

1638-A Mikahala Way
Honolulu, HI 96816

October 4, 2020

Chair Case and members of BLNR,

RE: Item D-3 (Maui Revocable Permits)

Three questions:

Why would you renew a revocable permit (RP 7487) for 187 acres that generates a grand total of \$624 when the Division of Forestry and Wildlife wants to use this parcel for forest restoration purposes? At the very least, shouldn't you impose conditions that would call for removing invasive species and begin the restoration process?

Why does Nobriga Ranch, Inc. pay so much less for pasture than others?

RP holder	RP #	Acres	Price	RP holder	RP #	Acres	Price
Nobriga	7487	187.47	\$624	Haleakala Ranch	7562	142.3	\$2,151.96
Nobriga	7483	78.6	\$480	Cambra	7527	18.365	\$480
Nobriga	7571	82	\$558	Jacintho	7608	25.077	\$570.96

Aloha,

/s/ David Kimo Frankel



Administrative Testimony
Testimony of Sylvia M. Hussey, Ed.D
Ka Pouhana, Chief Executive Officer

Board of Land and Natural Resources
Agenda Item D-3
ANNUAL RENEWAL OF REVOCABLE PERMITS FOR THE COUNTY OF MAUI

October 9, 2020

9:00 a.m.

YouTube

The Administration of the Office of Hawaiian Affairs (OHA) offers the following **COMMENTS** on agenda item D-3, which proposes to renew revocable permits (RPs) for public lands, including “ceded” and public land trust lands, on the island of Maui. OHA notes that this year’s RP consultation requests were not received by its Compliance Division due to a change in the contact e-mail used, and that OHA staff have provided Land Division staff with its current Compliance intake e-mail address for future use. Recognizing that the consultation period has passed, OHA nonetheless offers the following comments regarding RP rent rates, notable issues for particular RPs, and additional decisionmaking criteria for the Board of Land and Natural Resources’ (BLNR’s) consideration.

1. RP rent freezes may not be appropriate for all permittees.

OHA appreciates that the current pandemic represents an unprecedented hardship for many individuals and entities in the public and private sectors alike, and that in some cases, rent freezes for RP renewals may be appropriate. However, a blanket freeze of all RP rents may not necessarily be warranted for all permittees, and may represent a lost opportunity to capture much-needed additional revenues for the Land Division and the Department of Land and Natural Resources (DLNR) to carry out their important responsibilities in administering the public trust. For example, several RP rents have been held between \$10,000 to \$50,000 under their market rent for years, and it is unclear whether or not an even greater government subsidy of their private revenue generating activities on public lands would be warranted, in light of the DLNR’s own important responsibilities to the public. **OHA accordingly urges the BLNR to consider requiring a demonstration of extreme economic hardship, substantial contributions to the public interest or the local economy in response to the pandemic, and/or other extenuating circumstances relating to the COVID-19 pandemic, which would justify the granting of a rent freeze or a reduction in anticipated rent increases for those RPs issued to private commercial entities.**

2. Specific RPs where additional information or attention would appear warranted.

OHA recommends the examination of the following particular RPs, for issues identified in our previous correspondences and testimonies regarding the renewal of RPs on Maui.

RP5710. RP5710, continually reissued to a homeowner's association for the last 40 years, has been pending an easement conversion since at least 2017; **however, since at least 2017, comments on this RP simply noted that "applicant's engineer's drawings were not detailed enough for Survey Div."** Moreover, since 2017, staff submittals noted and continue to assert that "MDLO [is] to investigate" this matter. **It is unclear whether the applicant's engineer has repeatedly submitted deficient drawings for the last four years, if the original drawing's deficiencies have remained unaddressed for this entire time, and if any "investigation" has been initiated, much less carried out.** In any case, consistent with the Revocable Permit Task Force's (Task Force's) recommendation to provide a timeline for the conversion of specific RPs to any contemplated long-term disposition, the BLNR should require that an MDLO investigation and a sufficiently detailed drawing be completed by a date certain, as a condition of renewal for this RP.

RP5834 and RP5835. Both of these RPs have been pending conversion to BLNR-approved term easements for nearly a decade; however, from 2017-2019, the conversion of these RPs to easements was apparently frustrated by an appraisal dispute by the permittee homeowner association, which, since at least 2017, had "commissioned its own appraisal" for both permitted parcels. While the submittal is now silent regarding any permittee-commissioned appraisal, OHA notes and appreciates that the comments for these RPs indicates that an easement is anticipated by the end of this year. OHA recommends verifying that any appraisal issues have been resolved prior to renewing these RPs.

