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OUR REFERENCE NO.:
000PPT-1

February 13, 2020

VIA EMAIL: BLNR.TESTIMONY@HAWAII.GOV

Suzanne D. Case
Chairperson, Board of Land and Natural Resources
Department of Land and Natural Resources
Kalanimoku Building
1151 Punchbowl Street, Room 131
Honolulu, HI 96816

Re: Conservation District Enforcement HA 20-21 (Sheri Parish-Hamilton)
February 14, 2020, Agenda Item K-2

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

This firm represents Ms. Sherolyn (Sheri) Parish-Hamilton in connection with the above-referenced enforcement action which will be heard by the Board of Land and Natural Resources (the "**Board**") at its regular meeting on February 14, 2020. The Department of Land and Natural Resources ("**DLNR**") Staff Submittal for Agenda Item K-2 ("**Staff Submittal**") seeks to impose fines totaling \$47,000.00 on Ms. Hamilton. For the reasons stated below, Ms. Hamilton respectfully requests that the Board not impose such fines.

The Staff Submittal recommends the following fines:

1. \$15,000.00 for violation of the provisions of Hawai'i Revised Statutes ("**HRS**") § 183C-7 and Hawai'i Administrative Rules ("**HAR**") Title 13, Chapter 5 (effective August 12, 2011) (the "**Conservation District Rules**") for unauthorized construction of a single-family residence in the Conservation District without prior approval;
2. \$15,000.00 for violating HRS § 183C-7, the Conservation District Rules, and SINGLE FAMILY RESIDENTIAL STANDARDS (Exhibit 4 to the Staff Submittal) for building an unauthorized single-family residence that does not conform to the setback standards;
3. \$15,000.00 for violating HRS § 183C-7 and HAR § 13-5-42 for use of the property and unauthorized single-family residence as a transient rental; and
4. \$2,000.00 for administrative costs associated with the subject violations.

A. Background

Ms. Hamilton acquired the property identified by Tax Map Key No. (3) 8-4-013:016 in South Kona, Island of Hawai'i (the "**Property**"), in 2003 from her cousin by Warranty Deed dated May 28, 2003 and recorded as Regular System Document No. 2003-114227, attached hereto as Enclosure 1. Ms. Hamilton's deed does not indicate that the Property is in the Conservation District or otherwise restrict uses on the Property. Ms. Hamilton and her family have been stewards of the Property since 1938. *See* Exhibit 5, pages 3-6 of Staff Submittal. According to the tax rolls in the Field Book Land Sheet ("**Field Book**"), a single family residence has existed on the Property since at least 1944. Exhibit 9, page 2 of Staff Submittal.

In 2005 and 2006, Ms. Hamilton submitted evidence to DLNR of the Property's status as a kuleana parcel. *See* Exhibit 7 to Staff Submittal (evidence of the Property's kuleana status). The Property has been recognized by DLNR as a kuleana parcel. Staff Submittal at 2-3; Exhibit 8 to Staff Submittal (DLNR letter dated March 9, 2006).

When Ms. Hamilton acquired the Property from her cousin in 2003, there was already an existing single family residence ("**SFR**") structure on the Property which was approximately 1,696 square feet ("**s.f.**") in size (1,296 s.f. of living area with an approximately 400 s.f. garage). *See* Exhibit 3, page 1 of Staff Submittal.

The Conservation District rules in effect at the time that Ms. Hamilton purchased her Property and when she made repairs to the Property from 2007-2010 were the 1994 version as amended through 2006 ("**Old Rules**"). *See* Enclosure 2 (Excerpts of the relevant sections of the Old Rules). Because the SFR on the Property is a nonconforming use under HAR § 13-5-37 (2006), Ms. Hamilton understood that the SFR did not require a conservation district use permit ("**CDUP**"). Both HAR § 13-5-37 and § 13-5-22 (A-1) (2006) allowed for, without a permit, repairs, replacement or reconstruction of existing structures and facilities provided that "the new structure will be located approximately on the same site and will have substantially the same purpose, capacity, density, height, and dimensions as the structure replaced."

Ms. Hamilton's family has traditionally used the Property as a primary residence and also second home to family or others in the community needing a place to stay. Ms. Hamilton's grandfather also used the land for building canoes and fishing. The current primary use of the SFR on the Property is by family and community members. Ms. Hamilton only recently began using the SFR as a transient rental and has rented the property as such on a handful of occasions. Ms. Hamilton's ultimate goal is to continue to be a good steward of the land and to allow the community to continue to use the Property as it has traditionally been used. To that end, Ms. Hamilton made certain repairs to the existing structure between 2007 and 2010, all in good faith and believing that she was in compliance with the applicable state and County of Hawai'i ("**County**") laws. Ms. Hamilton also commissioned a land surveyor in 2003 to document the existing conditions on the land at the time that she acquired the property (Ex. 3, page 6 to Staff Submittal). As soon as she received notice from DLNR that the Property could not be used as a transient rental, she immediately ceased advertising the Property as such.

B. The fine for Unauthorized Construction of a Single-Family Residence in the Conservation District Should Not be Imposed on Ms. Hamilton as it Existed when she purchased the Property

The Staff Submittal seeks to impose a \$15,000.00 fine on Ms. Hamilton for expanding the original 369 s.f. structure existing on the Property as of November 14, 1976¹ to the size that it is now, which the Staff Submittal assumes is approximately 2,408 s.f. based solely on an estimate from a Google Earth image. Staff Submittal at 5. DLNR did not conduct a site visit. The Staff Submittal is incorrect. The current structure is approximately 1,100 s.f. (846 s.f. of living space with approximately 254 s.f. of outdoor decks).

Ms. Hamilton did not construct the SFR – it existed when she purchased the Property in 2003. Until receiving a copy of the Staff Submittal, Ms. Hamilton had no knowledge that the existing SFR purportedly violated the Conservation District Use Rules. Ms. Hamilton is an innocent purchaser and therefore should not be penalized for actions committed by another individual and doing so would be a violation of due process. *See Pelosi v. Wailea Ranch Estates*, 91 Hawai'i 478, 489, 985 P.2d 1045, 1056 (1999) (defining an innocent purchaser as "one who, by an honest contract or agreement, purchases the property or acquires an interest therein, without knowledge, or means of knowledge sufficient to charge him in law with knowledge, of any infirmity in the title of the seller"). Thus, for due process purposes, the SFR as it existed when Ms. Hamilton purchased it must be the baseline upon which the purported fines, if any, are imposed.

