

**STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
OFFICE OF CONSERVATION AND COASTAL LANDS
Honolulu, Hawai'i**

May 14, 2021

**Board of Land and Natural Resources
State of Hawai'i
Honolulu, Hawai'i**

REGARDING: Conservation District Enforcement Case, OA 21-24
**Regarding an Alleged Unauthorized Structures Located Along the
Shoreline Within the Conservation District**

BY: Gohana LLC
251 Portlock Road
Honolulu, HI 96825

And

Maunalua Bay Beach Ohana #29
735 Bishop Street, Suite 433
Honolulu, Hawaii 96813

LOCATION: Honolulu, Oahu
TAX MAP KEY: (1) 3-9-002:002 and (1) 3-9-002:029 (Seaward)

SUBZONE: Resource

DESCRIPTION OF AREA:

The subject area is located along the coastline of Maunalua Bay in the Portlock area of eastern Oahu, seaward of TMKs: (1) 3-9-002:002 and (1) 3-9-002:029 (*Figures 1-2*). Lot TMK: (1) 3-9-002:002 is a residential lot owned by Gohana LLC, while lot TMK: (1) 3-9-002:029 is a beach reserve lot, located directly Makai of the subject residential lot. The beach reserve lot is owned by a Hawaii non-profit corporation known as Maunalua Bay Beach Ohana #29, which includes beach front property owners located adjacent to the lot. 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.” In regards to this opinion the Attorney General has stated that, “*Global warming and sea level rise are scientific fact. This opinion emphasizes that Hawaii law plainly*

states that beaches and shoreline features remain our common heritage as part of the public trust when the shoreline moves.”



Figure 1 – Map of Oahu

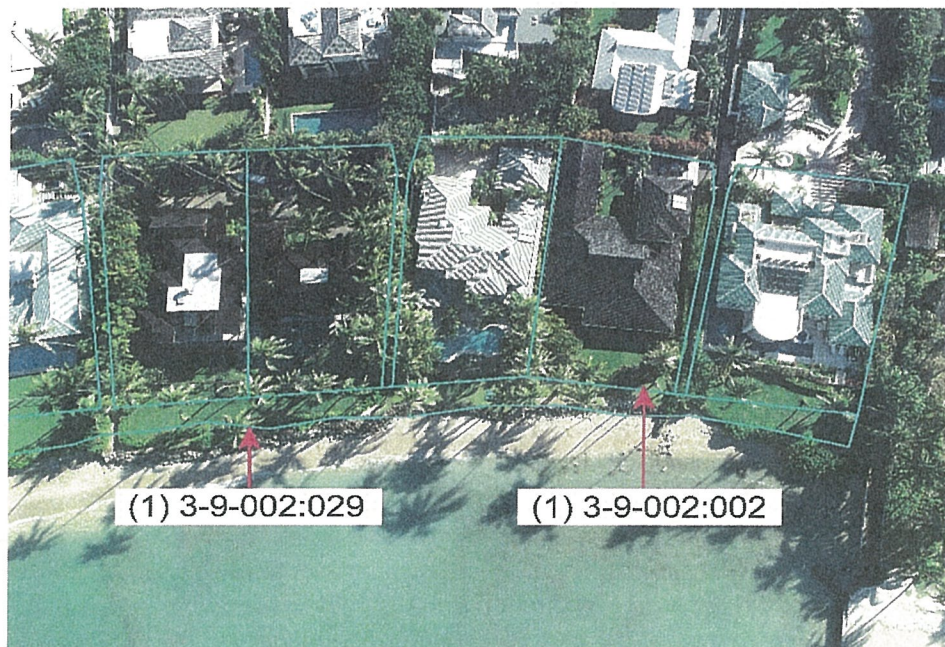


Figure 2 – East Oahu Map Showing Site Location

ALLEGED UNAUTHORIZED LAND USES:

Staff from the Office of Conservation and Coastal Lands visited the subject property on multiple occasions, including on July 21, July 23, September 26, and October 12. On July 21, 2020 OCCL staff reported observing what appeared to be work done in the shoreline area that included the placement of a large quantity of rocks and boulders, as well as objects (i.e. PVC irrigation tubing) projecting out of the erosion scarp into the sandy beach area. (*Figure 3*). On July 23, 2020 OCCL staff reported observing work actively being done to install a rock revetment along the erosion scarp using previously staged rocks and boulders (*Figure 4*). On July 28, 2020 OCCL staff reported that all staged rocks had been installed along the scarp in the form of a completed rock revetment. (*Figure 5*). On September 26, 2020 OCCL staff reported that rocks from the rock revetment had been removed and placed landward of the scarp and that a cement groin feature had been installed on the eastern end of the subject beach area (*Figure 6*). On October 12, 2020 OCCL staff reported that rocks had been reinstalled along scarp to form a completed rock revetment (*Figure 7*).

