STATE OF HAWAI`I
DEPARTMENT OF LAND AND NATURAL RESOURCES
OFFICE OF CONSERVATION AND COASTAL LANDS
Honolulu, Hawai`i

January 22, 2021

Board of Land and Natural Resources
State of Hawai`i
Honolulu, Hawai`i

REGARDING: Conservation District Enforcement Case, MO 20-32 Regarding an Alleged Unauthorized Structure Located Along the Shoreline on State Land Within the Conservation District

BY: George G. Peabody and Susan Yukiko Peabody
10254 Kamehameha V Hwy.
Kaunakakai, HI 96748

LOCATION: Kaunakakai, Moloka`i
TAX MAP KEY: (2) 5-7-001:001 (Seaward)

SUBZONE: Resource

DESCRIPTION OF AREA:
The subject area is located in the Waialua section of eastern Moloka`i along the Kamehameha V Highway, seaward of TMK: (2) 5-7-001:001 (***Figures 1-2***). Lands seaward of the shoreline are located in the Conservation District, Resource subzone, and are considered public land. As stated within the formal advisory opinion of the Attorney General released on December 12, 2017 ***(Exhibit A),*** *"The State owns all lands makai of the 'the upper reaches of the wash of waves, usually evidenced by the edge of vegetation or by the line of debris left by the wash of waves'"*, and further that, *"[b]y definition, if the shoreline moves landward, then the ownership line also moves mauka."*

Figure 1 – Map of Moloka`i

Figure 2 – East Moloka`i Map Showing Site

ALLEGED UNAUTHORIZED LAND USES:
A Division of Conservation and Resource Enforcement (DOCARE) officer visited the subject property on May 8, 2020, to respond to a complaint. The Officer reported observing what appeared to be active repairs of a seawall on the makai side of the subject property. According to the officer, it appeared to be a new seawall being built to replace or fortify a pre-existing unauthorized seawall. The officer reported seeing the waves flow over the lower section of the pre-existing seawall (***Figure 3, on next page)***.

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Figure 3 – Waves Washing Over Lower Section of Seawall

The DOCARE officer then proceeded to contact one of the owners of the residence, Mr. George G. Peabody, who allowed the officer to access the property to take pictures of the alleged violation.[1]

During this visit onto the property, the officer asked Mr. Peabody if he had a permit to build upon the pre-existing seawall on the makai side of his property. According to the report filed by the DOCARE officer, Mr. Peabody's response was, "I am not going to say anything."

The next day, May 9, 2020, two DOCARE officers arrived at the subject property on a follow-up site visit to observe the situation. The officers took photographs and further observed the new work that had been done at the site. According to one officer's report, Mr. Peabody became aware of their presence and confronted them, verbally engaging them in a shouting manner.

The officers' May 9, 2020 site visit allowed them to observe the details of the work. According to the officer's report, large, round rocks were cemented on top of the old wall to raise its height, rising upwards of 5-6 feet above the sandy beach. The officers noted that it appeared to be a work in progress as it appeared to be incomplete (***Figures 4-5***).

Figure 4 – Subject Seawall, Facing Mauka

[1] We have since determined that the property is owned by George Gary Peabody and Susan Yukiko Peabody by way of a 1986 deed recorded in the Bureau of Conveyances in Book 20075, page 659.

Figure 5 – Subject Seawall, Facing East

Two days later, on May 11, 2020, one of the DOCARE officers observed two men engaging in cement work, building the unfinished wall. The officer said he was unable to photograph the incident at the time and left the area.

The next day, on May 12, 2020, the DOCARE office received a phone call that a cement truck was headed to the Peabody residence. The officer arrived later that morning and observed a cement truck backed into the subject property. He observed approximately 7-8 males engaging in pumping the concrete into a large trench just behind the newly built seawall, apparently to serve as a type of footing for the wall. According to the DOCARE officer who reported to the scene, the cement truck present at the Peabody's residence was from **Tri-L Construction, Inc.**

On May 26, 2020 the Office of Conservation and Coastal Lands (OCCL) sent a Notice to Mr. Peabody regarding his alleged unauthorized land use (***Exhibit B)***. This Notice was sent via both certified and regular mail, and DOCARE Officer Apo attempted to serve the document in person to Mr. Peabody on May 31, 2020, who refused to accept the letter. A signed return receipt from the May 26, 2020 letter was then received by OCCL on June 10, 2020.

PROPERTY HISTORY:
Mr. Peabody has a history with the DLNR. Throughout 1976, Mr. Peabody went through the process of acquiring CDUA MO-767 to perform aquaculture research within the `Ualapu`e Fishpond. This application was originally denied at July 23, 1976 Board Hearing on the grounds that no Environmental Impact Statement had been completed pursuant to Chapter 343, Hawai`i Revised Statutes. Mr. Peabody requested that the Board reconsider his request if the request was amended. He amended his request, and the CDUA was accepted on October 22, 1976.

During the process of submitting and re-submitting his CDUA for research in the `Ualapu`e Fishpond, it was frequently stated in writing to Mr. Peabody that any work involving the seaward face of the seawall requires special attention and procedures. Thus, Mr. Peabody became clearly aware during this CDUA process in 1976 that work on seawalls is subject to heavy environmental scrutiny as well as extra layers of required government permitting.

Years later in 1999, the BLNR approved fines for Mr. Peabody at their August 27, 1999 meeting for failing to obtain the appropriate approvals for the construction of a shoreline protection structure in State Conservation District Land within the public right-of-way. This was under DOCARE case number MO 99-016 for a structure built on the shoreline without proper permits. The DLNR staff report for this matter states that Mr. Peabody allegedly constructed a shoreline structure during the month of December 1998.

The staff report details that no permits had been obtained for the work at any level – state, county, or federal – and that Planning Branch staff spoke with the alleged (Mr. Peabody) who affirmed building the structure. The report also states that not only had any permits not been obtained, no applications were even received by relevant agencies for the subject structure. Additionally, it is reported that the alleged informed DLNR staff that it was his impression that he could never receive a permit for a shoreline structure from the DLNR, so he did what he had to do. The DLNR Staff Report from the August 27, 1999 BLNR Meeting is attached at the end of this report as ***Exhibit C.***

It was found by the DLNR staff that the alleged did authorize or allow the construction of the structure, that said structure does in fact lie on State Lands within the Conservation District, and that the alleged was aware of the need for permitting but chose to proceed without authorization. Thus, DLNR staff recommended that the Board find the alleged in violation and impose fines totaling $2,500 to be paid within 30 days as well as the removal of the shoreline structure within 60 calendar days of the Board's decision. Failure to comply with these conditions would have resulted the matter being turned over to the Attorney General for disposition.

Mr. Peabody testified in opposition to this, stating that the staff recommendations are unjust and unsupported by any evidence. The Board unanimously agreed with the staff recommendations above, which led Mr. Peabody to request a Contested Case Hearing.

On September 9, 1999, Mr. Peabody filed a timely Petition for a Contested Case Hearing on the Board's determination found at the August 27, 1999 BLNR meeting. On the Petition form, Mr. Peabody states that he filed the Petition "to stop extortion by DLNR". He again argued that the

DLNR has no evidence of environmental harm and that the state has no jurisdiction in the area where his structure sits.

On June 26, 2002, the DLNR received a copy of the 4th Pre-Hearing Order re: Petitioner's (Peabody) Withdrawal of Petition for the Contested Case (***Exhibit D***). The Hearing Officer for the contested case had not received this Withdrawal when he filed and served the June 13, 2002 3rd Pre-Hearing Order regarding the motions hearing that was scheduled to take place on June 26, 2002 on Moloka`i. The petitioner, Mr. Peabody, then submitted an email message on June 19, 2002 confirming the withdrawal.

It appears that the seawall relevant to this August 27, 1999 BLNR meeting was never removed, and it also appears that it is the same pre-existing seawall referred to in the May 2020 reports of the DOCARE Officers.

ALLEGED UNAUTHORIZED LAND USE IN THE CONSERVATION DISTRICT:
The Department and Board of Land and Natural Resources owns land lying makai of the shoreline as evidenced by the upper reaches of the wash of the waves other than storm and seismic waves, at high tide during the season of the year in which the highest wash of the waves occurs, usually evidenced by the edge of vegetation growth, or the upper limits of debris left by the wash of the waves, pursuant to §205A-1, Hawai`i Revised Statutes (HRS). Such land is in the Conservation District.