The DLNR staff correctly notes that in 2005, Ms. Hamilton submitted a request to DLNR to expand the then-existing approximately 1,696 s.f. structure from one-story to two-stories which would have been approximately 3,057 s.f. Subsequent to those communications, Ms. Hamilton prepared a conservation district use application ("CDUA") but ultimately did not submit the CDUA because she did not pursue the construction she initially proposed to DLNR. Instead, Ms. Hamilton, repaired, replaced and reconstructed portions of the existing structure and facilities on approximately on the same site as allowed by both HAR § 13-5-37 and § 13-5-22 (A-1) (2006)

HAR § 13-5-37 (2006) pertaining to nonconforming uses and structures provides:

- (a) This chapter shall not prohibit the continuance of, or repair of nonconforming uses as defined in this chapter. . .
- (b) Any land identified as kuleana may be put to those uses which were historically, customarily, and actually found on the particular lot including, if applicable, a single family residence.

With respect to nonconforming uses, the Old Rules (and the current Conservation District rules) require a CDUP only in the case where more than 50% of the structure is reconstructed

¹ The Field Book notes that the structure existing on the Property as of November 14, 1976 was 369 s.f. Exhibit 9, page 4 of Staff Submittal.

after being damaged or destroyed and even then. Under HAR § 13-5-22 (P-9) (A-1) (2006), no permit is required for replacement or reconstruction of existing structures. Under HAR § 13-5-22 (P-8) (A-1) (2011), no permit is required for: "Minor repair, maintenance, and operation to an existing structure, facility, use, land, and equipment, whether it is nonconforming or permitted, that involves mostly cosmetic work or like-to-like replacement of component parts, and that results in negligible changes to or impacts to land, or a natural and cultural resource." Ms. Hamilton's maintenance and repair of the existing structure over the years falls in this category.

Furthermore, DLNR had knowledge of the size of the existing structure being 1,696 s.f. from letters by Ms. Hamilton dated March 28 and November 7, 2005 but never found a violation of the Conservation District Rules at that time. To now impose a \$15,000.00 fine on Ms. Hamilton (based solely on an estimate of the existing size of the SFR taken from Google Earth) nearly 15 years later is unjust and creates an extreme hardship for her. *See Pelosi*, 91 Hawai'i at 487-88, 985 P.2d. at 1054-55 (holding that it is proper to balance the equities where an innocent purchaser proceeds without knowledge or notice that the purchaser's activities are in violation of a restrictive covenant).

C. The Fine for the Presence of the SFR in the Setback Should Not be Imposed

DLNR also seeks to impose a \$15,000.00 fine for the presence of the SFR on the Property in the setback which is currently 15 feet on all sides for lots less than 10,000 s.f. The Staff Submittal acknowledges that the existing structure was already in the setback area on the south side. Staff Submittal at 2 (referring to the 2005 correspondence between Ms. Hamilton and DLNR). Ms. Hamilton has confirmed that this is the case and that the SFR was within the existing setback when she purchased the Property in 2003.

The SFR on the property existed prior to the enactment of the of the relevant County and State laws applicable to setbacks. Additionally, the Old Rules do not establish any setbacks for nonconforming uses or properties less than 10,000 s.f., such as Ms. Hamilton's kuleana Property. *See Enclosure 2* ("Exhibit 4, Single Family Residential Standards: September 9, 2005" stating that minimum lot size is 10,000 s.f. but excepting kuleana parcels and nonconforming uses; no minimum setbacks were established for such kuleana parcels and nonconforming uses).

In 2003, after her purchase of the Property, Ms. Hamilton engaged a surveyor to prepare a site plan for renovations to the Property proposed in her 2005 correspondence to DLNR. In connection with that work, the surveyor also documented the existing conditions of the Property. *See Exhibit 3*, page 6 of the Staff Submittal (*Map Showing Existing Conditions Upon TMK: (3) 8-4-13: 16*) dated 8/30/2003). Notwithstanding that her Property was exempt from County setback requirements and there were no Conservation District setbacks for her property at that time, Ms. Hamilton sought to bring the SFR on the Property into conformance with the County requirements by removing the structure from the 8-foot setback area. The map and September 2, 2003 letter from Ms. Hamilton's surveyor notes that the existing structure (once the portion within the setback was removed) did not violate County zoning setback codes (*Enclosure 3*). Ms. Hamilton relied in good faith on the opinion of the surveyor that she was in compliance with the applicable setback regulations.

The \$15,000.00 fine for the alleged setback violation that DLNR now recommends appears to be based on the assumption that Ms. Hamilton carried out her proposed 2005 build of the Property between 2007 and 2010. Staff Submittal at 3. As explained in Part B above, she did not pursue that expansion but rather decreased the size of the SFR along with other maintenance work. Ms. Hamilton completed this work when the Old Rules did not have a minimum setback for her nonconforming Property. Accordingly, no fine should be imposed for an existing nonconforming use in the setback area.

D. There is No Basis to Impose a Fine for Using the SFR as a Transient Rental

Ms. Hamilton now understands that she cannot rent her Property as a transient rental due to its location in the Conservation District and she will not do so in the future. As soon as she received notice from the Office of Conservation and Coastal Lands and the County Planning Department that she could not use her Property as a transient rental, she immediately ceased that use and advertising of the Property in that manner.

The prohibition against transient rentals comes from HAR § 13-5-42(a)(5) (2011) as a standard condition to a CDUP. Because the Property is a kuleana parcel and for the reasons explained above, Ms. Hamilton was not required to obtain a CDUP for the existing SFR.