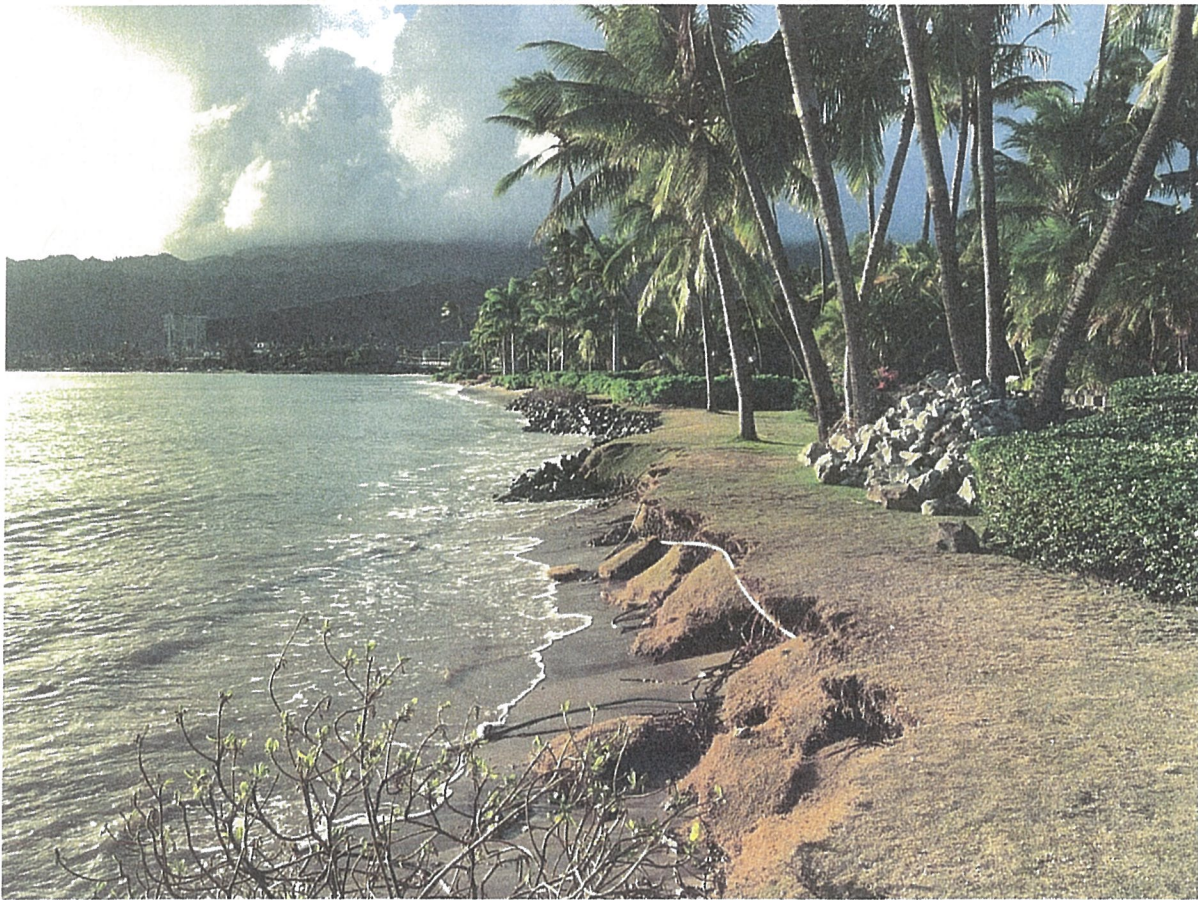


Figure 3 – Staged Rocks Located on Subject Parcels, Facing Northwest



Figure 4 – Rocks Actively Being Placed Along Scarp Located Seaward of Residential Parcel and Located on and Seaward of Subject Beach Reserve Parcel, Facing Southeast



Figure 5 – Completed Revetment Placed Along Scarp Seaward of Residential Parcel and Located on and Seaward of Subject Beach Reserve Parcel, Facing Southeast

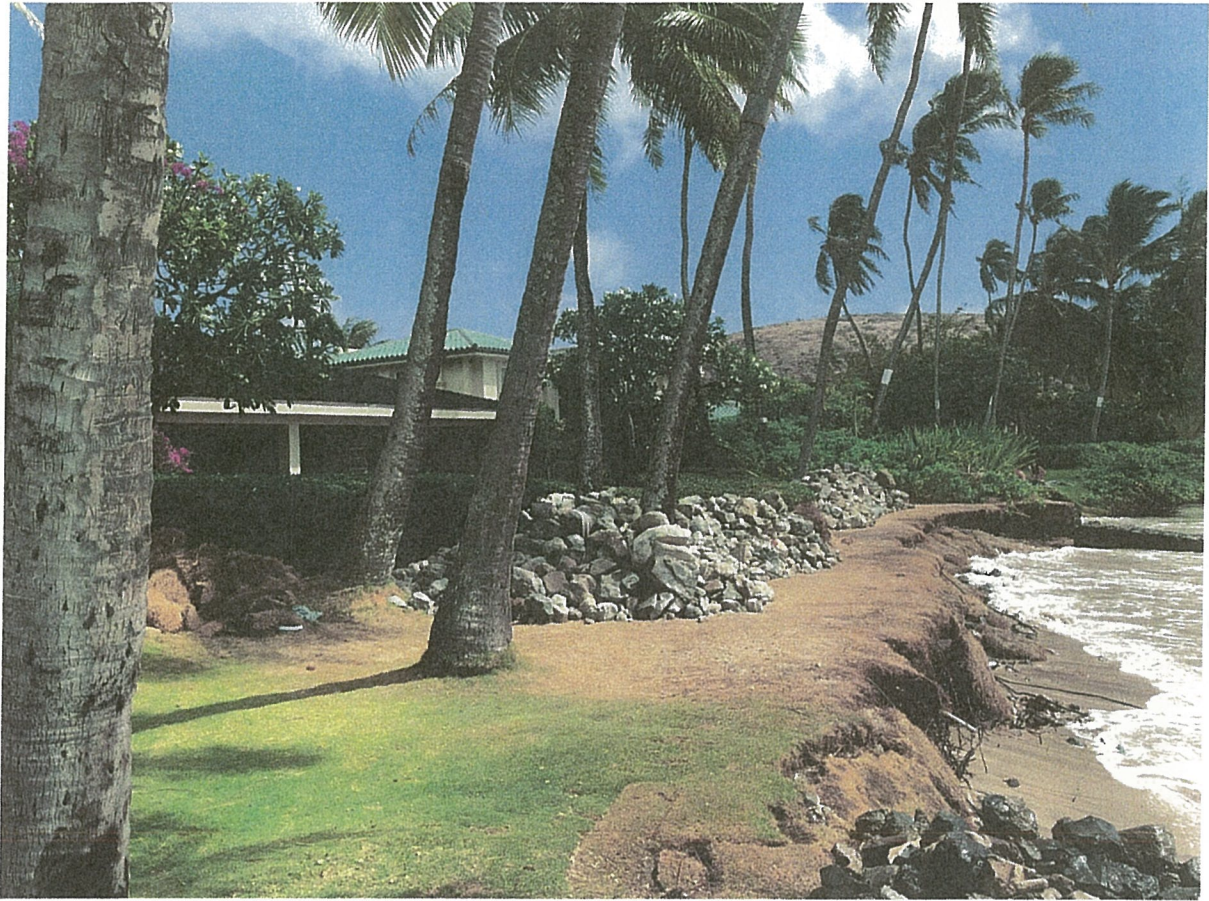


Figure 6 –Rocks Removed and Placed Landward of Scarp, Groin Remains



***Figure 7 –Rocks Placed Along Scarp for the Second Time,
Completing the Rock Revetment and Groin***

A shoreline certification report was finalized for the subject property on November 2, 2020 (*Exhibit B*). The shoreline was certified at the top of the bank as shown in associated images taken on 9/18/2020 (*Exhibit B, associated images*). Note that the certification was based on observations taken of the beach after rocks had been removed (the condition featured in *Figure 6*), and prior to

rocks being replaced on the beach as observed by OCCL staff on October 12, 2020 (the condition featured in *Figure 7*).