Staff believes the unauthorized land uses occurred on State land within the Conservation District based upon the location of the work seaward of Mr. Peabody's property. The OCCL believes there is sufficient cause to bring this matter to the Board since it is evident that the unauthorized land uses are on State land and within the Conservation District pursuant to the Hawai`i Administrative Rules (HAR), §15-15-20 Standards for determining "C" conservation district boundaries:

> It shall include lands having an elevation below the shoreline as stated by §205A-1, HRS, marine waters, fishponds, and tidepools of the State, and accreted portions of lands pursuant to §501-3, HRS, unless otherwise designated on the district maps. All offshore and outlying islands of the State are classified conservation unless otherwise designated on the land use district maps.

Chapter 13-5, HAR and Chapter 183C, HRS regulate land uses in the Conservation District by identifying a list of uses that may be allowed by a Conservation District Use Permit (CDUP). The chapters also provide for penalties, collection of administrative costs and damages to state land for uses that are not allowed or for which no permit has been obtained. HAR §13-5-2 defines "land use" as follows:

> The placement or erection of any solid material on land if that material remains on the land more than thirty days, or which causes a permanent change in the land area on which it occurs;

The work that was conducted at the subject property appears to consist of the placement of solid material in the form of rebuilding of a pre-existing seawall (one that had been previously identified as unauthorized by the DLNR) within the Conservation District for use as an erosion control structure. Neither the pre-existing seawall nor the newly built seawall were authorized under Hawai`i Administrative Rules (HAR) 13-5-22, P-15 SHORELINE EROSION CONTROL, "Seawall, revetment, groin, or other coastal erosion control structure or device, including sand placement, to control erosion of land or inland area by coastal waters, provided that the applicant shows that (1) the applicant would be deprived of all reasonable use of the land or building without the permit; (2) the use would not adversely affect beach processes or lateral public access along the shoreline, without adequately compensating the State for its loss; or (3) public facilities (e.g., public roads) critical to public health, safety, and welfare would be severely damaged or destroyed without a shoreline erosion control structure, and there are no reasonable alternatives (e.g., relocation). Requires a shoreline certification.

Additionally, the work in question that has taken place on makai of the property for the last two decades has been done by trespassing on State land without authorization. Neither the pre-existing seawall nor the newly built seawall were authorized under Hawai`i Administrative Rules (HAR) for Unencumbered Public Lands, in HAR 13-10-221. The work done violates HAR 13-221-23, GEOLOGICAL FEATURES, "No person shall destroy, disturb, or mutilate any geological features or dig, or remove sand, earth, gravel, minerals, rocks, fossils, coral or any other substance on the premises. No person shall excavate or quarry any stone, or lay, set, or cause any blast or explosion, or assist in these acts within the premises, except as provided by law or with the written permission of the board or its authorized representative.", as well as HAR 13-221-28 (a), PUBLIC PROPERTY, "No person shall destroy, deface, or remove any natural feature or natural resource within the premises."

DISCUSSION:

Based on the information received for the most recent violation - the rebuilding of the seawall - as well as the information compiled and retrieved from previous correspondence regarding the subject property, it is clear that a shoreline structure was built within the shoreline area without authorization from the Department. No State, County, or Federal permits were obtained or even applied for in order to perform the subject work.

The beaches of Hawai`i are held in trust by the State for the benefit of present and future generations. The State should be involved when individuals need to temporarily use beach areas for construction purposes, and there should be consequences when an individual unilaterally and willfully acts in such a way that endangers a public trust resource.

Information in the DLNR Staff Report for the August 27, 1999 BLNR Meeting reveals that DLNR Planning Branch staff spoke with Mr. Peabody after receiving the investigator's report for the original violation for the wall back in 1999. It states that Mr. Peabody's reason for building the structure was to protect his property and structures from erosion damages, and that Mr. Peabody related to staff that "it was his impression that he could never receive a permit for a shoreline structure from the DLNR, so he did what he had to do."

The chronology of events that occurred in May of 2020 between the DOCARE officers and Mr. Peabody seem to directly reflect the course of events that happened during the previous attempts to rectify this situation in the late 1990s and early 2000s. The DOCARE officers this past May repeatedly informed Mr. Peabody that he was not able to perform construction within the Conservation District without prior approval, which he appeared to understand. Nonetheless, construction continued and both the original (unauthorized) seawall and the newly rebuilt seawall remain in place today. Additionally, there are witnesses that documented daily on-going work by Mr. Peabody's construction crews from the end of April to the end of June on at least ten (10) separate occasions. DOCARE officers visited the site on at least four (4) separate occasions and witnessed on-going work.

In addition to the flagrant disregard for laws and regulations, Mr. Peabody has shown a tendency to be argumentative and confrontational when presented with the evidence of his unauthorized land use within the Conservation District. His attempt to fight the BLNR's decision at their August 27, 1999 meeting resulted in a drawn-out issue that lasted until the middle of 2002, when Mr. Peabody suddenly decided to withdraw his Petition for a Contested Case. The 4th Pre-Hearing Order regarding Mr. Peabody's Withdrawal of Petition for Contested Case that was received by the DLNR from John S. Rapacz, the Attorney at Law who was the Hearing Officer for the Contested Case, revealed that Mr. Peabody's email confirmation of the withdrawal said in pertinent part, "I WITHDRAW THE DEMAND FOR A CONTESTED CASE HEARING THAT I WAS COERCED INTO BY YOU FASCIST STOOGES." ***(attached as Exhibit D)***

More recently, reports received from the DOCARE officers who attempted to investigate the recent complaints for the subject work reveal that Mr. Peabody "verbally confronted them" in a shouting manner. Mr. Peabody also refused documents (an OCCL violation letter) that the DOCARE officers were subsequently sent to serve to him. Mr. Peabody sent a response email to the DLNR on October 1, 2020 in regard to the subject violation further expressing his lack of desire to comply in any way ***(attached as Exhibit E)***.

The history of the cases surrounding the subject seawall reveal that Mr. Peabody has little concern for the laws and regulations that exist in the State of Hawai`i and is willing to circumnavigate them in order to accomplish his desired work. The argumentative nature he has taken during both the original matter that began in 1999 as well as the more recent matter beginning in May of 2020 exemplify what will likely be the scenario any time an attempt to regulate his unauthorized land uses in the Conservation District occurs. For these reasons, in addition to the fact that the wall not only remained since the original enforcement actions in 1999 but was built upon - again without authorization - in May of 2020, DLNR staff believes that enforcement action needs to be taken.

AS SUCH, STAFF RECOMMENDS:
That pursuant to Chapter 183C, HRS, the Board find the Landowners (George Gary Peabody and Susan Yukiko Peabody, jointly and severally) of TMK: (2) 5-7-001:001 in Waialua, Kaunakakai, Moloka`i in violation of Chapter 183-7, HRS and Chapter 13-5-6, HAR, for constructing an unauthorized seawall within the Conservation District subject to the following:

1. That the landowners, George Gary Peabody and Susan Yukiko Peabody, are fined \$15,000 for construction of an unauthorized shoreline structure in the Conservation District and on State Submerged Land, pursuant to Chapter 183C-7, HRS;

2. That the landowners, George Gary Peabody and Susan Yukiko Peabody, are fined an additional \$60,000 (\$15,000/per day per violation) for continuing to perform unauthorized work after being notified by Division of Conservation and Resources Enforcement staff on at least 4 separate days (based on DOCARE site visits) pursuant to Chapter 183C-7, HRS;

3. The Landowners, George Gary Peabody and Susan Yukiko Peabody, are fined an additional \$5,000.00 for administrative costs associated with the subject violation;

4. The Landowners, George Gary Peabody and Susan Yukiko Peabody, shall pay all fines (total \$80,000) within sixty (60) days of the date of the Board's action;

5. The Landowners, George Gary Peabody and Susan Yukiko Peabody, shall remove the shoreline protection structure in its entirety within 90 days of the order of the Board; landowner is allowed to apply for temporary shoreline protection pursuant to Conservation District Rules upon removal of the subject structure;

6. That in the event of failure of the landowners, George Gary Peabody and Susan Yukiko Peabody, to comply with any order herein, the landowners shall be fined an additional \$15,000.00 per day until the order is complied with;

7. That all fines and directions apply to George Gary Peabody and Susan Yukiko Peabody, jointly and severally, and

8. That in the event of failure of the landowners, George Gary Peabody and Susan Yukiko Peabody, to comply with any order herein, the matter shall be turned over to the Attorney General for disposition, including all administrative costs.