RP5847. Since at least 2017, MDLO staff have asserted that they have been working with the deceased permittee's granddaughter to convert this RP to an easement. From 2017 – 2019, a survey of the permitted parcel had also been noted as "partially complete." OHA notes that the comment regarding a "partially complete" survey is no longer included in this year's submittal, and hopes that this is an indication that survey has been completed, as a necessary step toward the conversion of this RP to an easement. OHA also appreciates that Conservation District Use Permits (CDUPs) have been identified for certain uses of the covered parcel, although the comments are unclear as to whether the permittee's granddaughter has herself contacted the Office of Conservation and Coastal Lands (OCCL) and verified compliance with all applicable conservation district regulations. Consistent with the Task Force's recommendation to provide a timeline for the conversion of specific RPs to any contemplated long-term disposition, **OHA does recommend that the BLNR request information on an anticipated timeline for the conversion of this RP to an easement, including whether any survey necessary for the easement has in fact been completed. OHA also recommends that the BLNR verify that all outstanding conservation district compliance concerns have been addressed.**

RP6047. This RP has been pending conversion to an easement since at least 2017; the submittal this year continues to fail to indicate any progress on this contemplated conversion,

and further fails to provide a timetable or milestones for such progress. OHA also again notes a lack of comments as to whether the seawall maintenance uses covered under this RP may require a conservation district use permit, as uses occurring on state submerged lands.

Accordingly, any renewal of RP6047 should be made contingent upon the provision of a timetable or proposed milestones for the conversion of this RP to an easement, as well as the resolution of any potential conservation district use issues associated with the permitted use(s).

RP7208 and RP7209. Since 2017, the comments for these RPs have asserted that Land Division staff will “explore the possibility of selling a lease at public auction” for the parcels covered under these RPs. There is no indication of what progress, if any, has been made with regards to the Land Division’s evaluation of the contemplated lease conversions. **Notably, the difference between the RP rents and the fair market rents for these permitted parcels total nearly \$30,000 per year, indicating the significant revenue opportunities that may be foreclosed by not converting these RPs to leases in a timely manner.** Consistent with the Task Force’s recommendations, a timeline or milestones should therefore be required for these RPs’ contemplated lease conversions.

RP7343. This RP has been pending an easement conversion since at least 2017; OHA notes that conservation district compliance issues flagged in last year’s submittals appear to remain unaddressed. Consistent with the Task Force’s recommendations, a timeline or milestones should therefore be required for this RP’s contemplated conversion to a lease, as well as deadlines for the identification and resolution of any outstanding conservation district use issues. OHA also notes that a fair market valuation for both the RP use and the contemplated “long-term lease for exclusive use of the pier” may also be critical to informing the future disposition of the permitted area, and urges the BLNR to consider requiring such a valuation as a condition of RP renewal.

RP7345. No timetable or milestones are provided for the contemplated conversion of this RP to alternative long-term dispositions that can better serve the environmental and shoreline access interests of the public; notably, the current permittee’s uses have also been flagged as requiring conservation district compliance verification since at least 2017. Consistent with the Task Force’s recommendations, a timeline or milestones should therefore be required for the conversion of this RP to the contemplated long-term and publicly beneficial uses, and any renewal of this RP should be conditioned on the resolution of any outstanding conservation district use issues by a date certain.

RP7484. This RP has an indicated annual fair market rent that exceeds its proposed 2020 rent by \$50,000, and has been pending conversion to an easement since at least 2017. **To take advantage of the significant and untapped revenue potential of this permitted parcel, a timeline or milestones should be required for this RP’s conversion to an easement.**

RP7537. Conservation district use issues were flagged for this RP last year, and raised particular concerns given the sensitive natural areas adjacent to and potentially within the

covered 360-acre parcel. OHA notes that the submittal this year does not indicate any conservation district compliance issues for this RP, and urges the BLNR to ensure that all conservation district concerns have been addressed prior to the RP's renewal. OHA also notes that conservation district concerns have also now been flagged for the same permittee in the comments for **RP7562**, which is also expressly contemplated for conversion to a lease at public auction; OHA urges the BLNR to ensure that the renewal of this latter RP be made contingent on the resolution of all conservation district concerns by a date certain, and that a timeline be established for its conversion to a lease.

RP7545. Conservation district use issues have been flagged for this parcel since 2018, and this year's submittal indicates no progress with staff's request that "permittee contact OCCL to determine if CDUP required." Given the potentially sensitive natural and cultural resources and sites within this parcel, and given the apparent lack of progress on other conservation district compliance issues raised for numerous years for other RP parcels, any renewal of RP7545 should be made contingent upon the identification resolution of all conservation district use issues by a date certain.