PROPERTY HISTORY:

The subject residential lot TMK: (1) 3-9-002:002 is located immediately Mauka of beach reserve lot TMK: (1) 3-9-002:029. The subject beach reserve lot is owned by The Maunalua Bay Beach Ohana 29, a non-profit corporation formed by the owners of lots located directly Mauka of the beach reserve lot. This non-profit corporation was formed for the specific and sole purpose of owning the beach reserve lot. The beach reserve lot was acquired via quitclaim deed from KS on May 6, 2005 (*Exhibit C*).

ALLEGED UNAUTHORIZED LAND USE IN THE CONSERVATION DISTRICT:

The Department and Board of Land and Natural Resources has jurisdiction over the 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, Hawaii Revised Statutes (HRS).

Staff believes the unauthorized land uses occurred within the Conservation District based upon the location of the work seaward of Gohana LLC property and Maunalua Bay Beach Ohana #29 properties. The OCCL believes there is sufficient cause to bring this matter to the Board since it is evident that the unauthorized land uses are within the Conservation District pursuant to the Hawaii 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 a rock revetment within the Conservation District for use as an erosion control structure. Placement of this structure was not authorized under Hawaii 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.

Installation of the rock revetment was not authorized under Hawaii 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 compiled regarding installation of the subject rock revetment, 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 Hawaii 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.

Chronic coastal erosion is widespread across the Hawaiian Islands. Local studies, have shown that 70% of beaches on Kauai‘i, O‘ahu, and Maui are chronically eroding such that shorelines are progressively receding landward¹. Coastal armoring can degrade and even destroy beaches by impounding natural sand resources, thereby impacting the sediment budget of a beach. Shoreline armoring also increases wave turbulence, wave reflection, and wave refraction, which can accelerate coastal erosion both fronting the coastal armoring and on neighboring properties adjacent to the armoring.

AS SUCH, STAFF RECOMMENDS:

That pursuant to Chapter 183C, HRS, the Board find the Landowner of TMK: (1) 3-9-002:002 located along the coastline of Maunalua Bay in the Portlock area of eastern Oahu in violation of Chapter 183-7, HRS and Chapter 13-5-6, HAR, subject to the following:

¹ Fletcher, C.H., Romine, B.M., Genz, A.S., Barbee, M.M., Dyer, Matthew, Anderson, T.R., Lim, S.C., Vitousek, Sean, Bochicchio, Christopher, and Richmond, B.M., 2012, National assessment of shoreline change: Historical shoreline change in the Hawaiian Islands: U.S. Geological Survey Open-File Report 2011–1051, 55 p. (Also available at <http://pubs.usgs.gov/of/2011/1051/>.)

1. The Landowner of TMK: (1) 3-9-002:002 is fined \$15,000 for construction of an unauthorized shoreline structure, pursuant to Chapter 183C-7, HRS;
2. The Landowner is fined an additional \$5,000.00 for administrative costs associated with the subject violation;
3. The Landowner shall pay all fines (total \$20,000) within thirty (30) days of the date of the Board's action;
4. The Landowner shall remove the shoreline protection structure in its entirety within 90 days of the order of the Board;
5. That in the event of failure of the landowners to comply with any order herein, the landowner shall be fined an additional \$15,000.00 per day until the order is complied with; and
6. That in the event of failure of the landowners to comply with any order herein, the matter shall be turned over to the Attorney General for disposition, including all administrative costs.

Respectfully submitted:

Sam Lemmo

Samuel Lemmo, Administrator
Office of Conservation and Coastal Lands

Approved for submittal:

Suzanne D. Case

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

***Exhibit A – Attorney General’s Opinion Regarding Shoreline Retreat,
Released on December 13, 2017***



DEPARTMENT OF THE ATTORNEY GENERAL

DAVID Y. IGE
GOVERNOR

DOUGLAS S. CHIN
ATTORNEY GENERAL

For Immediate Release
December 13, 2017

News Release 2017-176

**ATTORNEY GENERAL OPINES THE PUBLIC INTEREST
REMAINS PROTECTED AS THE SHORELINE RETREATS**

HONOLULU – Hawaii Attorney General Doug Chin issued a formal advisory opinion today stating that when the shoreline migrates landward (or *mauka*) due to erosion or sea level rise, the dividing line between public and private ownership also migrates *mauka*.

Attorney General Chin said, "Global warming and sea level rise are scientific fact. This opinion emphasizes that Hawaii law plainly states that beaches and shoreline features remain our common heritage as part of the public trust when the shoreline moves."

The opinion, supported in part by the Hawaii Supreme Court's recent decision in *Gold Coast Neighborhood Association v. State (2017)*, states that "[t]his migration does not give rise to a constitutional claim by the former owner ... this result is not affected by laws relating to the acquisition of real property, [and] the Attorney General does not need to give prior approval in connection with such land." The opinion further provides that the Board of Land and Natural Resources should charge former owners fair market value in return for an easement interest in the land.

The opinion was issued as a result of a request for advice from Suzanne Case, Chair of the Board of Land and Natural Resources about the Land Board'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.

Attorney General Opinion 2017-01 is attached.

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DAVID Y. IGE
GOVERNOR



DOUGLAS S. CHIN
ATTORNEY GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
425 Queen Street
Honolulu, Hawaii 96813

RUSSELL A. SUZUKI
FIRST DEPUTY ATTORNEY
GENERAL

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 ANSWERS¹

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.

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"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 "evinced 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

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.