While DLNR did notify Ms. Hamilton that she would need to apply for a CDUP in order to expand the existing SFR to the proposed 3,000+ s.f. structure, as discussed above, Ms. Hamilton did not pursue the expansion and therefore was not required to obtain a CDUP for continued use of the kuleana parcel and existing structure. Because the restriction against transient rentals applies to a "permittee" and Ms. Hamilton's nonconforming use does not require a CDUP, it is improper for the Board to impose a fine based on violation of a permit condition that Ms. Hamilton is not subject to. Accordingly, the Board should decline staff's recommendation to impose a \$15,000.00 fine on Ms. Hamilton for violation of HAR § 13-5-42. *See Lanai Co., Inc. v. Land Use Comm'n*, 105 Hawai'i 296, 314, 97 P.3d 372, 390 (2004) ("Parties subject to an administrative decision must have fair warning of the conduct the government prohibits or requires, to ensure that the parties are entitled to fair notice in dealing with the government and its agencies.").

As stated, Ms. Hamilton is now aware of the prohibition on transient rentals and will not engage in that use in the future, but given the above circumstances, requests that the Board uses its discretion to refrain from imposing this fine. Ms. Hamilton's case is different from the other enforcement cases related to transient rentals currently before the Board. *See* January 24, 2020 Agenda Item K-1-1 (HA 20-18); February 14, 2020 Agenda Items K-1 (HA 20-20) and K-3 (HA 20-17). In each of those cases, the SFR use was permitted pursuant to a CDUP and, presumably, each of the CDUPs includes the standard condition set forth in HAR § 13-5-42(a)(5) prohibiting the SFR from being used as a transient rental. In this case, Ms. Hamilton's SFR is allowed without a CDUP and thus she has not violated a CDUP condition. Accordingly, it would not be an abuse of discretion for the Board to decline imposing this fine in Ms. Hamilton's case.

E. If the Board Imposes Fines, They Should be Reduced

Under HRS § 183C-7, the Board *may* impose fines of up to \$15,000 per violation. (Emphases added.) Exhibit 17 to the Staff Submittal, *Conservation District Violation Penalties Schedule Guidelines and Assessment of Damages to Public Land or Natural Resources, September 2009, Relating to penalties for violations within the Conservation District (Act 217)*, provides a Penalty Guideline Framework as follows:

<u>Harm to resource or potential for harm to resource</u>	<u>Identified land use permit beginning with the letter</u>	<u>Penalty Range</u>
Major	D (Board)	\$10,000-\$15,000
Moderate	C (Departmental)	\$2,000-\$10,000
Minor	B (Site Plan)	\$1,000-\$2,000
Very Minor	B (Site Plan)	Up to \$1,000

Exhibit 17, page 3 of Staff Submittal.

As discussed above, Ms. Hamilton was not required to get either DLNR or Board approval for her use of the Property as a SFR under the Conservation District Rules because the SFR is an existing nonconforming use of a kuleana parcel. Ms. Hamilton's maintenance and repair of the SFR in existence at the time that she purchased the land in 2003 falls under HAR § 13-5-22 (A-1) (2006) allowing for repairs, replacement or reconstruction of existing structures and facilities. Under HAR § 13-5-22(b) (2006) is clear that "identified land uses beginning with the letter (A) require no permit from the department or board[.]" Therefore, based upon the above guidelines, there does not appear to be a basis for the Board to impose any fine on Ms. Hamilton related to her maintenance of the existing SFR in the Conservation District or setback areas (DLNR proposed fines #1 and #2). Because the existing use of the property as an SFR is allowed, there is no harm to the resource by Ms. Hamilton's continued use as a SFR. Furthermore, Ms. Hamilton purchased the Property with the existing structure that seems to have been expanded by another prior to her obtaining the Property. Imposing the maximum penalties on someone who did not knowingly commit the violation is improper.

Furthermore, DLNR's recommendation for imposing the maximum fines in each of these categories is based on an estimate of the size of the SFR from Google Earth that the structure was enlarged between 2007 and 2010. The 2007 Google Earth images (Exhibit 10 to the Staff Submittal) used to support DLNR's position is extremely blurry and by no means provides a basis of comparison to the structure existing as of 2010. (The poor quality of the exhibit appears to result from the poor quality of the photo resolution on Google Earth in 2007.) Without substantial evidence, it is inappropriate and a violation of due process to impose such exorbitant fines.

As discussed above, when Ms. Hamilton acquired the Property in 2003, the existing structure in 2003 was 1,696 s.f. The roof that was on the then-existing structure was made of

corrugated metal that had rusted over the years to a brownish color. A roof of that color is indistinguishable from the surrounding vegetation on the 2007 Google Earth image proffered by DLNR. In 2010, Ms. Hamilton replaced the old roof with the new light green roof that is visible in the 2010 Google Earth image.

With respect to DLNR's proposed fine #3 related to using the Property as a transient rental, Ms. Hamilton submits that there is no basis to impose the fine because the prohibition against transient rentals is set forth in the standard permit conditions for a CDUP. As explained above, Ms. Hamilton's use of the Property did not require a CDUP. Therefore, Ms. Hamilton has not violated a condition of her permit.

Notwithstanding that Ms. Hamilton is not required to obtain a CDUP for her existing nonconforming use of the Property, Ms. Hamilton is now aware of the restriction on transient rentals in the Conservation District and will not engage in that use until there is further clarity on this issue. Ms. Hamilton had on occasion rented her home as a transient rental solely based on her lack of knowledge that she was prohibited from doing so, but has ceased renting it as a transient rental as soon as she received notice from DLNR about this enforcement action. However, Ms. Hamilton also allows the community to use the property free of charge (except for reimbursement of utilities). If the Board decides to impose a fine, for the reasons discussed above, maximum fines are not warranted in this situation where the landowner was unaware of the purported prohibitions against transient rentals and specifically stopped renting and advertising as soon as she received notice from DLNR that she was unable to do so.

Ms. Hamilton therefore respectfully requests that the Board take these factors into consideration and show leniency when considering any imposition of fines. The maximum fines are certainly not warranted under these facts nor are they needed to deter Ms. Hamilton's future behavior. However, imposing \$47,000.00 worth of fines on Ms. Hamilton will severely impact her and her family. The Board has used its discretion in other situations to reduce fines. *See, e.g.,* BLNR Meeting Minutes on Agenda Item B-1 (June 23, 2017) (reducing the \$11,000 fine for engaging in illegal commercial activity on state lands to \$2,000); BLNR Meeting Minutes on Agenda Item J-1 (June 9, 2017) (reducing the proposed fine in an illegal commercial operations matter).