Respectfully submitted,

Salvatore Saluga

Salvatore Saluga, Coastal Lands Program Specialist
Office of Conservation and Coastal Lands

Approved for submittal:

Suzanne D. Case

Suzanne D. Case, Chairperson
Board of Land and Natural Resources

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FIRST DEPUTY ATTORNEY
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December 11, 2017

The Honorable Suzanne D. Case
Chairperson, Board of Land and Natural Resources
State of Hawai'i
1151 Punchbowl Street, Room 130
Honolulu, Hawai'i 96813

Dear Chairperson Case:

RE: Shoreline Encroachment Easements

INTRODUCTION

By memorandum dated August 10, 2017, you asked for our advice regarding the Board of Land and Natural Resource's practice of requiring private owners of coastal properties to obtain easements for structures that were originally constructed on private property but are now located on State-owned land due to the landward migration of the shoreline.

QUESTIONS AND SUMMARY ANSWERS[1]

1. What is the dividing line between public and private property with respect to oceanfront property?

Short answer: The State owns all lands makai of the "the upper reaches of the wash of waves, usually evidenced by the edge of vegetation or by the line of debris left by the wash of waves." For convenience, we refer to this description as the

[1] The intent of your memorandum is clear even though it does not directly ask specific questions. We have taken the liberty of setting out questions we believe are raised.

Op. No. 17-1

Exhibit A – Attorney General Opinion re: Shoreline Migration and Ownership, December 11, 2017

"shoreline." This use of the term "shoreline" is closely related to but not exactly the same as the "certified shoreline" described in chapter 205A, Hawaii Revised Statutes (HRS). This line (the shoreline) is identical to -- and indeed defines -- the dividing line between public and private property (the ownership line).[2]

2. How is the ownership line affected when there is landward migration of the shoreline caused by erosion or sea level rise?

Short answer: By definition, if the shoreline moves landward, then the ownership line also moves mauka.[3]

3. What, if anything, is the effect of statutes that require the Board of Land and Natural Resources (Board) or the Attorney General to approve "acquisition" of real property?

Short answer: The State already owns an inchoate interest in land that might be gained through erosion or sea level rise. Ripening of this inchoate interest is not "acquisition" of land covered by these statutes. This result is fortified by the Supreme Court's decision in *Gold Coast Neighborhood Ass'n v. State*, 140 Haw. 437, 403 P.3d 214 (2017). The Court held that the statutes do not "imperatively require" abrogation of common law rules or "evince an express legislative intent to do so."

4. Does this result violate private owners' due process rights or constitute a "taking" of private property?

Short answer: No. The Hawai'i Supreme Court has specifically considered and rejected such claims. As to federal

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[2] The shoreline and ownership lines are the same where the shoreline is not affected by structures. No Hawai'i case or statute addresses the question of where the ownership line is when the shoreline is affected by a seawall or other man-made structure. We have not found it necessary to address that question in providing this advice.

[3] The term "mauka" means "inland." *Leslie v. Bd. of Appeals of County of Hawai'i*, 109 Haw. 384, 386, 126 P.3d 1071, 1073, note 3 (2006). A "mauka" movement of the ownership line means toward the mountain or (equivalently) away from the sea.

taking law, the State's inchoate rights in the property existed prior to private ownership. The interest lost was not part of private title to begin with and cannot be the basis of a taking claim.

5. Is the Attorney General required to give prior approval to State ownership of land by reason of erosion or sea level rise? Is the Attorney General required to approve as to legality and form documents relating to land owned by the State by reason of erosion or sea level rise?

Short answer: No. Ownership of land by erosion or sea level rise is not an acquisition of land and the State is not acquiring land within the meaning of those statutes. Therefore the statutes requiring that the Attorney General review and approve land acquisitions do not apply.

6. Can the Board require the former landowner to pay fair market value in order to obtain an easement or other interest in land now owned by the State?

Short answer: Yes, applicable statutes specifically provide for the payment of fair market value in most cases.

DISCUSSION

1. What is the dividing line between public and private property with respect to oceanfront property?

It is the uniform law of every coastal state that land below (seaward or "makai" of) the shoreline is owned by the State and held in public trust[4] for the people of the State.[5]

[4] The public trust doctrine is a common law doctrine, inherited from England and dating back to Roman law, dictating that all submerged lands are the property of the state and held in trust for the people. *Shively v. Bowlby*, 152 U.S. 1 (1894). The seminal United States case for the public trust doctrine is *Illinois Cent. R.R. Co. v. State of Illinois*, 146 U.S. 387 (1892). The seminal case in Hawai‘i is *King v. Oahu Ry. & Land Co.*, 11 Haw. 717 (1899). In Hawai‘i the public trust is also recognized in the Constitution, article XI, section 1.

[5] The same issue can arise as to rivers, lakes, or other bodies of water. Indeed *Illinois Cent. R.R. Co., see supra note 4,*

Most states define the shoreline/ownership boundary as the mean high tide mark. *Purdie v. Attorney Gen.*, 143 N.H. 661, 666, 732 A.2d 442, 446-47 (1999):

> The few States that reject the mean high tide mark as the public-private shoreland boundary do so on distinct histories not applicable to our State. *See, e.g., Application of Ashford*, 50 Haw. 314, 440 P.2d 76, 77 (1968) (Hawaii boundary based on Hawaiian King's issuance of royal patents in 1866); *Bell v. Town of Wells*, 557 A.2d 168, 171-72 (Me.1989) (Massachusetts and Maine adopted mean low water as boundary line based on 1647 Massachusetts ordinance); *cf. Opinion of the Justices (Public Use of Coastal Beaches)*, 139 N.H. at 88-89, 649 A.2d at 608 (refusing to adopt Massachusetts rule for New Hampshire).

See also Margaret E. Peloso & Margaret R. Caldwell, *Dynamic Property Rights: The Public Trust Doctrine and Takings in a Changing Climate*, 30 Stan. Envtl. L.J. 52, 57 (2011) ("In nearly all cases, the lines for defining the limits of private title and public access are the mean high water and mean low water marks.")

Purdie rightly identifies Hawaiʻi as a state with a unique approach to defining the shoreline. This approach was initiated and explained in three landmark cases, all authored by then Chief Justice William S. Richardson.

In *Application of Ashford*, 50 Haw. 314, 440 P.2d 76 (1968), the Court considered the ownership line in the context of a request to register land title in the land court:

> Clinton R. Ashford and Joan B. S. Ashford, the appellees, petitioned the land court to register title to certain land situate on the Island of Molokai. The lands are the makai (seaward) portions of Royal Patent 3004 to Kamakaheki and Royal Patent 3005 to Kahiko, both issued on February 22, 1866.

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concerned sale of land filled land reclaimed from Lake Michigan. Freshwater shorelines present some extraneous complications and are not further considered in this letter.

> The question before this court is the location of the makai boundaries of both parcels of land, which are described in the royal patents as running 'ma ke kai' (along the sea). The appellees contend that the phrase describes the boundaries at mean high water which is represented by the contour traced by the intersection of the shore and the horizontal plane of mean high water based on publications of the U. S. Coast and Geodetic Survey.

50 Haw. at 314-15, 440 P.2d at 76-77.

The Court held that the boundary (ownership line) was not the mean high water mark. Rather the boundary -- pursuant to Hawaiian custom as established by kama'aina[6] testimony -- is further mauka, specifically:

> along the upper reaches of the wash of waves, usually evidenced by the edge of vegetation or by the line of debris left by the wash of waves, and that the trial court erred in finding that it is the intersection of the shore with the horizontal plane of mean high water.

50 Haw. at 14, 440 P.2d at 77 (1968). That landmark ruling was confirmed and elaborated on in *Hawaii County v. Sotomura*, 55 Haw. 176, 517 P.2d 57 (1973), and *Application of Sanborn*, 57 Haw. 585, 562 P.2d 771 (1977). *See Sotomura*, 55 Haw. at 182, 517 P.2d at 62:

> We hold as a matter of law that where the wash of the waves is marked by both a debris line and a vegetation line lying further mauka; the presumption is that the upper reaches of the wash of the waves

[6] "Kama'aina" is defined as "Native-born, one born in a place, host." Other relevant senses include "acquainted [with], familiar." M. Pukui & S. Elbert, *Hawaiian Dictionary* 9 (rev. ed. 1986).

Leslie v. Bd. of Appeals of County of Hawai'i, 109 Haw. 384, 386, 126 P.3d 1071, 1073 (2006), *as amended* (Feb. 28, 2006).