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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 trust⁴ 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,

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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 Hawai'i 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.

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

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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'aina⁶ 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).

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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 Hawai'i.

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

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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

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

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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.

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

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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.

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[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

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

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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.

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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

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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.

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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-existing 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

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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

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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 Env'tl. 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

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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

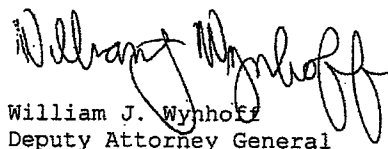
For these reasons, we conclude that the State owns additional public land resulting when the shoreline has migrated landward or mauka due to erosion or sea level rise, that this migration does not give rise to a constitutional claim by the former owner, that this result is not affected by laws relating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

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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. Wynnhoff
Deputy Attorney General

APPROVED:

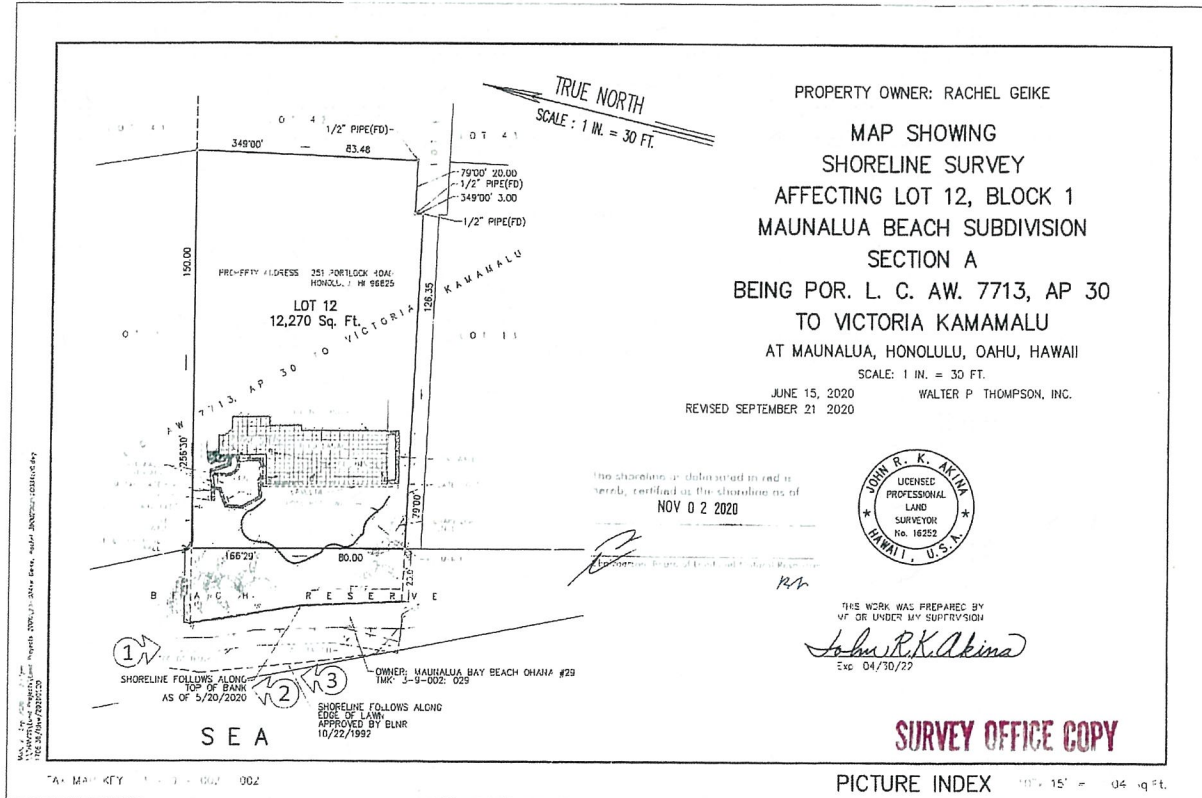


Douglas S. Chin
Attorney General

WJW:w

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**Exhibit B – Shoreline Certification of Subject Property
Finalized on November 1, 2020**



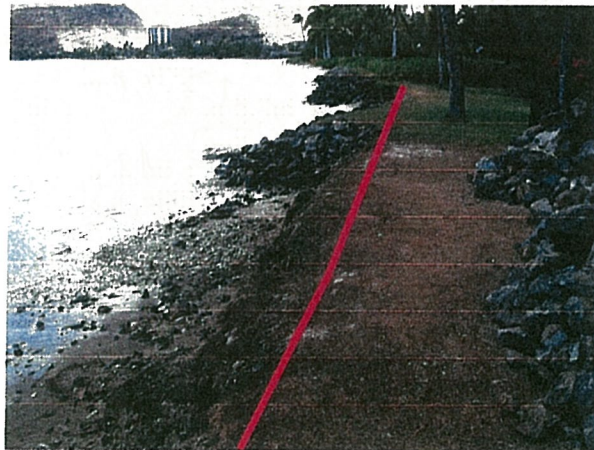


September 21, 2020

Shoreline Certification
Tax Map Key: 3-9-002: 002
Maunalua, Honolulu, Oahu, Hawaii



Picture 1: Facing south. Taken 9/18/2020



Picture 2: Facing north. Taken 9/18/2020

720 IWILEI RD. • SUITE 425 • P. O. BOX 3351 • HONOLULU, HI 96801 • PHONE: (808) 536-2705
WWW.WALTERPTHOMPSON.COM



Picture 3: Facing north. Taken 9/18/2020

**Exhibit C – Documentation of Land Acquisition Regarding
the Subject Beach Reserve TMK: (1) 3-9-002-029**

✓
670



R-369 STATE OF HAWAII
BUREAU OF CONVEYANCES
RECORDED
MAY 06, 2005 06:01 AM
Doc No(s) 2005-090885



By CARL T. WATANABE
REGISTRAR OF CONVEYANCES

CONVEYANCE TAX: \$1.00

40 2/25 Z6

LAND COURT SYSTEM

REGULAR SYSTEM

AFTER RECORDATION, RETURN BY MAIL[XX] PICKUP[] G:\Client
Files\Maunaloa Bay Beach Ohana\DEED MBBO 29 4-13-2005.wpd

PS 2

Kamehameha Schools
P.O. Box 3466
Honolulu, Hawaii 96801

354366A
TGCH 200522081
TGES A5-101-1166
BARBARA PAULO

This Document contains 40 pages.