Thank you for the Board's attention to this matter.

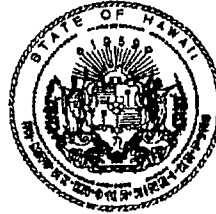
Sincerely,



Onaona P. Thoene

Enclosures

1. Warranty Deed
2. Excerpts from HAR Title 13, Chapter 5 (2006)
3. September 2, 2003 Letter from D.McIntosh to Mike and Sheri Hamilton



R-110 STATE OF HAWAII
BUREAU OF CONVEYANCES
RECORDED
JUN 09 2003 08 01 AM
Doc No(s) 2003-114227



/s/ CARL T. WATANABE
REGISTRAR OF CONVEYANCES
CONVEYANCE TAX \$80.00

20 1/2 Z2

6

LAND COURT SYSTEM	REGULAR SYSTEM
AFTER RECORDATION, RETURN BY MAIL () PICK-UP ()	
Ms. Sheri Parish-Hamilton Post Office Box 5004 Kailua-Kona, Hawaii 96745	TG: 328,401 B TGE A3-301-0536 Janet Lum Won

Rs ①

TITLE OF DOCUMENT:

WARRANTY DEED

PARTIES TO DOCUMENT

GRANTOR: GARNET K. SCHLINKMANN, a married woman, ROBERT K. HOOHULI, a married man, and JASON MURANAKA, a married man

GRANTEE: SHERI PARISH-HAMILTON, *a married woman*
Post Office Box 5004, Kailua-Kona, Hawaii 96745

PROPERTY DESCRIPTION.

TMK (3) 8-4-013-016 being R.P. No 3735, L.C. Aw No. 9769-B to Makaio, situate at Honaunau, District of South Kona, Island, County and State of Hawaii

LIBER/PAGE.

DOCUMENT NO
TRANSFER CERTIFICATE OF
TITLE NO(S)

03-136/A3-301-0536/0516 v/r.0523 v

VAN PERNIS, SMITH & VANCELL,
Post Office Box 1837, Kailua-Kona, Hawaii 96745-1837, Telephone No (808) 329-3551

Enclosure 1

WARRANTY DEED

THIS INDENTURE, made this 28TH day of May, 2003,
by and between **GARNET K. SCHLINKMANN, a married woman, ROBERT K. HOOHULI, a married man, and JASON MURANAKA, a married man**, hereinafter referred to as the "Grantor", and **SHERI PARISH-HAMILTON, a married woman** whose address is Post Office Box 5004, Kailua-Kona, Hawaii 96745, hereinafter referred to as the "Grantee",

WITNESSETH:

THAT the Grantor, for and in consideration of the sum of **TEN AND NO/100 DOLLARS (\$10.00)** and other valuable consideration paid to Grantor by the Grantee, the receipt whereof is hereby acknowledged by the Grantor, does hereby grant, bargain, sell and convey unto the Grantee, as **TRUSTEE** forever and in fee simple, the following described property

ALL that certain property as more fully set forth in Exhibit "A" attached hereto and by this reference made a part hereof.

AND the reversions, remainders, rents, issues, improvements and profits thereof and all of the estate, right, title and interest of the Grantor, both at law and in equity therein and thereto

TO HAVE AND TO HOLD the same, together with all buildings, improvements, tenements, hereditaments, rights, easements, privileges and appurtenances thereunto belonging or appertaining or held and enjoyed therewith unto the said Grantee and Grantee's heirs, personal representatives and assigns, absolutely and in fee simple, **SUBJECT, HOWEVER,** as aforesaid

AND, in consideration of the premises, Grantor covenants, on behalf of Grantor and Grantor's heirs, personal representatives and assigns, that the Grantor is lawfully seized in fee simple of the premises hereby conveyed, that the same are free and clear of and from all encumbrances **EXCEPT** as aforesaid, and **EXCEPTING ALSO** current real property taxes which shall be prorated as of the date of the delivery of this Deed, that Grantor has good right to sell and convey said real property as aforesaid, and that Grantor will and Grantor's heirs, personal representatives and assigns shall **WARRANT AND DEFEND** the same unto the said Grantee and Grantee's heirs, personal representatives and assigns against the lawful claims and demands of all persons **EXCEPT** as aforesaid

corporations, and their and each of their respective successors in interest, heirs, personal representatives and assigns, and that if these presents shall be signed by two or more Grantors or Grantees, all covenants of such parties shall be and for all purposes are deemed to be joint and several, respectively

THE PARTIES hereto agree that this instrument may be executed in counterparts, each of which shall be deemed an original, and said counterparts shall together constitute one and the same agreement, binding all of the parties hereto, notwithstanding all of the parties are not signatory to the original or the same counterparts For all purposes, including, without limitation, recordation, filing and delivery of this instrument, duplicate unexecuted and unacknowledged pages of the counterparts may be discarded and the remaining pages assembled as one document

IN WITNESS WHEREOF the undersigned has executed this instrument as of the day and year first hereinabove written

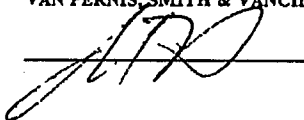
"GRANTOR"


GARNET K. SCHLINKMANN

ROBERT K. HOOHULI

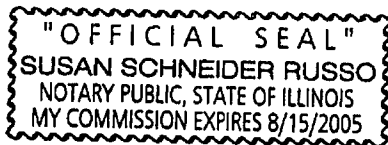
JASON MURANAKA

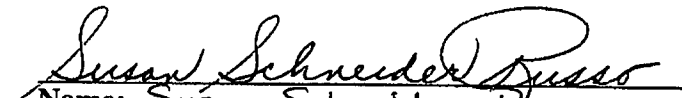
APPROVED AS TO FORM
VAN PERNIS, SMITH & VANCIL



STATE OF ILLINOIS)
COUNTY OF KANE) SS.

