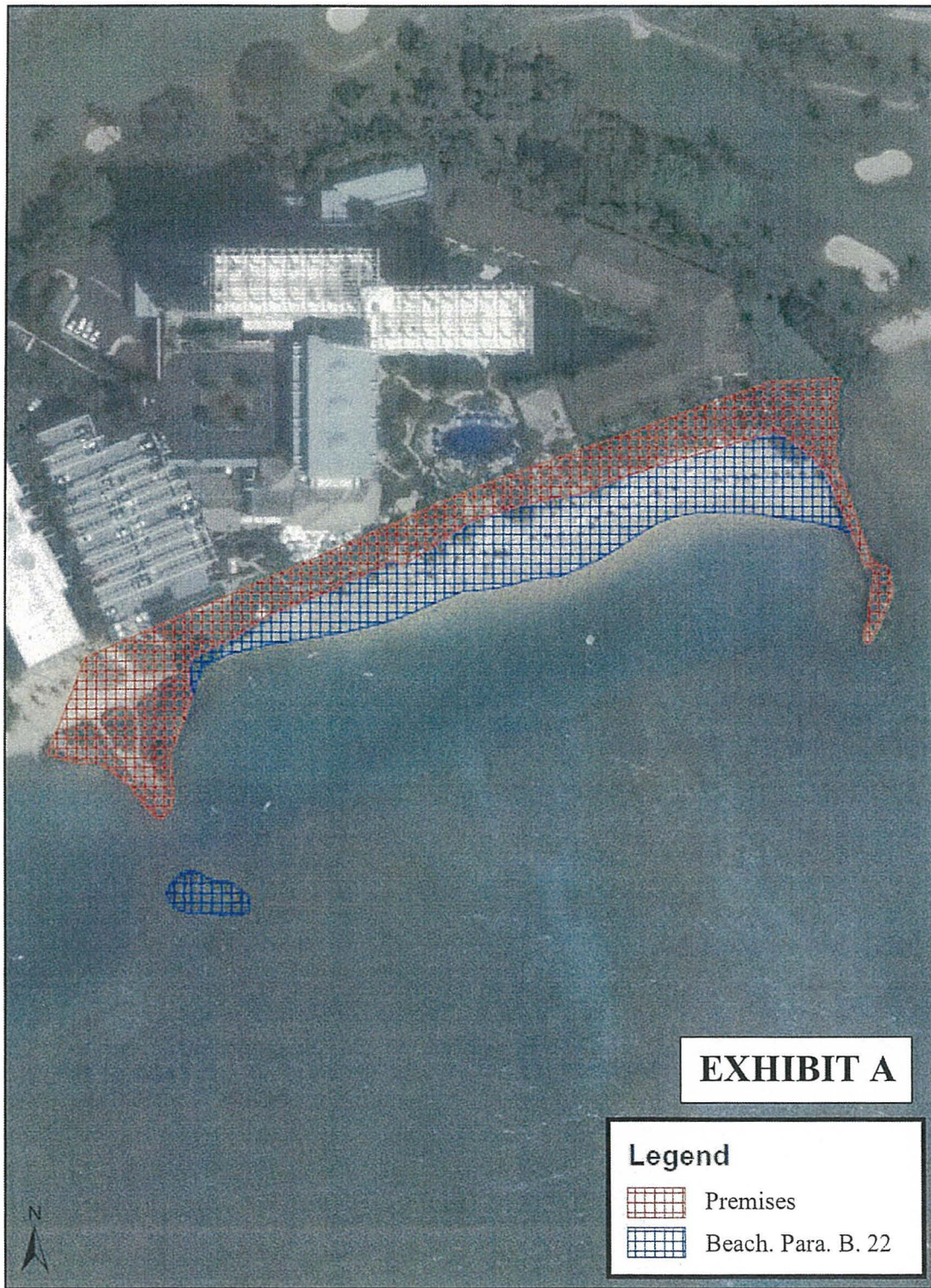
Document Description: Revocable Permit  
No. S-7915

Date of Document: 1.25.2019 No. of Pages: 14

G. Murphy  
**GABRIEL-ERIK MURPHY**, Notary Public, State of Hawai'i Date 1-25-2019  
**First Circuit**







PRELIM. APPR'D.  
Department of the  
Attorney General





# EXHIBIT 3



**AMENDED**

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

October 25, 2019

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

Ref: RP 7915

OAHU

Annual Renewal of Revocable Permit No. 7915; Resorttrust Hawaii, LLC,  
Permittee; Waialae, Honolulu, Oahu, Tax Map Key (1) 3-5-023:041.

## I. INTRODUCTION

This submittal concerns issuance or continuation of a revocable permit for a small area of urban land makai of The Kahala Hotel & Resort. The property has been subject to a revocable permit in one form or another since 1968. The "Premises" as defined under RP-7915 (the "RP") is approximately 1.280 acres (55,757 square feet). Resorttrust Hawaii, LLC ("RTH"), the owner of the hotel was granted rights to use approximately 3237<sup>1</sup> square feet, or less than 6% of the total. In return RTH pays rent and assumes responsibility to clean, maintain, and insure the Premises along with a maintenance obligation for the beach area and a small offshore island.

The Hotel has voluntarily suggested additional restrictions on its use of the Premises. RTH now proposes to use some 1492 square feet, approximately 2% of the total. Staff supports continuation of the RP.

## II. FACTS

This submittal concerns property located on or near the ocean in the Kahala area of the island of Oahu, State of Hawai'i. The property and surrounding land were historically owned by

<sup>1</sup> The use table in the RP states 3263.5. The correct number is 3236.5.

as amended  
APPROVED BY THE BOARD OF  
LAND AND NATURAL RESOURCES  
AT ITS MEETING HELD ON  
October 25, 2019

**EXHIBIT " 3 "**  
D-7

# EXHIBIT 4



[REDACTED]  
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.<sup>1</sup> Although things are much better than they were, problems persist. Here is what things looked like near sunrise on July 4:



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<sup>1</sup> 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.

**EXHIBIT "4"**



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 overridden 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 breach 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