Tax Map Key No. (1) 3-9-002-029

**QUITCLAIM DEED WITH COVENANTS;
AGREEMENT AND LIEN**

KNOW BY ALL MEN THESE PRESENTS:

That DIANE JOYCE PLOTTS, ROBERT KALANI UICHI KIHUNE,
JAMES DOUGLAS KEAHOE ING, CONSTANCE HEE LAU and CHARLES NAINOA
THOMPSON, as Trustees of the Estate of Bernice Pauahi Bishop,
whose post office address is 567 South King Street, Kawaiahao
Plaza, Suite 200, Honolulu, Hawaii 96813 ("Grantor"), in
consideration of TEN AND NO/100 UNITED STATES DOLLARS (U.S.
\$10.00) and other valuable consideration paid by MAUNALUA BAY
BEACH OHANA #29, a Hawaii non-profit corporation, having its
address at 735 Bishop Street, Suite 433, Honolulu, Hawaii 96813
("Grantee"), receipt whereof is hereby acknowledged, does hereby
remise, release and forever quitclaim all of that certain real
property more particularly described in Exhibit "A" attached
hereto and incorporated herein by this reference, together with
all sea walls and other improvements located thereon

Jeffrey S. Grad
Attorney At Law
A Law Corporation

A 000825

EXHIBIT "G"

("Property"), unto Grantee, as Tenant in Severalty, in fee simple.

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

TO HAVE AND TO HOLD the same, together with all rights, easements, privileges and appurtenances thereon and thereunto belonging or appertaining or held and enjoyed therewith, unto Grantee, absolutely and forever, according to the tenancy set forth hereinabove, forever.

AND Grantee acknowledges and agrees that this conveyance is "AS IS, WHERE IS," and Grantor has not made and does not make any warranties or representations of any kind, expressed or implied, as to Grantor's title in or to the Property or any other property or rights quitclaimed hereby, as to the conditions, merchantability or state of repair of the Property or any other property or rights quitclaimed hereby, or fitness of the Property or any other property or rights quitclaimed hereby, for any particular purpose;

AND Grantee hereby acknowledges that Grantor is not responsible for any latent defects, hidden defects or defects which time may reveal with respect to said Property;

AND Grantee, Grantee's successors, assigns, agents and representatives, generally, fully completely and unconditionally, absolutely and irrevocably agree to indemnify, defend and hold harmless, and to release, acquit and forever discharge Grantor and its trustees, officers, directors, attorneys, agents, affiliates, employees, subsidiaries, divisions, representatives, successors and assigns, of and from any and all claims, demands, causes of actions, obligations, damages and liabilities of every kind and nature whatsoever, in law, equity or otherwise, known or unknown, suspected or unsuspected, disclosed or undisclosed, contingent or matured, asserted or unasserted (collectively, "Claims"), which Grantee or any other person may have, arising out of or relating to (i) the Property or any other property or rights quitclaimed hereby, (ii) the use or improvement of the Property for any purpose inconsistent with land use or other laws, ordinances and regulations applicable to the Property, (iii) any breach of Grantee's covenant regarding public use of the Property, and (iv) any failure by Grantor to enforce any provisions of this Deed (but excluding any Claims which accrued prior to the recordation of this Deed);

AND Grantor hereby reserves easements in the Property for access, electrical, gas and other utility purposes and for sewer, drainage and water facilities over, under, along, across

and through such Property, together with the right to grant to the State of Hawaii, City and County of Honolulu, Board of Water Supply of the City and County of Honolulu or any other appropriate governmental agency or to any public utility or other corporation or to any entity or individual, easements for such purposes over, under, across, along and through the Property, provided, however, that (1) such easement rights must be exercised in such manner as not to interfere unreasonably with the use of such Property by the owners thereof and those claiming by, through or under such owners; and (2) in connection with the installation, maintenance or repair of any facilities pursuant to any of said easements, the Property shall be promptly restored by and at the expense of the person owning and exercising such easement rights to the condition of the Property immediately prior to the exercise thereof;

AND the Grantee hereby agrees that the Property shall not, without Grantor's prior written consent, be further subdivided or consolidated and resubdivided so as to create any additional lots used for residential purposes; provided, however, that the Property or portions thereof may be consolidated with the residential lots and beach access lots immediately abutting the Property and which are listed in Exhibit "B" attached hereto and incorporated herein by this reference ("Abutting Lots"), and thereafter resubdivided to enlarge such Abutting Lots (Grantee hereby acknowledging that Grantor makes no representations, warranties or assurances with respect to such consolidation or resubdivision); and provided further, that the restrictions set forth herein shall not apply to any subdivision, consolidation, or resubdivision required to effect a public use or purpose, such as water or sewer line easements;

AND Grantee hereby acknowledges that its members and such members' respective predecessors-in-interest, exclusive of Grantor, have, upon acquisition of the Abutting Lots, been in continuous possession and made use of the Property described in Exhibit "A" and therefore: (1) Grantee is fully aware of any past or present conditions existing on the Property; (2) Grantee has conducted or has been allowed to conduct a full visual inspection of the Property, and has not been denied reasonable access to any portion of the Property; (3) Grantee has investigated to Grantee's own satisfaction the condition of the soil, water, groundwater and any structures on the Property, and any equipment or material stored on the Property; (4) Grantee's review and investigation of the condition of the Property has included consideration of the applicability and effect of all applicable laws, including hazardous materials laws; (5) Grantee acknowledges that Grantor has no liability or responsibility for any improvements currently located on the Property, including, but not limited to, any presently existing seawalls, and Grantor shall have no obligation for maintaining such seawalls or other improvements nor for making any repairs thereto; and (6) Grantee

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A 000827

accepts the Property in its current condition, but disclaims any obligation to maintain, repair or replace any existing seawalls comprising the Property.

AND Grantee hereby agrees that part of the consideration paid by Grantee to Grantor for the conveyance of the Property, includes the provisions of the Agreement and Lien attached hereto and made a part hereof as Exhibit "C", which are incorporated herein by reference as if fully set forth herein.