On this 27th day of May, 2003, before me personally appeared **GARNET K. SCHLINKMANN** to me known to be the person described in and who executed the foregoing instrument and acknowledged that she executed the same as her free act and deed




Name: Susan Schneider Russo
Notary Public, State of Illinois
My Commission Expires: August 15, 2005

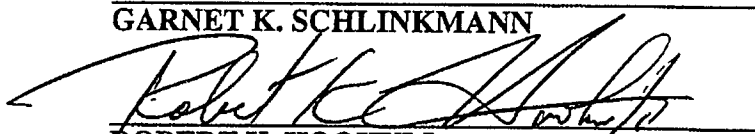
corporations, and their and each of their respective successors in interest, heirs, personal representatives and assigns, and that if these presents shall be signed by two or more Grantors or Grantees, all covenants of such parties shall be and for all purposes are deemed to be joint and several, respectively

THE PARTIES hereto agree that this instrument may be executed in counterparts, each of which shall be deemed an original, and said counterparts shall together constitute one and the same agreement, binding all of the parties hereto, notwithstanding all of the parties are not signatory to the original or the same counterparts For all purposes, including, without limitation, recordation, filing and delivery of this instrument, duplicate unexecuted and unacknowledged pages of the counterparts may be discarded and the remaining pages assembled as one document

IN WITNESS WHEREOF the undersigned has executed this instrument as of the day and year first hereinabove written

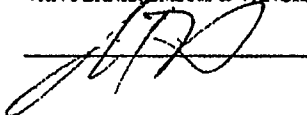
"GRANTOR"

GARNET K. SCHLINKMANN


ROBERT K. HOOHULI

JASON MURANAKA

APPROVED AS TO FORM
VAN PERNIS, SMITH & VANCIL



STATE OF ILLINOIS)
) SS.
COUNTY OF _____)

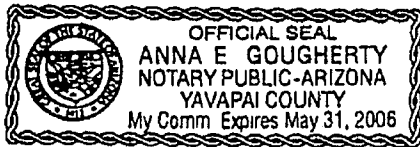
On this _____ day of _____, 2003, before me personally appeared **GARNET K. SCHLINKMANN** to me known to be the person described in and who executed the foregoing instrument and acknowledged that she executed the same as her free act and deed

Name: _____
Notary Public, State of Illinois
My Commission Expires: _____



STATE OF ARIZONA)
COUNTY OF YAVAPAI } SS.

On this 27 day of MAY, 2003, before me personally appeared **ROBERT K. HOOHULI** to me known to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed



Anna E. Gougherty
Name: ANNA E GOUGHERTY
Notary Public, State of Arizona
My Commission Expires: 5/31/2006

STATE OF CALIFORNIA)
COUNTY OF _____ } SS.

On this _____ day of _____, 2003, before me personally appeared **JASON MURANAKA** to me known to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed

Name:
Notary Public, State of California
My Commission Expires: _____

corporations, and their and each of their respective successors in interest, heirs, personal representatives and assigns, and that if these presents shall be signed by two or more Grantors or Grantees, all covenants of such parties shall be and for all purposes are deemed to be joint and several, respectively

THE PARTIES hereto agree that this instrument may be executed in counterparts, each of which shall be deemed an original, and said counterparts shall together constitute one and the same agreement, binding all of the parties hereto, notwithstanding all of the parties are not signatory to the original or the same counterparts For all purposes, including, without limitation, recordation, filing and delivery of this instrument, duplicate unexecuted and unacknowledged pages of the counterparts may be discarded and the remaining pages assembled as one document

IN WITNESS WHEREOF the undersigned has executed this instrument as of the day and year first hereinabove written

"GRANTOR"

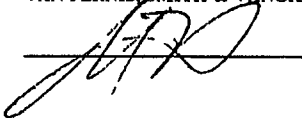
GARNET K. SCHLINKMANN

ROBERT K. HOOHULI



JASON MURANAKA

APPROVED AS TO FORM
VAN FERNIS, SMITH & VANCIL



STATE OF ILLINOIS)
) SS.
COUNTY OF _____)

On this _____ day of _____, 2003, before me personally appeared **GARNET K. SCHLINKMANN** to me known to be the person described in and who executed the foregoing instrument and acknowledged that she executed the same as her free act and deed

Name:
Notary Public, State of Illinois
My Commission Expires: _____

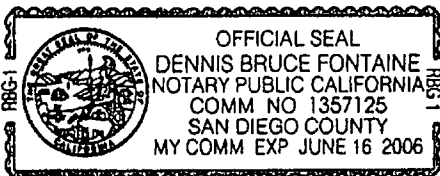
STATE OF ARIZONA)
COUNTY OF _____) SS.

On this _____ day of _____, 2003, before me personally appeared **ROBERT K. HOOHULI** to me known to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed

Name: _____
Notary Public, State of Arizona
My Commission Expires: _____

STATE OF CALIFORNIA)
COUNTY OF San Diego) SS.

On this 28 day of May, 2003, before me personally appeared **JASON MURANAKA** to me known to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed



Name: _____
Notary Public, State of California
My Commission Expires: 6/16/06

EXHIBIT "A"

ALL of that certain parcel of land (being all of the land(s) described in and covered by Royal Patent Number 3735, Land Commission Award Number 9769-B to Makaio) situate, lying and being at Honaunau, District of South Kona, Island and County of Hawaii, State of Hawaii, being Tax Key designation 8-4-013-016 (3), and containing an area of 8,712 square feet, more or less

SUBJECT, HOWEVER, to:

- 1 Reservation in favor of the State of Hawaii of all minerals and metallic mines
- 2 Discrepancies, conflicts in boundary lines, shortage in area, encroachments or any other matters which a correct survey or archaeological study would disclose
- 3 All rights, claims and/or interests of others which exist or might arise by virtue of those matters set forth in the following, to-wit

Land Commission Award Number 9769-B, a houselot, containing an area of 2/10 acre, was awarded to MAKAIIO and Royal Patent Number 3735 was subsequently issued thereon. No conveyances appear of record by MAKAIIO dealing with the subject land and there are no probate proceedings under this name nor judicial determination of heir(s).