> over the course of a year lies along the line marking the edge of vegetation growth. The upper reaches of the wash of the waves at high tide during one season of the year may be further mauka than the upper reaches of the wash of the waves at high tide during the other seasons. Thus while the debris line may change from day to day or from season to season, the vegetation line is a more permanent monument, its growth limited by the year's highest wash of the waves.

See Sanborn, 57 Haw. at 182, 562 P.2d at 773 (1977):

> The law of general application in Hawaii is that beachfront title lines run along the upper annual reaches of the waves, excluding storm and tidal waves.

2. How is the ownership line affected when the shoreline moves landward or mauka because of erosion or sea level rise?

These same cases address and resolve the issue of whether and how ownership changes when the shoreline moves landward or mauka due to erosion or rising sea levels.

Sotomura is particularly relevant. In that case, the private owner indisputably owned the land in the past. In fact, the private owner had registered the property in the land court. The land court had determined the seaward boundary of the property and described it by distances and azimuths. The shoreline moved mauka due to erosion. The Court framed the question as "whether title to land lost by erosion passes to the state." The Court noted that this was an issue of first impression in Hawaiʻi.

The Court held that the answer was "yes," making clear that the ownership was fluid and specifically that it changed with erosion:

> We hold that registered ocean front property is subject to the same burdens and incidents as unregistered land, including erosion. HRS § 501-81. Thus the determination of the land court that the seaward boundary of Lot 3 is to be located along high water mark remains conclusive; however, the precise

> location of the high water mark on the ground is subject to change and may always be altered by erosion.

55 Haw. at 180, 517 P.2d at 61.

Even the previous determination of boundaries in land court was not binding where the actual shoreline was altered by erosion:

> This court recently rejected the position that the state cannot subsequently challenge title to registered land where the state later discovered that the seaward boundary was located further mauka than shown on the maps, and a portion of the property had become submerged by erosion.

55 Haw. at 181, 517 P.2d at 61 (citing *In re Application of Castle*, 54 Haw. 276, 277, 506 P.2d 1, 3 (1973)).[7]

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[7] *Sotomura* has a complex and murky path after the Hawai'i Supreme Court decision. The United States Supreme Court rejected the owners' petition for certiorari. 419 U.S. 872 (1974). Landowners then sued the County and State officials in federal court. The federal district court judge was the Honorable Dick Yin Wong. Judge Wong was previously the state land court judge. It was his decision that the Hawai'i Supreme Court reversed in *Application of Sanborn*, 57 Haw. 585, 562 P.2d 771 (1977).

Judge Wong ruled in federal court that the Hawai'i Supreme Court deprived landowners of due process by deciding the case on a basis not presented by the parties or actually litigated. Judge Wong also held that the Hawai'i Supreme Court's decision "ignore[ed] vested property rights" and "was so radical a departure from prior state law as to constitute a taking of the Owners' property by the State of Hawaii without just compensation in violation of rights secured to them by the Fourteenth Amendment to the United States Constitution." *Sotomura v. Hawaii County*, 460 F. Supp. 473, 482-83 (D. Haw. 1978).

Although Judge Wong wrote the decision, it appears that Judge Samuel King entered the judgment. Defendants appealed but the

Importantly, the Court based its ruling on the common law principle that loss of land by erosion is an inherent aspect of littoral property:

> The loss of lands by the permanent encroachment of the waters is one of the hazards incident to littoral or riparian ownership. . . . [W]hen the sea, lake or navigable stream gradually and imperceptibly encroaches upon the land, the loss falls upon the owner, and the land thus lost by erosion returns to the ownership of the state. *In re City of Buffalo*, 206 N.Y. 319, 325, 99 N.E. 850, 852 (1912).

55 Haw. at 183, 517 P.2d at 62.

One reason for that common law rule (now abrogated in part by statute, section 171-2, HRS) is the tradeoff between accretion and erosion: "since the riparian owner may lose soil by the action of the water, he should have the benefit of any land gained by the same action." *Id.* (citing 65 C.J.S. *Navigable Waters* § 82(1), at 256 (1966) (footnotes omitted)). *See Application of Banning*, 73 Haw. 297, 303-04, 832 P.2d 724, 728 (1992), where the Court explained that accretion belongs to the littoral landowner.

Sotomura also relied on the public trust doctrine, citing to *King v. Oahu Ry. & Land Co.*, 11 Haw. at 723-24, for the proposition that:

> The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.

55 Haw. at 184, 517 P.2d at 63. Public policy therefore "favors extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible." 55 Haw. at 182, 517 P.2d 61-62.

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appeal was untimely. *See Sotomura v. Hawaii County*, 679 F.2d 152 (9th Cir. 1982).

This public policy remains in effect as the Court has repeatedly ruled. *Application of Banning*, 73 Haw. 297, 309-10, 832 P.2d 724, 731 (1992); *Diamond v. Dobbin*, 132 Haw. 9, 26, 319 P.3d 1017, 1034 (2014); *Gold Coast Neighborhood Ass'n v. State*, 140 Haw. 437, 458, 403 P.3d 214, 235 (2017).

The Court reached the same result in *Application of Sanborn*, 57 Haw. 585, 562 P.2d 771 (1977). *Sanborn* also concerned property registered in the land court where the shoreline moved mauka from the land court boundary. The Court framed the issue as:

> In addressing the issue of the Sanborns' beachfront title line, the primary question is whether the line is to be determined according to Hawaii's general law of ocean boundaries, or whether certain distances and azimuths contained in the Sanborns' 1951 land court decree of registration are to prevail.

57 Haw. at 588, 562 P.2d at 773.

The Court specifically held that the land court boundary was subject to change in the event of erosion:

> We hold that, regardless of whether or not there has been permanent erosion, the Sanborns' beachfront title boundary is the upper reaches of the wash of waves. Although we find that the State is bound by the 1951 decree to the extent that the decree fixes the Sanborns' title line as being 'along the high water mark at seashore', we also find that the specific distances and azimuths given for high water mark in 1951 are not conclusive, but are merely prima facie descriptions of high water mark, presumed accurate until proved otherwise.

57 Haw. at 590, 562 P.2d at 774.

The Ninth Circuit Court of Appeals made the same ruling in *Napeahi v. Paty*, 921 F.2d 897 (9th Cir. 1990). The court there considered ownership of land that was mauka of the shoreline when ceded land was granted to the Territory in 1898. The land later became makai of the shoreline because of erosion. The court specifically held that the property moved from private to public ownership.

> [T]he holdings in *Sotomura* and *Zimring*[8] require us to conclude that if the 1.75 acres became submerged land because of natural erosion after 1898 and before being altered by the actions of the property owner, then that property would be ceded lands subject to the terms of the trust.

Napeahi v. Paty, 921 F.2d 897, 903 (9th Cir. 1990).

For these reasons and based on the cases cited above, we advise that the law in Hawai'i is that when the shoreline boundary migrates landward or mauka because of erosion or sea level rise, the State owns the additional submerged land that results from the migration.

3. What, if anything, is the effect of statutes that require the Board of Land and Natural Resources (Board) or the Attorney General to approve "acquisition" of real property?

A concern has been raised as to a trio of statutes that require Board and Attorney General approval of acquisitions of real property or interests in real property. The statutes are sections 26-7, 107-10, and 171-30, HRS.[9]

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[8] *State by Kobayashi v. Zimring*, 58 Haw. 106, 566 P.2d 725 (1977). This case is discussed in more detail below.

[9] Section 26-7, HRS provides in relevant part:

> The department [of the attorney general] shall . . . approve as to legality and form all documents relating to the acquisition of any land or interest in lands by the State

Section 107-10, HRS, provides in relevant part:

> No real property or any right, title, or interest therein shall be acquired by agreement, purchase, gift, devise, eminent domain, or otherwise, for any purpose, by the State or any department, agency, board, commission, or officer thereof, without the

We advise that those statutes are not applicable to change in the ownership line caused by landward or mauka migration of the shoreline due to erosion or sea level rise. As we now show, the possibility of boundary changes due landward or mauka migration of the shoreline due to erosion and accretion is already part of the State's ownership of public trust land. That possibility already encumbers private littoral land. *Sotomura*, 55 Haw. at 183, 517 P.2d at 62. When the State comes into possession of land because of erosion or sea level rise, the State is not "acquiring" property within the meaning of the statutes.

State by Kobayashi v. Zimring, 58 Haw. 106, 566 P.2d. 725 (1977), is a key case supporting this proposition. *Zimring*

> prior approval of the attorney general as to form, exceptions, and reservations.