AND Grantee and its members acknowledge that Grantor's intent in conveying the Property to Grantee includes preserving the status quo regarding current public rights and uses of the Property, and therefore Grantee and its members hereby covenant that the Property which is currently being used by the public for access, customary beach activities and related recreational and community purposes, may continue to be used for such purposes in perpetuity (the "Permitted Uses"), but subject to reasonable rules established by Grantee and its members to ensure that the public does not unreasonably interfere with the use and enjoyment of the Property by Grantee's members ("Rules"); as long as the Rules do not circumvent the Permitted Uses. Grantee is not required to permit any activities which alter the above-referenced status quo. Grantee understands that no improvements are required to be provided, modified or removed in order to satisfy the covenants contained in this paragraph.

Any dispute regarding the Rules which cannot be resolved by mutual agreement, shall be submitted to binding arbitration before one neutral arbitrator agreed to by the parties within thirty (30) days following notice from the party requesting arbitration of the dispute. If the parties are unable to agree upon an arbitrator, then the arbitrator shall be selected under the Arbitration Rules, Procedures and Protocols of Dispute Prevention & Resolution, Inc., or a similar organization in effect at the time ("DPR's Rules"). The decision of the arbitrator shall be final and binding on both parties, their respective legal representatives, successors and assigns, and judgment may be entered thereon in an appropriate court of law pursuant to Hawaii Revised Statutes Chapter 658A, as amended ("Chapter 658A"). The parties each shall pay one-half (2) of the arbitrator's fees, and the dispute resolution organization's charges. The parties agree that the arbitrator shall have the authority to award attorneys' fees and costs, and if the arbitrator decides not to award attorneys' fees and costs, the parties shall each bear its own expenses of arbitration, including their own attorneys' fees and costs. Notwithstanding any provision contain in DPR's Rules or Chapter 658A, the parties and the arbitrator shall be bound by the following: (a) the arbitrator shall not have the authority to determine an award of punitive damages or other exemplary relief and the parties waive any right to seek the same, or (b) the arbitrator shall not have

the authority to determine any dispute involving other parties, (c) the parties waive any right to discovery and each party agrees that it shall not request that the arbitrator issue a subpoena to compel a deposition or other discovery, and (d) the arbitrator shall issue its decision based on submissions by the parties without the need for a hearing. In furtherance of the foregoing, each party hereby voluntarily and knowingly waives and relinquishes any right to a trial by jury in any action, proceeding or counterclaim brought by any party against the other as to any dispute regarding the Rules.

AND this instrument has been approved or executed by the Trustees of the Estate of Bernice Pauahi Bishop in their fiduciary capacities as said Trustees, and not in their individual capacities. No personal liability or obligations under this instrument shall be imposed or assessed against said Trustees in their individual capacities;

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

The covenants of Grantee and its members contained herein shall run with the Property, shall be jointly and severally binding upon the person, or persons identified above as "Grantee" and Grantee's members, and their respective successors and assigns, and shall run in favor of and inure to the benefit of the person or persons identified above as "Grantor" and Grantor's successors in trust and assigns. The covenants of Grantee and its members regarding the Permitted Uses of the Property shall also run in favor of and inure to the benefit of the public, including without limitation, the Grantee, the Portlock Community Association, the City and County of Honolulu and the State of Hawaii. Notwithstanding the foregoing, (a) the covenants of Grantee contained herein shall terminate as to any portion of the Property that is conveyed in any condemnation action, provided that such conveyance shall not operate to release Grantee from any claims with respect thereto and which accrued prior to such conveyance, and further provided that such termination of Grantee's covenants shall not affect the remainder of the Property not so conveyed, and (b) upon any other conveyance of fee title to the Property, if the grantee expressly assumes Grantee's covenants hereunder, then the grantor shall be released of liability therefor (except for claims which accrued

prior to such conveyance), from and after the date of such conveyance.

The use herein of the singular in reference to a party shall include the plural and the use of a pronoun of any gender shall include all genders. The term "person" shall include an individual, partnership, association or corporation, as the context may require.

[The remainder of this page is intentionally left blank - signature page follows]

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A 000830

IN WITNESS WHEREOF, the parties hereto have executed
these presents this ____ day of APR 22 2005, 2005.

TRUSTEES OF THE ESTATE OF
BERNICE PAUHI BISHOP, as
aforesaid

Approved as to Content,
Authority,
and Compliance with KS Policy:

Philip Nere
Manager

JB, edur
Vice President/Director

Approved as to Form:

USS
Legal Group

K. P. M.
Retained Counsel

By *Louanne K. L. Kam*
Name: LOUANNE KAM, Director
Their Attorney-in-Fact

By *Dana K. N. Jao*
Name: DANA SATO, Sr. Counsel
Their Attorney-in-Fact

Grantor

MAUNALUA BAY BEACH OHANA #29, a
Hawaii non-profit corporation

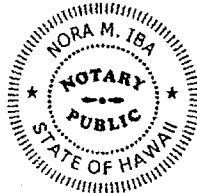
By: Bruce Rubin
Its Secretary

By: _____
Its _____

"Grantee"

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

On this 26th day of April, 2005, before me personally
appeared Bruce Rubin and _____
to me personally known, who, being by me duly sworn or affirmed,
did say that such person(s) executed the foregoing instrument as
the free act and deed of such person(s), and if applicable, in
the capacity shown, having been duly authorized to execute such
instrument in such capacity.



Nora M. Iba, Notary Public
above mentioned State Nora M. Iba
My Commission expires: 10/12/07

-7a-

A 000832

9

MAUNALUA BAY BEACH OHANA #29, a
Hawaii non-profit corporation

By:

Mary Chin Dang

MARY CHIN DANG, as Trustee under
that unrecorded Mary Chin Dang 1998
Qualified Personal Residence Trust

"Owner of 7005 Kalaniana'ole Hwy."

ASSOCIATED HOLDINGS LIMITED, a
Turks & Caicos Islands corporation

By _____
Its

By _____
Its

"Owner of 7015 Kalaniana'ole Hwy."

JAMES T. LEAVITT, JR.