Appearing of record is a certain Deed by one PEE MAKAIIO (k) dated June 7, 1928, recorded in Liber 946 at Page 173, conveying unto PUA HOOHULI (w), the parcel of land described as "No 9769B The houselot Makaio at Honaunau, South Kona, Hawaii", containing 2/10 acre. The foregoing further recites that "this parcel of land which is described above is my own whereas I am the own son of Makaio, and have the power under law to sell this land as I have done, and I shall oppose all persons who may dispute my right to sell this land as I have done." Other than the foregoing deed, no other deed or deeds appear of record by any person or persons claiming under the awardee, MAKAIIO.

On November 17, 1930, PUA HOOHULI (w), a widow, married Kelekolio Kupa at South Kona. The record shows her being age 68, her father's name being Kaluwalu Hoohuli and mother, Kaukiuku Kapena. Subsequently, by Deed dated February 24, 1938, recorded in Liber 1425 at Page 449, said PUA HOOHULI KUPA (and husband Kelekolio Kupa) conveyed unto her unmarried granddaughter, ELIZABETH HOOHULI, the parcel of land at Honaunau, Kona, Hawaii, described as "Number 9769B to Makaio" containing 2/10 acre, "being all of the land conveyed to the said GRANTOR by deed of PEE MAKAIIO, dated June 7, 1928, recorded in book 946, pages 173-174".

ELIZABETH HOOHULI, the Grantee in the last mentioned deed married JUICHI MURANAKA under the name of KEAKA HOOHULI on September 23, 1950 in Honolulu. The record shows her being age 37, single, her father's name being Joseph Hoohuli and mother Milie Apo. Subsequently, by Decree of Name Change dated September 16, 1953, recorded in Liber 2740 at Page 206, the name of KEAKA HOOHULI MURANAKA was changed to ELIZABETH KEAKA HOOHULI MURANAKA. Thereafter, by Quitclaim Deed dated July 29, 1987, recorded in Liber 21543 at Page 410, ELIZABETH HOOHULI, also known as ELIZABETH

MURANAKA quitclaimed the subject land unto ELIZABETH MURANAKA, CO-TRUSTEE AND THEIR SUCCESSOR IN TRUST, UNDER THE ELIZABETH MURANAKA TRUST DATED JULY 29, 1987. Later by Quitclaim Deed dated November 11, 1992, recorded as Document No. 93-020099, ELIZABETH MURANAKA again quitclaimed the subject land unto ELIZABETH MURANAKA, TRUSTEE OF THE ELIZABETH MURANAKA TRUST DATED JULY 29, 1987. (-Note - It appears the foregoing conveyance was made to ratify and confirm the previous deed made by her.)

- 4 The terms and provisions, including the failure to comply with any covenants, conditions and reservations, contained in the Elizabeth Muranaka Trust dated July 29, 1987
- 5 Claims arising out of customary and traditional rights and practices, including without limitation those exercised for subsistence, cultural, religious, access or gathering purposes, as provided for in the Hawaii Constitution or the Hawaii Revised Statutes

END OF EXHIBIT "A"

DEPARTMENT OF LAND AND NATURAL RESOURCES

**Adoption of Chapter 13-5
Hawaii Administrative Rules**

September 6, 1994

SUMMARY

**Chapter 13-5, Hawaii Administrative Rules,
entitled "Conservation District", is adopted.**

HAWAII ADMINISTRATIVE RULES

TITLE 13

DEPARTMENT OF LAND AND NATURAL RESOURCES

SUBTITLE 1 ADMINISTRATION

CHAPTER 5

CONSERVATION DISTRICT

Subchapter 1 General Provisions

- §13-5-1 Purpose
- §13-5-2 Definitions
- §13-5-3 Appeals
- §13-5-4 Mediation
- §13-5-5 Amendments
- §13-5-6 Penalty
- §13-5-7 to 13-5-9 (Reserved)

Subchapter 2 Subzones

- §13-5-10 Subzones; generally
- §13-5-11 ~~Protective (P) subzone~~
- §13-5-12 Limited (L) subzone
- §13-5-13 Resource (R) subzone
- §13-5-14 General (G) subzone
- §13-5-15 Special (S) subzone
- §13-5-16 Designation of subzones
- §13-5-17 Boundary determinations; criteria
- §13-5-18 to 13-5-21 (Reserved)

Subchapter 3 Identified Uses and Required Permits

- §13-5-22 Identified land uses in the protective subzone
- §13-5-23 Identified land uses in the limited subzone
- §13-5-24 Identified land uses in the resource subzone
- §13-5-25 Identified land uses in the general subzone
- §13-5-26 to 13-5-29 (Reserved)

§13-5-1

Subchapter 4 Procedures for Permits, Site Plan
Approvals and Management Plans

- §13-5-30 Permits, generally
- §13-5-31 Permit applications
- §13-5-32 Fees
- §13-5-33 Departmental permits
- §13-5-34 Board permits
- §13-5-35 Emergency permits
- §13-5-36 Temporary variance
- §13-5-37 Nonconforming uses
- §13-5-38 Site plan approvals
- §13-5-39 Management plan approvals
- §13-5-40 Hearings
- §13-5-41 Single family residence; standards
- §13-5-42 Standard conditions
- §13-5-43 Time extensions
- §13-5-44 Revocation of permits
- §13-5-45 Severability

Historical Note: This chapter is based substantially upon chapter 13-2 [Eff 6/22/81; am and comp 12/27/90; comp 12/5/91; am and comp 12/31/92; R]

SUBCHAPTER 1

~~GENERAL PROVISIONS~~

§13-5-1 Purpose. The purpose of this chapter is to regulate land-use in the conservation district for the purpose of conserving, protecting, and preserving the important natural resources of the State through appropriate management and use to promote their long-term sustainability and the public health, safety, and welfare. [Eff DEC 12 1994] (Auth: HRS §183C-3) (Imp: HRS §183C-1)

§13-5-2 Definitions. As used herein unless otherwise provided:

"Accessory use" means use of land or of a building or a portion thereof that is customarily incidental and subordinate to the principal use of the land or building and located on the same lot with the principal use.

"Aquaculture" means the cultivation and production of aquatic life in a controlled salt, brackish, or fresh water environment.