Section 171-30, HRS, provides in relevant part:

> (a) The board of land and natural resources shall have the exclusive responsibility, except as provided herein, of acquiring, including by way of dedications:
> (1) All real property or any interest therein and the improvements thereon, if any, required by the State for public purposes, including real property together with improvements, if any, in excess of that needed for such public use in cases where small remnants would otherwise be left or where other justifiable cause necessitates the acquisition to protect and preserve the contemplated improvements, or public policy demands the acquisition in connection with such improvements.
> (2) Encumbrances, in the form of leases, licenses, or otherwise on public lands, needed by any state department or agency for public purposes or for the disposition for houselots or for economic development.
> The board shall upon the request of and with the funds from the state department or agency effectuate all acquisitions as provided under this section.

addressed ownership of lands newly created by a 1955 lava flow that extended the shoreline and added 7.9 acres of land in the Puna area. One of the issues in that case was whether the lava extension was ceded land acquired by the State from the federal government. The State argued that the federal government transferred the lands to the State under section 5(b) of the Admission Act. The opponents countered that the only lands that passed to the State under section 5(b) were those lands ceded to the United States by the Republic of Hawaii in 1898. They argued that the lava extension did not exist in 1898, and could not have been ceded to the United States. The Hawaii Supreme Court disagreed with the opponents and sided with the State. The Court held that the term "property," as used in the Joint Resolution of Annexation, is "extremely broad," and includes "property which is real, personal and mixed, choate and inchoate, corporal or incorporeal." *Id.* at 122-23, 566 P. 2d at 736.

The lava land was an inchoate property right in 1898. When the lava land was later created, that circumstance resulted in the ripening of State ownership of ceded land even though the land did not exist in 1898.

Napeahi v. Paty, 921 F.2d 897 (9th Cir. 1990), is on point for the proposition that an inchoate property interest in the possibility of erosion was also "public property" under the Joint Resolution of Annexation. In that case, a native Hawaiian sued the State, alleging that the State had a trust duty under the Admission Act to claim ownership of 1.75 acres shorefront property Kona. It was undisputed that "at the time the public land was ceded by the Republic of Hawaii to the United States in 1898, it did not include the 1.75 acres in contention." 921 F.2d at 902. However, that did not "end the inquiry." Relying on *Zimring* and *Sotomura*, the Ninth Circuit ruled that the land passed from private to public ownership because of erosion -- automatically and as a matter of law:

> There is no reason to distinguish the inchoate property interest in submerged land that could be acquired by the State as the result of erosion from that which could be acquired by a lava extension. Both were inchoate property interests which *Zimring* held to be property that was ceded to the United States and then returned to the State in 1959. Thus, the holdings in *Sotomura* and *Zimring* require us to

> conclude that if the 1.75 acres became submerged land because of natural erosion after 1898 and before being altered by the actions of the property owner, then that property would be ceded lands subject to the terms of the trust.

921 F.2d at 903.

We therefore conclude that under Hawai'i law, the State holds an inchoate right to land that may pass to it by erosion or sea level rise. This is an inherent aspect of the State's ownership of land, already owned by the State (and by the Territory before it). Ripening of that inchoate right is not "acquiring" or "acquisition" of real property under any of the statutes cited above.

This conclusion is bolstered by the Hawai'i Supreme Court's recent ruling in *Gold Coast Neighborhood Ass'n v. State*, 140 Haw. 437, 403 P.3d 214 (2017). The issue in that case was whether the State owned seawalls and land under the seawalls because the general public used the seawalls as a walkway. The State argued that under section 264-1, HRS, property could only be dedicated to the State by "deed of conveyance" accepted by the State. The State also cited to and relied on the other statutes cited above. The Court rejected this argument, holding that an "implied dedication" is not a "dedication" covered by section 264-1, HRS.

Instead implied dedication is a common law doctrine, not addressed or abrogated by section 264-1, HRS, or by the other statutes discussed above. The Court articulated a strict standard for statutory abrogation of common law rights:

> The Hawaii Revised Statutes, and in particular, HRS §§ 264-1(c)(1), 171-30, 26-7, 107-10, and 520-7, do not "imperatively require" abrogation of common law implied dedication, nor do they evince an express legislative intent to do so. Minneapolis Fire & Marine Ins. v. Matson Nav. Co., 44 Haw. 59, 67-68, 352 P.2d 335, 340 (1960); Burns Int'l Sec. Servs., Inc. v. Dep't of Transp., 66 Haw. 607, 611, 671 P.2d 446, 449 (1983).

140 Haw. at 452, 403 P.3d at 229.

We believe the Court would view the statutes in the same way with respect to land gained by erosion or sea level rise -- there is no express intention to abrogate common law principles to the effect that the State owns the land without the need for affirmative action by either the Land Board or the Attorney General.

This conclusion is consistent with case law from other jurisdictions which have generally viewed a state's interest in land that may come to the public trust in the future as either a vested or contingent future interest. For example in *Severance v. Patterson*, 370 S.W.3d 705, 718 (Tex. 2012), the Texas Supreme Court said:

> A person purchasing beachfront property along the Texas coast does so with the risk that her property may eventually, or suddenly, recede into the ocean. When beachfront property recedes seaward and becomes part of the wet beach or submerged under the ocean, a private property owner loses that property to the public trust.

Similarly in *Nies v. Town of Emerald Isle*, 780 S.E.2d 187 (N.C. Ct. App. 2015), *cert. denied,* 2017 WL 1550808 (U.S. Oct. 2, 2017) the court ruled against a taking claim. Under North Carolina common law the dry sand portion of plaintiffs' property had always been encumbered by the public trust. Thus enforcement of that public trust did not interfere with or "take" any pre-exiting right. *See generally* Margaret E. Peloso & Margaret R. Caldwell, *Dynamic Property Rights: The Public Trust Doctrine and Takings in A Changing Climate*, 30 Stan. Envtl. L.J. 51, 87 (2011).

4. Does this result violate private owners' due process rights or constitute a "taking" of private property?

In *Application of Sanborn*, 57 Haw. 585, 596, 562 P.2d 771, 777-78 (1977), the Sanborns argued that the Court's ruling raised constitutional issues, including a takings claim.

> The Sanborns contend that both the Hawaii and federal constitutions would be violated if this court fixes the Sanborns' title line along the upper reaches of the wash of waves. It is contended that such an adjudication would be a taking of private property for

> public use without just compensation and also, by allegedly denying res judicata to the 1951 decree, would be a violation of due process per se.

The Court rejected these arguments, because its ruling was simply an application of existing Hawai'i law:

> Under our interpretation of the 1951 decree, we see no constitutional infirmity. The 1951 decree recognized that the Sanbors' [sic] title extends to a line 'along high water mark'. We affirm the holding in McCandless, supra, that distances and azimuths in a land court decree are not conclusive in fixing a title line on a body of water, where the line is also described in general terms as running along the body of water.

Id. This ruling resolves the issue in state courts.

Nor are there viable federal claims, notwithstanding the suggestion to the contrary in *Sotomura v. Hawaii County*, 460 F. Supp. 473 (D. Haw. 1978). As explained in the previous section of this opinion, the possibility that private littoral land may pass into public ownership is an inherent part of the State's ownership of land. And conversely, the possibility that the seaward boundary may migrate inherently burdens private shoreline property.

This is important to the putative taking claim because the threshold question in any taking case is whether "private property" is being taken at all. As the Supreme Court put it in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992), compensation need not be paid "if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."

Similarly, in *Esplanade Properties, LLC v. City of Seattle*, 307 F.3d 978, 985 (9th Cir. 2002), the Ninth Circuit denied a taking claim after determining as a threshold issue that "plaintiff's claimed property right never existed" in the first place. *See also Maritrans Inc. v. U.S.*, 342 F.3d 1344, 1351 (Fed. Cir. 2003) (In deciding whether governmental action constitutes a taking of private property without just compensation, "[f]irst, a court must evaluate whether the

claimant has established a 'property interest' for purposes of the Fifth Amendment."); *Conti v. U.S.*, 291 F.3d 1334, 1339 (Fed. Cir. 2002) ("However, if a claimant fails to demonstrate that the interest allegedly taken constituted a property interest under the Fifth Amendment, a court need not even consider whether the government regulation was a taking."); *Raceway Park, Inc. v. Ohio*, 356 F.3d 677, 683 (6th Cir. 2004) ("[T]here is no taking if there is no private property in the first place.").

Property rights are protected by the federal and state constitutions. They are not, however, "created by the [federal] Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). *Cf. Stop the Beach Renourishment, Inc. v. Florida Dept. of Envtl. Prot.*, 560 U.S. 702, 707 (2010) ("State law defines property interests.").