RP7573. This RP has been pending conversion to an easement since 2013; there is no indication of any progress having been made on such a conversion since that time. Notably, there is also no indication as to the permittee's response, much less actions taken, to resolve the encroachments also identified in 2013. **The provision of a timeline or milestones for the conversion of this RP as well as a deadline for the resolution of any outstanding encroachments should be established as conditions on any renewal of this RP.**

RP7581. The comments for this RP explicitly state that both a CDUP and a water lease are required, although its proposed renewal is not conditioned on compliance with these requirements. Notably, since 2017, OHA has asserted that this RP should be treated as a water RP; the comments regarding a water lease appear to now finally validate this assertion. **This RP should not be renewed in this agenda item and instead be treated as a water RP subject to public trust requirements and conditions, and a CDUP should be required as part of its renewal.**

RP7608. There is no reason provided as to why this nearly decade-old RP should not be considered for conversion to a longer term disposition, as required under the Task Force's recommendations. In addition, since last year, comments for this RP have noted, as they do this year, that the permittee will be instructed "to contact OCCL to determine if CDUP required." Prior to any renewal of this RP, the BLNR should require an explanation as to why a temporary RP disposition is appropriate for the permitted parcel, as well as clarification regarding whether conservation district issues are in fact present for the RP's permitted uses; the continuation of this RP should also be conditioned upon the resolution of any such issues by a date certain.

RP7621. The permittee for this RP has been allegedly instructed to "contact OCCL to determine if CDUP required" since at least 2017; however, there is no indication as to whether

any such contact has been made, and this year's submittal continues to note the need to determine whether conservation district issues exist with the permitted uses. Accordingly, any renewal of this RP should be made contingent upon the identification and resolution of any conservation district compliance issues by a date certain.

RP7778. There is no reason provided as to why this nearly decade-old RP should not be considered for conversion to a longer term disposition, as required under the Task Force's recommendations. In addition, conservation district use issues have been flagged for this parcel since 2017, when Land Division comments indicated that staff would "instruct permittee to apply for a CDUP or provide proof to OCCL that its use/structure is nonconforming." This year's submittal continues to state that "staff requested permittee contact OCCL to determine if CDUP required." Prior to any renewal of this RP, the BLNR should require an explanation as to why a temporary RP disposition is appropriate for the permitted parcel, as well as clarification regarding whether conservation district issues are in fact present for the RP's permitted uses; the continuation of this RP should also be conditioned upon the resolution of any such issues by a date certain.

RP7781. The possibility of converting this RP to a lease has been contemplated since 2017, when Land Division comments noted, as they continue to do this year, that "there may be potential for a significant revenue increase." Land Division comments also indicated in 2017 that staff "will instruct permittee to apply for a CDUP or provide proof to OCCL that its use/structure is nonconforming." There is no progress indicated for the evaluation of this parcel for conversion to a lease, and no clarification has been provided regarding the permittee's compliance with conservation district requirements. The provision of a timeline or milestones for the exploration of the potential for this RP to be converted to a lease, as well as deadlines for identifying and resolving any conservation district compliance issues, should be required as part of any renewal of this RP.

RP7783. This RP has an indicated annual fair market rent that exceeds its proposed 2020 rent by over \$45,000, and has been pending conversion to an easement since at least 2017. To avoid the continued foreclosure of significant potential revenue generating opportunities, a timeline or milestones should be required for the timely evaluation of this RP's potential conversion to an easement.

RP7787. This RP has an indicated annual fair market rent that exceeds its proposed 2020 rent by over \$10,000, and staff exploration of the conversion of this RP to a lease has been pending since at least 2017. To minimize the continued foreclosure of what appears to be a significant revenue generating opportunity, a timeline or milestones should be required for the evaluation of this RP's conversion to a lease.

RP7816. This RP was noted as having the potential for a "significant revenue increase" since at least 2017; however, since that time, no progress has been indicated as to the contemplated staff evaluation of its potential conversion to a lease. To avoid the continued

foreclosures of significant revenue generating opportunities, a timeline or milestones should be required for the evaluation of this RP's conversion to a lease.

3. RP recommendations should include additional explicit considerations relevant to the BLNR's responsibilities and obligations under the public trust.

As a final matter, OHA again reiterates its request that RP renewal recommendations include explicit, substantive considerations relevant to the BLNR's primary, public trust duties to conserve and protect Hawai'i's natural and cultural resources. Such duties include the fulfillment of the constitutional mandate that the state "conserve and protect Hawai'i's . . . natural resources . . . and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the state. All public natural resources are held in trust by the state for the benefit of the people."¹ The BLNR also holds a constitutional duty to protect cultural resources, as well as the practices which rely upon them.² Accordingly, OHA urges the inclusion of additional express considerations in all RP renewal recommendations, which would assist the BLNR in better upholding these duties. Examples of such considerations for any given RP may include:

- **An indication as to when the last affirmative review of a permittee's compliance with previously-issued RP terms and conditions occurred, if any;**
- **An indication as to the existence of any known culturally or environmentally significant or sensitive areas or resources within or adjacent to the subject parcel; and**
- **An indication of any previous or planned future uses of the parcel or on areas adjacent to the parcel, which may result in cumulative impacts to natural and cultural resources.**

Mahalo nui for the opportunity to comment on this matter.

¹ HAW. CONST. ART. XI SEC. 1.

² HAW. CONST. ART. XII SEC. 7; Ka Pa'āakai o ka ʻĀina v. Land Use Comm'n, 94 Hawai'i 31 (2000).



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