HAI LUEN C. LEAVITT

"Owners of 7017 Kalaniana'ole Hwy.
and 201 Portlock Rd."

PORTLOCK PROPERTIES LLC, a Nevada
company

By _____
Its

"Owner of 207 Portlock Rd."

-E-

A 000833

MAUNALUA BAY BEACH OHANA #29, a
Hawaii non-profit corporation

By:


MARY CHIN DANG, as Trustee under
that unrecorded Mary Chin Dang 1998
Qualified Personal Residence Trust

"Owner of 7005 Kalaniana'ole Hwy."

ASSOCIATED HOLDINGS LIMITED, a
Turks & Caicos Islands corporation

By Gloria Gam
ICS Vice President

By _____
Its _____

"Owner of 7015 Kalanianaʻole Hwy."

 JAMES T. LEAVITT, JR.

JAMES T. LEAVITT, JR.

Hai Luen C. Leavitt
HAI LUEN C. LEAVITT

HAI LUEN C. LEAVITT

"Owners of 7017 Kalaniana'ole Hwy.
and 201 Portlock Rd."

PORTLOCK PROPERTIES LLC, a Nevada
company

By B. D. [Signature]
Its Member

"Owner of 207 Portlock Rd."

A 000834

KOKO HEAD HOLDINGS, LLC, a Nevada
limited liability company

By Bruce P. [Signature]
Its Member

"Owner of 219 A Portlock Rd."

POP INTERNATIONAL CORPORATION, Co.
Ltd., a Japan corporation

By Takeshi Tanaka
Its PRESIDENT
TAKESHI TANAKA

By _____
Its _____

PI CO., LTD., a Japan corporation

By Takeshi Tanaka
Its PRESIDENT
TAKESHI - TANAKA

By _____
Its _____

GALERIE DE POP CO., LTD., a Japan corporation

corporation

By Tanaka
Its PRESIDENT
TAKEHI. TANAKA

By _____
Its _____

A 000835

POP CO., LTD., a Japan corporation

By Tanaka
Its PRESIDENT
TAKESHI. TANAKA

By _____
Its _____

~~POP GROUP CORPORATION CO., LTD., a~~
~~Japan corporation~~

By _____
Its _____

By _____
Its _____

U.P. COMPANY, CO., LTD., a Japan corporation

By Tanaka
Its PRESIDENT
TAKESHI. TANAKA

By _____
Its _____

"Owners of 227 A Portlock Rd. and
237 Portlock Rd."

ROBERT S. WELLS

CHRISTA B. WELLS

"Owners of 245 Portlock Rd."

A 000836

POP CO., LTD., a Japan corporation

By _____
Its

By _____
Its

POP GROUP CORPORATION CO., LTD., a
Japan corporation

By _____
Its


By _____
Its

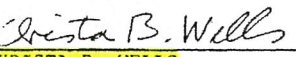
U.P. COMPANY, CO., LTD., a Japan
corporation

By _____
Its

By _____
Its

"Owners of 227 A Portlock Rd. and
237 Portlock Rd."


ROBERT S. WELLS


CHRISTA B. WELLS

"Owners of 245 Portlock Rd."

SIMONS HAWAII LLC., a Delaware
limited liability corporation

By *Sandra M. Simons*
Its *Manager*

"Owner of 251 Portlock Rd."

DWB 1 LLC, a Hawaii limited
liability company

By _____
Its

"Owner of 255 Portlock Rd."

Grantee

-11-

A 000838


14

SIMONS HAWAII LLC., a Delaware
limited liability corporation

By _____
Its

"Owner of 251 Portlock Rd."

DWB 1 LLC, a Hawaii limited
liability company

By  DwB LLC
its Managing Member

"Owner of 255 Portlock Rd."

Grantee

-11-

A 000839

15

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

On this 22 day of April, 2005, before me personally appeared LOUANNE KAM, Director and DANA SATO, Sr. Counsel, to me personally known, who being by me duly sworn, did say that they are two of the attorneys-in-fact for DIANE JOYCE PLOTTS, ROBERT KALANI UICHI KIHUNE, JAMES DOUGLAS KEAHOHU ING, CONSTANCE HEE LAU and CHARLES NAINOA THOMPSON, Trustees of the Estate of Bernice Pauahi Bishop, duly appointed under Limited Power of Attorney and Revocation of All Previous Powers of Attorney effective February 1, 2004, recorded in the Bureau of Conveyances of the State of Hawaii as Document Nos. 2004-012327 and 2004-012328 and in the Office of the Assistant Registrar of the Land Court of the State of Hawaii as Document Nos. 3057130 and 3057131; and that the foregoing instrument was executed in the name and on behalf of DIANE JOYCE PLOTTS, ROBERT KALANI UICHI KIHUNE, JAMES DOUGLAS KEAHOHU ING, CONSTANCE HEE LAU and CHARLES NAINOA THOMPSON, Trustees of the Estate of Bernice Pauahi Bishop, by such persons in their capacities as attorneys-in-fact; and they acknowledged the instrument to be the free act and deed of the Trustees of the Estate of Bernice Pauahi Bishop, as aforesaid.



Lori Kaneshiro
Notary Public, in and for said
State

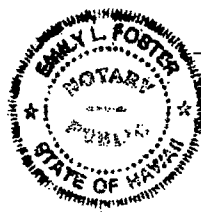
LORI KANESHIRO
Notary Public, State of Hawaii
My commission expires September 14, 2007


(Print/Type Name)

My Commission Expires: _____

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

On this 10th day of April, 2005, before me personally appeared MARY CHIN DANG, as Trustee under that unrecorded Mary Chin Dang 1998 Qualified Personal Residence Trust, to me known to be such person described in and who executed the foregoing instrument and acknowledged that such person executed the same as such person's free act and deed as Trustee aforesaid.




Emily L. Foster, Notary Public,
 above mentioned State
 My Commission expires: February 14, 2007

(ASSOCIATED HOLDINGS)

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

On this ^{4th} day of April, 2005, before me personally appeared Alicia Yad and to me personally known, who, being by me duly sworn or affirmed, did say that such person(s) executed the foregoing instrument as the free act and deed of such person(s), and if applicable, in the capacity shown, having been duly authorized to execute such instrument in such capacity.