As noted above, the Hawai'i Supreme Court has definitively ruled:

> The loss of lands by the permanent encroachment of the waters is one of the hazards incident to littoral or riparian ownership.

Sotomura, 55 Haw. at 183, 517 P.2d at 62.

It follows that "the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Lucas*, 505 U.S. at 1027. Thus there is no taking.

5. Is the Attorney General required to give prior approval to State ownership of land by reason of erosion or sea level rise? Is the Attorney General required to approve as to legality and form documents relating to land owned by the State by reason of erosion or sea level rise?

As shown by the discussion of question 3, ownership of land by erosion or sea level rise occurs pursuant to the common law and is a ripening of a pre-existing inchoate right in the land. This ripening is not an acquisition of land and the State is not acquiring land within the meaning of those statutes. It follows

that the Attorney General does not have to review the ownership change and does not have to review or approve "documents relating to" the ownership.

We note that all of the cases discussed above (*Ashford, Sotomura, Sanborn,* and *Napeahi*) were decided after enactment of the three laws. None of the cases imposed the additional requirement that the Attorney General or the Board approve State ownership. In light of those cases, we do not believe the Supreme Court would require Attorney General approval. *See Gold Coast*, 140 Haw. at 455, 403 P.3d at 232: "These provisions express no intent to abrogate common law implied dedication, nor have they ever been mentioned by our courts as having any relevance to the doctrine."

Conversely, we do not believe the Court would uphold a hypothetical refusal by the Attorney General to approve ownership by reason of change in the shoreline.

6. Can the Board require the former landowner to pay fair market value in order to obtain an easement or other interest in land now owned by the State?

Not only can the Board require a former landowner to pay fair market value, but it must do so under current law. Applicable statutes specifically require fair market value in most cases. *See, e.g.*, section 171-13, HRS (requiring that easements be sold for fair market value determined pursuant to section 171-17(b), HRS).

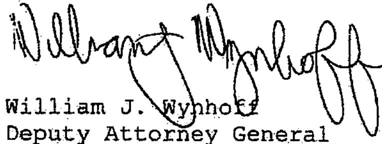
This requirement could be changed by the Legislature. We understand that the Department has introduced appropriate legislation but has not been successful.

CONCLUSION

For these reasons, we conclude that the State owns additional public land resulting when the shoreline has migrated landward or mauka due to erosion or sea level rise, that this migration does not give rise to a constitutional claim by the former owner, that this result is not affected by laws relating to the acquisition of real property, that the Attorney General

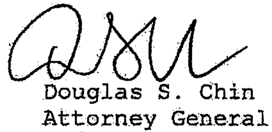
does not need to give prior approval in connection with such land, and that the Board can and should charge former owners fair market value in return for an easement interest in the land.

Very truly yours,



William J. Wynhoff
Deputy Attorney General

APPROVED:



Douglas S. Chin
Attorney General

WJW:w

DAVID Y. IGE
GOVERNOR OF HAWAII

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Office of Conservation and Coastal Lands
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SUZANNE D. CASE
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

ROBERT K. MASUDA
FIRST DEPUTY

M. KALEO MANUEL
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

Certified/Return Receipt
REF:OCCL:SS
7019 0700 0001 4008 9316

Vio. MO 20-32

MAY 26 2020

George G. Peabody
10254 Kamehameha V Hwy.
Kaunakakai, HI 96748

SUBJECT: NOTICE of Alleged Unauthorized Land Use Within the Conservation District Located Makai of 10254 Kamehameha V. Hwy., Kaunakakai, Molokai, Hawaii; Tax Map Key: (2) 5-7-001:001

Dear Landowner:

It has come to the Department of Land and Natural Resources (DLNR), Office of Conservation and Coastal Lands' (OCCL) attention that there has been work done within the Conservation District without our authorization. It appears that there has been work done in the shoreline area that includes work on an existing illegal seawall, as well as the construction of a new seawall upon the pre-existing illegal seawall. Officers of the Division of Conservation and Resource Enforcement (DOCARE) observed activity in this alleged manner at the subject property on each of May 8, May 9, May 11, and May 12 of 2020.

NOTICE IS HEREBY GIVEN that you may be in violation of Hawaii Administrative Rules (HAR) Title 13, Chapter 5, entitled Conservation District providing for land uses within the Conservation District, enacted pursuant to the Hawaii Revised Statutes (HRS), Chapter 183C.

The Department of Land and Natural Resources (DLNR) has reason to believe that:

1. The improvements are located on the public sandy beach seaward location of the alleged unauthorized land use is located makai of TMK: (2) 5-7-001:001, and are located within the State Land Use Conservation District, Resource Subzone;

2. Pursuant to §13-5-2, HAR, "Land use" means:

   (1) The placement or erection of any solid material on land if that material remains on the land more than thirty days, or which causes a permanent change in the land area on which it occurs;

   (2) The grading, removing, harvesting, dredging, mining, or extraction of any material or natural resource on land;

   (3) The subdivision of land; or

Exhibit B – OCCL Violation Notice Sent on May 26, 2020

(4) The construction, reconstruction, demolition, or alteration of any structure, building, or facility on land.

3. This land use was not authorized by the Department of Land and Natural Resources under Chapter 13-5, HAR.

4. The land use has occurred on public land owned by the State without authorization or permission from the State as landowner.

Pursuant to 183C-7(b), HRS, the Board of Land and Natural Resources (Board) may subject you to fines of not more than $15,000.00 per violation in addition to administrative costs and costs associated with land or habitat restoration, or both, if required, and damages to state land. Should you fail to immediately cease such activity after written or verbal notification from the department, willful violation may incur an additional fine of up to $15,000.00 per day per violation for each day in which the violation persists.

We recommend that you stop all work and contact our office within 10 days of receipt of this notice to discuss a remedy to the situation. Failure to do so will result in the matter being forwarded to the Board for formal action. Should you have any questions pertaining to this letter, please contact the Office of Conservation and Coastal Lands at (808) 587-0377.

Sincerely,

Suzanne D. Case, Chairperson
Board of Land and Natural Resources

c: County of Maui
Department of Planning and Permitting
DOCARE (Maui County)
MDLO

D-24

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

Ref. File No.:ENF-99-1
DOCARE: MO-99-16

August 27, 1999

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

REGARDING: Alleged Unauthorized Construction of a Shoreline Structure at Waialua, Molokai

BY: Mr. George Peabody
P.O. Box 342
Kaunakakai, Hawaii 96748

LANDOWNERSHIP: State of Hawaii

LOCATION/TMK: Waialua, Molokai
TMK:Seaward of 5-7-001:001

SUBZONE: Resource

This item was deferred and revised from the August 13, 1999 Board meeting.

DESCRIPTION OF AREA:

The location of the alleged unauthorized land use is a shoreline area in Waialua, Molokai (Exhibits 1-3). The area in question is located within the Conservation District, Resource subzone (Exhibit 4).

APPROVED BY THE BOARD OF
LAND AND NATURAL RESOURCES
AT ITS MEETING HELD ON
August 27, 1999

ITEM D-24

Exhibit B

Exhibit C – DLNR Staff Report from August 27, 1999 BLNR Meeting

ALLEGED UNAUTHORIZED LAND USES:

In December 1998, the Land Division, Planning Branch received an enforcement report from the Department of Land and Natural Resources (DLNR), Division of Conservation and Resources Enforcement (DOCARE), Molokai Branch. The report alleges that Mr. George Peabody built a shoreline structure on the seaward perimeter of his property during the month of December 1998.

The investigator's photographs show rocks placed on the Beach beyond what appear to be fence posts. The investigator notes that the upper wash of the waves did touch and cover portions of the wall. Additional pictures were taken showing people working on the wall. According to the investigator's report, one person was digging holes and placing rocks into the holes, and the other person was mixing cement, which was used to cement the rocks in place. The photographs clearly indicate that a portion of the wall was constructed on the sand beach.

DISCUSSION:

It is clear from the investigator's report that a shoreline structure was built in December 1998. It is also clear that the wall was built to protect the abutting property owner's land and residence from potential erosion damages. No State, County or Federal permits were obtained for the work. Planning Branch staff contacted the County of Maui, Planning Department who indicated that no permits or approvals were obtained for the shoreline structure.

The Department of Land and Natural Resources has sufficient cause to enforce this matter since it is evident that a portion of the structure was constructed within submerged lands considered to be under the jurisdiction of the Board of Land and Natural Resources (Board) "conservation land" pursuant to Section 15-15-20(6), Hawaii Administrative Rules (HAR) (Exhibit 5).