- (4) Where a subzone boundary follows an elevation, the boundary shall be determined by reference to topographical maps or other evidence that may be used to establish elevation. [Eff DEC 12 1994] (Auth: HRS §183C-3) (Imp: HRS §183C-3)

SUBCHAPTER 3

IDENTIFIED LAND USES AND REQUIRED PERMITS

§13-5-22 Identified land uses in the protective subzone. (a) If a proposed use in the protective subzone is not presented below, an applicant may request a temporary variance, petition the land use commission for a land use district boundary change, or initiate an administrative rule amendment to have the proposed use added to the identified land uses.

(b) Identified land uses in the protective subzone and their required permits (if applicable), are listed below:

- (1) Identified land uses beginning with letter (A) require no permit from the department or board;
- (2) Identified land uses beginning with letter (B) require a site plan approval by the department;
- (3) Identified land uses beginning with letter (C) require a departmental permit; and
- (4) Identified land uses beginning with letter (D) require a board permit, and where indicated, a management plan.

P-1 DATA COLLECTION

- (A-1) Basic data collection, research, education, and resource evaluation which does not involve a land use.
- (B-1) Basic data collection, research, education, and resource evaluation as identified in the exempt classes established in section 11-200-8.
- (C-1) Basic data collection, research, education, and resource evaluation which involves a land use with incidental ground disturbance from installation of equipment (e.g. rain gauges or meteorological towers).

- (D-1) Basic data collection, research, education, and resource evaluation that involves a land use causing ground disturbance (e.g. exploratory wells).

P-2 FISHPONDS

- (A-1) Repair, strengthening, reinforcement or maintenance of a fishpond under an approved conservation district use permit and approved management plan.
- (D-1) Restoration or repair of a fishpond under an approved management plan; where restoration is the act or process of returning the property to a state of utility through repair or alteration which makes possible an efficient contemporary use, such as aquaculture.

P-3 KULEANA LAND USES

- (D-1) Agriculture and a single family residence, if applicable, when such land use was historically, customarily and actually found on the property. Agriculture means the planting, cultivating, and harvesting of horticultural crops, floricultural crops, or forest products, and subsistence livestock.

P-4 LANDSCAPING, REMOVAL OF NOXIOUS PLANTS

- (A-1) Removal of noxious plants for maintenance purposes without the use of power tools that does not result in significant ground disturbance (e.g. weeding). Noxious plants are defined in chapter 152 HRS, and chapter 4-68, subtitle 6.
- (C-1) Landscaping, defined as alteration (including clearing) of plant cover. Such alteration shall be limited to plant materials that are endemic or indigenous and similar in character and appearance to existing vegetation in the surrounding area. Natural vegetative plant cover, where disturbed, shall be restored or replaced with endemic or indigenous planting. The introduction of alien plant species is prohibited in the protective subzone.

P-5 MOORINGS AND AIDS TO NAVIGATION

- (C-1) Moorings and aids to navigation. This requirement is satisfied by obtaining a permit pursuant to chapter 200, HRS.

P-6 PUBLIC PURPOSE USES

- (D-1) Land uses undertaken by the State of Hawaii or the counties to fulfill a mandated governmental function, activity, or service for public benefit and in accordance with public policy and the purpose of the conservation district. Such land uses may include transportation systems, water systems, communications systems, and recreational facilities.
- (D-2) Transportation systems, transmission facilities for public utilities, water systems, energy generation facilities utilizing the renewable resources of the area (e.g. hydroelectric or wind farms) and communications systems and other such land uses which are undertaken by non-governmental entities which benefit the public and are consistent with the purpose of the conservation district.

P-7 SANCTUARIES

- (D-1) Plant and wildlife sanctuaries, natural area reserves (see chapter 195, HRS) and wilderness and scenic areas, including habitat improvements under an approved management plan.

P-8 SIGNS

- (B-1) Signs, including safety signs, danger signs, no trespassing signs, and other informational signs. No signs shall exceed twelve square feet in area and shall be non-illuminated. All signs shall be erected to be self-supporting and be less than or equal to eight feet above finished grade.

P-9 STRUCTURES, EXISTING

- (A-1) Replacement or reconstruction of existing

structures and facilities as identified in the exempt classes established in section 11-200-8, except as provided in section 13-5-37 where the new structure will be located approximately on the same site and will have substantially the same purpose, capacity, density, height, and dimensions as the structure replaced.

(C-1) Demolition, removal, or alteration of existing structures, facilities and equipment. Any historic property shall be evaluated by the department for historical significance.

(C-2) Operations, repair, maintenance, or renovation of existing structures, facilities, equipment, or topographical features which are different from the original permit or which are different from the department-approved construction plans, where applicable. When county permit(s) are required the department shall approve the associated plan(s).

Note: for nonconforming uses, see section 13-5-37.

(D-1) Demolition, grading, removal or alteration of topographic features.

P-10 STRUCTURES, ACCESSORY

(A-1) Construction or placement of structures accessory to existing facilities as identified in the exempt classes established in section 11-200-8.

P-11 SUBDIVISION OR CONSOLIDATION OF PROPERTY

(C-1) Consolidation and resubdivision into an equal number of lots that does not result in increased density.

(C-2) Consolidation of property into a lesser number of legal lots of record currently existing and approved, which furthers the objectives of the subzone. Consolidation followed by resubdivision shall constitute a subdivision.

(D-1) Subdivision of property into two or more legal lots of record which serves a public purpose and is consistent with the

§13-5-37

§13-5-37 Nonconforming uses. (a) This chapter shall not prohibit the continuance of, or repair of nonconforming uses as defined in this chapter. The burden of proof to establish that the land use or structure is legally nonconforming shall be on the applicant.

(b) Any land identified as a kuleana may be put to those uses which were historically, customarily, and actually found on the particular lot including, if applicable, a single family residence.

(c) Any structures may be subject to conditions to ensure they are consistent with the surrounding environment.

(d) If a nonconforming structure is destroyed by any means to an extent of more than fifty per cent of its replacement cost at the time of destruction, it shall not be reconstructed except in conformity with the provisions of this chapter.