Land under the jurisdiction of the Board consists of lands lying below the shoreline as evidenced by the "upper reaches of the wash of the waves other than storm and seismic waves, at high tide during the season of the year in which the highest wash of the waves occurs, usually evidenced by the edge of vegetation growth, or the upper limits of debris left by the wash of the waves," (205A-1, definitions, Hawaii Revised Statutes).

Planning Branch staff spoke with the alleged, after receiving the investigator's report, who affirmed building the structure. His reason for building the structure was to protect his property and structures from erosion damages. Based on the site photographs, it

is evident that the alleged was acting to protect his property and his single-family residence from erosion damages, as the edge of the escarpment appears to have been advancing landward. Staff does not dispute these facts. The primary dispute arises from the unauthorized actions of the alleged.

RESOLUTION OF ALLEGED UNAUTHORIZED LAND USES

Title 13-5, Hawaii Administrative Rules:

The Department's Administrative Rules identify a list of uses that "may" be developed in the Conservation District, and also define land use as follows:

> "The placement or erection of any solid material on land if that material remains on the land more than fourteen days.."

Since the shoreline structure qualifies as a land use under the definition of land use, a permit or approval of some type should have been obtained by the alleged.

ISSUES:

Shoreline armoring is one of the most difficult and controversial issues facing the Department of Land and Natural Resources as well as all coastal states in the Nation. The Department developed the Hawaii Coastal Erosion Management Plan (COEMAP), which is a strategic plan to address coastal erosion issues within a framework of beach protection, something that had never been attempted before in this State. The development of this plan was a response to the loss of Hawaii's sandy beaches.

Studies show that nearly 25 percent, or 17 miles of sandy beaches on the island of Oahu have been lost or severely narrowed over the past 70 years due to shoreline armoring. Similar losses have occurred on the island of Maui, and to a lesser degree, on Kauai and Hawaii. Beach loss and/or narrowing have been shown to occur on shorelines experiencing recession, when the shoreline is armored. Sand sources are blocked when shoreline structures are introduced causing erosive forces to act upon the fronting beach rather than the upland area.

The Department, through the Coastal Lands Program (CLP) has identified alternatives to shoreline hardening to address this problem in a more "rational framework". Some of these measures include beach nourishment, retreat, erosion control (i.e., slowing the rate of erosion), abandonment (e.g., allowing the shoreline to recess in order to preserve beach resources), and temporary erosion control measures such as sand bags. The latter, which have proven

Item 2

effective all over the State, could have easily been approved if the alleged had applied to the Department.

The dilemma of shoreline hardening is compounded when an illegal structure is built, even if the structure serves a legitimate erosion control purpose (i.e., stopping shoreline erosion/retreat in order to protect fast land and valuable structures).

Staff recognizes the need for shoreline hardening under an appropriate set circumstances (when important structures/facilities are threatened), but only after a complete and thorough evaluation of the effects of shoreline hardening on the fronting beach, and its effects on littoral processes, public access, adjacent land, etc. If negative environmental/social effects are anticipated by the request to armor - i.e., beach loss, restriction of lateral public access, but an armoring project is needed to protect upland structures/facilities from erosion damages, a process must ensue in which the costs and benefits of different actions are fully and comprehensively considered. There are intermediary measures that can be taken to provide "time" to find longer-term solutions. The most common has been to use temporary sea bags.

However, when people fail to follow process, and choose to take matters into their own hands, government regulators are forced to respond. Inasmuch as it is the goal of the Department to protect and conserve the State's natural resources, including beaches, this type of behavior should be stopped.

It is staff's professional opinion that the alleged never attempted to comply with the permit process. An application was never filed with the Land Division to built a shoreline structure, nor does staff remember speaking with the alleged about the matter prior to the alleged's unauthorized actions. As such, the effects of the alleged's actions on the environment are not fully understood (albeit, significant environmental problems are likely to arise from the subject armoring action since the shoreline appears to be retreating) since there was no objective review of the measure.

The alleged related to staff that it was his impression that he could never receive a permit for a shoreline structure from the DLNR, so he did what he had to do.

If the alleged had contacted staff, staff would have discussed the situation and recommended some course of action, perhaps favorable or unfavorable to the alleged, or perhaps a temporary measure such as sea bags. In any case, the alleged was free to submit an application for shoreline hardening, or some other form of erosion control, as this is an identified land use under Title 13-5, Administrative Rules.

Item 3

If the process had been followed properly, the alleged would have been required to file an application for a shoreline certification, and then applied either to the County of Maui for a shoreline setback variance to construct some type of shore protection on the mauka side of the shoreline, applied for a CDUA for a structure or some other form of erosion control, on public lands, or applied for temporary emergency shore protection.

Staff has given this matter serious consideration and has concluded that the structure must be removed. The actions by the alleged are in direct violation of land use laws and have resulted in the shore being fixed by a permanent structure, thereby, restricting natural processes of erosion on a sandy beach. Moreover, staff believes that the work could adversely affect public use of beach resources in this area.

FINDINGS:

1. That the alleged did if fact, authorize or allow the construction of the structure;

2. That the structure does lie within the State Land Use Conservation District within the public right-of-way;

3. That the alleged was aware of the need for permits but choose to proceed without authorization.

As such, staff recommends as follows:

A. That the Board of Land and Natural Resources finds that the alleged violated the provisions of Title 13-5 Hawaii Administrative Rules, and Chapter 183C, Hawaii Revised Statutes by failing to obtain the appropriate approvals for the construction of a shoreline structure;

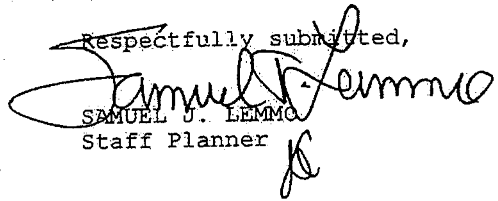
B. That the Board of Land and Natural Resources impose a fine of $2,000 pursuant to Chapter 183C, HRS. In addition, that the Board impose fines to cover all administrative costs totaling $500.00 [$300.00 DOCARE and $200.00 Planning Staff];

C. That the fine and administrative costs shall be paid within thirty (30) days of the date of the Board's action;

D. That the alleged shall remove the shoreline structure within sixty (60) calendar days of the date of the Board's action;

E. Should the alleged not remove the structure within sixty (60) calendar days from the date of the Board's action, fines of $2,000 per day will begin to accrue on the sixty first (61) day, and on every day thereafter, pursuant to Chapter 183C, HRS, until the unauthorized structure is removed; and

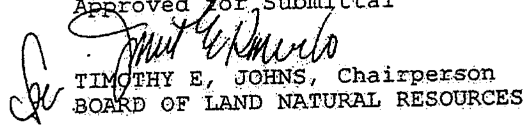
F. That in the event of failure of the alleged to comply with items C, D and E, in addition to a $2,000 per day fine, the matter shall be turned over to the Attorney General for disposition, including all administrative costs.



Respectfully submitted,

SAMUEL J. LEMMO
Staff Planner

Attachments



Approved for Submittal

TIMOTHY E, JOHNS, Chairperson
BOARD OF LAND NATURAL RESOURCES

6

Item 2

John S. Rapacz, Attorney at Law
Attorney ID 4408
POB 2776
Wailuku, HI 96793
(808) 244-6955

Hearing Officer for
The Board of Land and Natural Resources,
State of Hawaii

RECEIVED
LAND DIVISION
2002 JUN 26 P 12:18

BEFORE THE BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAII

In The Matter Of The Contested Case Proceeding, Contested Case Regarding the Board's August 27, 1999 Finding of Unauthorized Construction of a Shoreline Structure at Waialua, Molokai, Seaward of TMK 5-7-001:001, Petitioner George Peabody (Petition filed September 9, 1999.)	**DOCKET NO. 00-03-MO** **4th PRE-HEARING ORDER, Re. Petitioner's WITHDRAWAL OF PETITION for Contested Case, filed on June 12, 2002; TERMINATION OF CONTESTED CASE HEARING PROCESS; Exhibit "A"; CERTIFICATE OF SERVICE.**

4th PRE-HEARING ORDER, Re. Petitioner's Withdrawal of Petition for Contested Case, Filed on June 12, 2002; Termination of Contested Case Hearing Process.

I. BACKGROUND

On June 24, 2002, the Hearing Officer received by fax a copy of Petitioner's notice to the DLNR of withdrawal of his petition for contested case hearing. The notice, attached hereto as Exhibit "A" is dated June 11, 2002 and is marked "Received, Land Division" on Jun 12, 2002 at 11:07 a.m. The submission states in pertinent part, "Cancel the Contested Case Hearing......I withdraw the Contested Case."