(e) Repairs or reconstruction of the nonconforming structure shall not exceed the size, height or density of the structure which existed immediately prior to October 1, 1964 or at its inclusion into the conservation district. [Eff DEC 12 1994] (Auth: HRS §183C-3) (Imp: HRS §183C-5, 183C-6)

§13-5-38 Site Plan Approvals. (a) Where required, an applicant shall submit site plans, including construction, grading, site restoration, landscaping or any other plans to the department for its review and approval. All plans shall first obtain department approval before they are submitted for approval by the pertinent state and county agencies.

(b) An application for a site plan approval shall be accompanied by an application fee of \$50. [Eff DEC 12 1994] (Auth: HRS §183C-3) (Imp: HRS §183C-3, 183C-6)

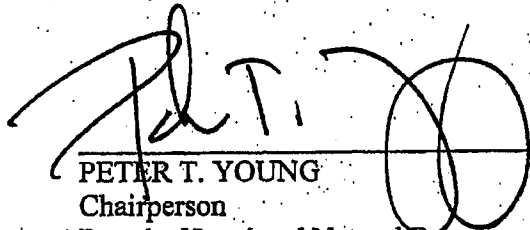
§13-5-39 Management plan approvals. (a) Where required, management plans shall be submitted with the board permit application and shall include the requirements listed in Exhibit 3, entitled "Management Plan Requirements, dated September 6, 1994."

(b) An annual report to the department is required which shall include the status of compliance of the permit conditions and the implementation of land uses pursuant to the approved management plan schedule.

DEPARTMENT OF LAND AND NATURAL RESOURCES

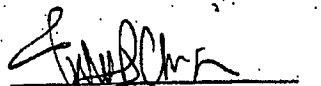
Amendments to chapter 13-5, Hawaii Administrative Rules, were adopted on June 9, 2006, following a public hearing held on May 3, 2006, after public notice was given in the Honolulu Star-Bulletin and the Garden Island News on April 2, 19 & 16, 2006.

These amendments shall take effect ten days after filing with the Office of the Lieutenant Governor.




PETER T. YOUNG
Chairperson
Board of Land and Natural Resources

APPROVED AS TO FORM:



Deputy Attorney General



LINDA LINGLE
Governor
State of Hawaii

Date: JUL 17 2006

JUL 18 2006

Filed

Exhibit 4

Single Family Residential Standards: September 9, 2005

Minimum Lot Size: 10,000 square feet

Exceptions:

- 1) kuleana
- 2) nonconforming use
- 3) lots designated as "Good Interior House Lots" or "Good House Lots on Road" on Exhibit "C" of the Final Order in partition entered October 20, 1967, in Allerton, et al. v. Heirs of Ahi, et al., Civil No. 30, Fifth Circuit Court, State of Hawaii.

Minimum Setback: For lots 10,000 square feet to one acre:

Front: 15 feet
Sides: 15 feet
Back: 15 feet

For lots over one acre:

Front: 25 feet
Sides: 25 feet
Back: 25 feet

Exceptions: Site characteristics and lot shape may be a factor in adjusting minimum setbacks when so determined by the board.

Maximum Developable Area:

Means the total floor area in square feet allowed under the approved land use. The floor area computation shall include: all enclosed (on three sides minimum, with floor or roof structure above) living areas; above grade decks in excess on 4'-0" in width; garage or carport; swimming pools, saunas or other developed water features (excluding naturally

existing ponds, tidepools, etc.); play courts; or any other standing structures, which are accessory to the approved land use.

For lots 10,000 sq. ft. to one (1) acre: 3,500 square feet.

For lots larger than one (1) acre: 5,000 square feet.

Exceptions: Site characteristics and the degree of pre-existing site disturbance may be a further limiting factor in the calculation of maximum developable area when so determined by the board.

**Maximum Height
Limit:**

The maximum height of the building shall not exceed twenty-five feet measured from the highest point of the roof structure (excluding any allowed chimney, antenna, vents, or similar protrusions) down to the lower of the existing or finished grade at the lowest corner of the building.

Exceptions: Tsunami or flood-prone areas may allow consideration for additional height limits to satisfy flood insurance ordinances when so determined by the board.

**Compatibility
Provisions:**

Compatibility with surrounding environs. Structure is designed in accordance with standard conditions, including:

- Landscaping - screening of structures
- Color of paint/surface of structure and roof - earth tones, or compatible with surrounding area

- DOH wastewater permit/water collection system approval
- Grading/contouring of property kept to minimum with consideration of slope
- All structures connected, or best alternative
- In conformance to applicable building and grading code and shoreline setback provisions
- One kitchen¹

¹"Kitchen" means a facility within the residential dwelling for food preparation, including fixtures, appliances or other devices to wash, prepare, heat, cook and refrigerate food and wash cooking utensils and dining implements.



DON McINTOSH CONSULTING, INC.
P. O. Box 58, Kailua-Kona · Hawaii 96745-0058

Don McIntosh
Licensed Professional Land Surveyor · LS-4968

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Facsimile (808) 325-9633
Email: macd@hawaii.rr.com

September 2, 2003

Mike Hamilton
Sheri Parish-Hamilton
P. O. Box 5004
Kailua-Kona, HI 96745-5004

RE: TMK: (3) 8-4-13:16 HONAUNAU BAY, PARCEL 16 SURVEY

Gentlemen:

We performed a survey of the subject property on **July 26 & August 26, 2003** and found the existing improvements in the vicinity of the lot boundary lines and setback areas to be as shown on the enclosed Map. For your added information, the Zoning Code Setbacks for this parcel of land are as follows:

Both front	15 feet
Both side setbacks	8 feet

According to the Code, roof overhangs may protrude into the setback up to four (4) feet on the sides and up to five (5) feet on the front and rear yards.

The land use is Conservation and the zoning is Unplanned; but the lot size fits the above setbacks. A check with the Planning Department will (*I expect*) verify that the above setbacks are correct.

Please notice the boundaries (*more or less*) follows along the existing rock walls as shown on the Bishop Estates Map No. 658; thus, the walls are not considered encroachments.

No encroachments were found, and there were no violations of county setback codes noted since the shack will be demolished. The features and distances shown between lot lines are based on selected found boundary monuments and acceptable tolerances for properties in this area and subdivision age.

Donald C. McIntosh, L. P. L. S. #4968
Consultant-Planner, Developments

DCM/jlkm
Enclosures

Enclosure 3