The Hearing Officer, not having yet received a copy of Petitioner's withdrawal, filed and served on June 13, 2002 the 3rd Pre-hearing Order regarding the motions hearing scheduled to be held on Molokai on June 26, 2002. In response, Petitioner submitted an email message on June 19, 2002, confirming the prior

(Item 3)

Exhibit D – Peabody's Withdrawal of Contested Case

withdrawal, and in pertinent part stating: "I WITHDRAW THE DEMAND FOR A CONTESTED CASE HEARING THAT I WAS COERICED INTO BY YOU FASCIST STOOGES."

II. ORDER

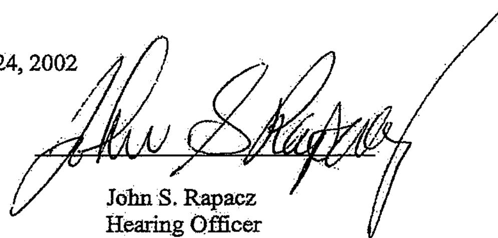
Petitioner's withdrawal has ended the contested case proceeding, and the matter reverts to its status prior to Petitioner's filing of the Petition for the contested case. The Hearing Officer hereby rescinds all orders regarding the remaining scheduled events and deadlines in the contested case hearing process, and all scheduled events and deadlines are cancelled. The Hearing Officer shall take no further action in this matter, unless so instructed by the Board of Land and Natural Resources or its counsel.

SO ORDERED.

END OF

4th PRE-HEARING ORDER, Re. Petitioner's Withdrawal of Petition for Contested Case, filed on June 12, 2002; Termination of hearing

DATED: Wailuku, Maui, Hawaii, June 24, 2002



John S. Rapacz
Hearing Officer

Item 3

ENV. RESPONSE BRANCH ID:808-586-7537 JUN 24'02 9:12 No.002 P.01

Izu/Lemmo/Apz

DLNR Et Al 6-11-02

RECEIVED
2002 JUN 12 A 11:07

Re: MO-99-16

You have NO jurisdiction

You are a FRAUD
You Lie! No Due Process!
Cancell the Contested
Case Hearing. It is
A Sham, Extortion!

I withdraw the Contested Case!

George Peabody
HC01, Box 770 K'Kai
Molokai, HI 96748

Exhibit "A"

(Item)

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was duly served on the following party(ies) by the method stated below, on June 24, 2002,:

George Peabody
HC01 Box 770
Kaunakakai, Molokai, Hawaii 96748

Certified Return Receipt US Mail, (x)
By Hand ( ) Court Jacket ( )

Kathleen S. Ho
Deputy Attorney General
465 So. King St., Room 200
Honolulu, HI 96813

US Mail (x) By Hand ( ) Court Jacket ( )

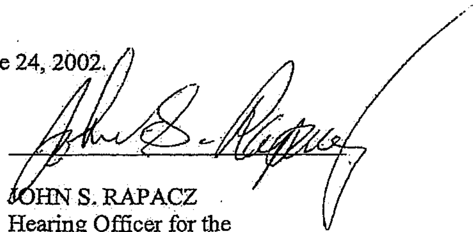
Yvonne Izu
Deputy Attorney General
465 So. King St., Room 300
Honolulu, HI 96813

US Mail (x) By Hand ( ) Court Jacket ( )

Masa Alkire
Staff Planner, DLNR, Land Division
P.O. Box 621
Honolulu, HI 96809

US Mail (x) By Hand ( ) Court Jacket ( )

Dated: Wailuku, Maui, Hawaii, June 24, 2002.



JOHN S. RAPACZ
Hearing Officer for the
Board of Land and Natural Resources

>>> "EditorMolokai Advertiser-News George Peabody" <MolokaiMAN@BasicSP.net> 10/1/2020 9:35 PM >>>
Aloha,.re. Waialua Molokai RFS #20-0000611. CLOSED. 09-30-2020; DLNR
Susan.D.Case@Hawaii.gov re Vio MO 20-32. case CLOSED 09-30-2020

We American Citizens know that the number one responsibility of all government agents, no matter if it's Republican-led or Democratic-led Administration, is to provide for public safety, protect lives, protect private property, protect God Given and Constitutional Rights of American Citizens. But Hawaii DLNR and Maui County SMA agents have abandoned this vital responsibility at the shorelines of Hawaii where private homes are being destroyed by ocean caused erosion of the Aina, and instead respond to such natural weather emergencies of ocean caused erosion to private property with official letters threatening criminal prosecution and huge fines on anyone who, like myself, takes reasonable practical action to save his home, save the Aina, and protect the public beach. But this is USA and our Constitution FOR the USA prohibits such takings by any government Agents.

Do you not understand emergency? I saving my home, saving the aina, saving the public beach, all work done on my property. I did not go to the beach, the ocean king tides took my aina. Interesting, no exculpatory or mitigating information included in complaints, I suppose, from my enemies who have been trying to run me and Susan out of Waialua since 1986. I SHOULD have been able to fix this emergency erosion problem without fear of reprisal, this harassment, abusive, and unconscionable threats from DLNR and SMA. Fortunately, I was able to repair the old seawall that is now protecting my home and my Aina located mauka of the public beach that is still located where it was Approved by Maui County INSPECTORS before and during construction in mid 1980's.

The public beach has restored itself here, contrary to Fletcher & LEMMO'S fraud study conclusion 1995: "All narrowed and lost beaches occur in front of coastal armoring structures that fix the position
of the shoreline [to protect the AINA]. We conclude from this study that using a wall or revetment to fix the position of a shoreline undergoing retreat will cause the narrowing and eventual loss of the adjoining beach. FRAUD and lies by UH Flettcher and DLNR LEMMO. !!

GET A Permit? Ha ! They declared they will never issue a permit for a seawall. YOU CAN APPLY for permit, but waste your time. Yet their recent propaganda states: The most threatened properties fall into an "administrative erosion hazard zone," an area likely to experience erosion [of AINA] hazards and QUALIFY for the emergency permitting process to harden the shoreline."

SMA and DLNR people do NOTHING to protect private property, they do not even protect public parks from erosion like at Molokai Kakahaia County Park used to be 100 feet deep off highway with sand and couple coconut trees, now nearly all gone about 1-foot per year. I complain but County ignores erosion where they should build seawall protect aina and save beach and highway. SMA conservation? KAHAHAIA Park is lost due to ocean erosion that County refused to prevent !!
County SMA Committee has weaponized Conservation by making it a tool of intimidation and threat, EXTORTION!
The ultimate goal of beach climate alarmists is to push socialism. To set strict laws preventing even private citizens from owning land—a cornerstone of liberty. Companies and individuals will be subject to severe control by the government, the exact opposite of our Founding Fathers' intentions. That's why Democrats keep pushing it. Even when the average person could look outside and see their claims are bunk, they still push the FRAUD and lies beach scams by UH Fletcher and DLNR LEMMO !
Their PLAN is to force all shoreline property owners to RETREAT and move elsewhere.

I have learned that people in bureaucracies can be extremely callous and irrational......So, "I'm sorry I'm late. I had to save a life of my home. The successful wall is protecting aina, home, and beach. I have done everything construction wise to comply with the logical intent of SMA regulations, there are no access or negative physical affects to beach, SMA areas, etc.

Democrat Politicians in Hawaii make decisions like SMA which are incomprehensible to us, they are completely devoid of reality, and invite vindictive neighbors to use SMA/DLNR to harass me. Anonymous complaints amplified by SMA committee – giving the oxygen of publicity to the kind of cry-bully activists whom we would probably all do better to ignore because they are so unrepresentative of normal common sense people who would protect their homes from weather-related

Exhibit E – Peabody's Email Response to Subject Violation, Dated October 1, 2020

destruction.

I declare: Build seawall, Save the Aina and Save Beach! Corps of Engineers Approved, and common sense, and responsible management. Instead they want to take my home? Economic murder! Criminalize me ?
Furthermore, I declare RFS #20-0000611 is CLOSED as of 09-30-2020, and, DLNR Susan.D.Case@Hawaii.gov re Vio MO 20-32. case CLOSED 09-30-2020.

George Peabody
10254 Kamehameha V Hwy
Kaunakakai, HI. 96748

PS: If you know how to email Susan D. Case, please forward this message to her as the email her Office gave me has bounced back 5-times. mahalos