Greg S. Honda, Notary Public,
above mentioned State

My Commission expires: 7/20/2007



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

On this 4th day of April, 2005, before me personally appeared JAMES T. LEAVITT, JR. and HAI LUEN C. LEAVITT, known to me to be such persons described in and who executed the foregoing instrument and acknowledged that such persons executed the same as such persons' free act and deed.



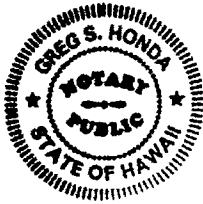
Greg S. Stone, Notary Public,
above mentioned State

My Commission expires: 7/20/2007

(PORTLOCK PROPERTIES)

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

On this 4th day of April, 2005, before me personally appeared Bruce Robb and to me personally known, who, being by me duly sworn or affirmed, did say that such person(s) executed the foregoing instrument as the free act and deed of such person(s), and if applicable, in the capacity shown, having been duly authorized to execute such instrument in such capacity.



Erin S. Horne, Notary Public,
above mentioned State

My Commission expires: 7/20/2007

(KOKO HEAD HOLDINGS)

STATE OF HAWAII

CITY AND COUNTY OF HONOLULU

)
) SS.
)

On this 4th day of Apr, 2005, before me personally appeared Bruce Robin and _____ to me personally known, who, being by me duly sworn or affirmed, did say that such person(s) executed the foregoing instrument as the free act and deed of such person(s), and if applicable, in the capacity shown, having been duly authorized to execute such instrument in such capacity.



Greg S. Honda, Notary Public,
above mentioned State

My Commission expires: 7/20/2007

JAPAN)
CITY OF TOKYO) SS:
EMBASSY OF THE UNITED STATES OF AMERICA)

Yoshiaki Cotoh
Consular Associate

Before me, _____, Consul of the
United States of America at Tokyo, Japan, duly commissioned
and qualified, personally appeared

**** Takeshi TANAKA ****

who, being duly sworn, deposes and says:

That he/she is the President

of POP INTERNATIONAL CORPORATION, Co., Ltd.,

and that the foregoing instrument was signed in behalf of
said corporation by authority of its board of directors and
that said officer acknowledged said instrument to be the
free act and deed of said corporation.

IN WITNESS WHEREOF I have hereunto set my hand and official
seal this _____ day of _____, A.D. APR 12 2005

Yoshiaki Cotoh
Consular Associate

Consul of the United States of America at Tokyo, Japan, duly
commissioned and qualified

A 000846

JAPAN)
CITY OF TOKYO) SS:
EMBASSY OF THE UNITED STATES OF AMERICA)

Carl Watson

Before me, American Vice Consul, Consul of the
United States of America at Tokyo, Japan, duly commissioned
and qualified, personally appeared

TAKESHI. TANAKA


who, being duly sworn, deposes and says:

That he/she is the president
of PL. CO, LTD

and that the foregoing instrument was signed in behalf of
said corporation by authority of its board of directors and
that said officer acknowledged said instrument to be the
free act and deed of said corporation.

IN WITNESS WHEREOF I have hereunto set my hand and official
seal this _____ day of _____, A.D. APR 14 2005

Carl Watson

 American Vice Consul

Consul of the United States of America at Tokyo, Japan, duly
commissioned and qualified

A 000847

JAPAN)
CITY OF TOKYO) SS:
EMBASSY OF THE UNITED STATES OF AMERICA)

Carl Watson
Before me, American Vice Consul, Consul of the
United States of America at Tokyo, Japan, duly commissioned
and qualified, personally appeared

TAKESHI. TANAKA
who, being duly sworn, deposes and says:

That he/she is the president
of GALERIE DE POP. COLTD

and that the foregoing instrument was signed in behalf of
said corporation by authority of its board of directors and
that said officer acknowledged said instrument to be the
free act and deed of said corporation.

IN WITNESS WHEREOF I have hereunto set my hand and official
seal this _____ day of _____, A.D. APR 14 2005.

Carl Watson
American Vice Consul
Consul of the United States of America at Tokyo, Japan, duly
commissioned and qualified

A 000848

JAPAN)
CITY OF TOKYO) SS:
EMBASSY OF THE UNITED STATES OF AMERICA)

Carl Watson

Before me, American Vice Consul, Consul of the
United States of America at Tokyo, Japan, duly commissioned
and qualified, personally appeared

TAKESHI. TANAKA

who, being duly sworn, deposes and says:

That he/she is the president
of P.O.P CO LTD

and that the foregoing instrument was signed in behalf of
said corporation by authority of its board of directors and
that said officer acknowledged said instrument to be the
free act and deed of said corporation.

IN WITNESS WHEREOF I have hereunto set my hand and official
seal this _____ day of _____, A.D. APR 14 2015.

Carl Watson

Carl Watson
American Vice Consul
Consul of the United States of America at Tokyo, Japan, duly
commissioned and qualified

A 000849

JAPAN)
CITY OF TOKYO) SS:
EMBASSY OF THE UNITED STATES OF AMERICA)

Carl Watson

American Vice Consul

Before me, _____, Consul of the
United States of America at Tokyo, Japan, duly commissioned
and qualified, personally appeared

TAKESHI. TANAKA

who, being duly sworn, deposes and says:

That he/she is the

president

of


V.P COMPANY CO. LTD

and that the foregoing instrument was signed in behalf of
said corporation by authority of its board of directors and
that said officer acknowledged said instrument to be the
free act and deed of said corporation.

IN WITNESS WHEREOF I have hereunto set my hand and official
seal this _____ day of _____, A.D. APR 14 2005.

Carl Watson

American Vice Consul



Consul of the United States of America at Tokyo, Japan, duly
commissioned and qualified

A 000850

24

(SIMONS HAWAII)

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

On this 7 day of April, 2005, before me personally appeared Janeen M. Simms and to me personally known, who, being by me duly sworn or affirmed, did say that such person(s) executing the foregoing instrument as the free act and deed of such person(s), and if applicable, in the capacity shown, having been duly authorized to execute such instrument in such capacity.

STACIE L. IKE, Notary Public,
above mentioned State

My Commission expires: 11606

(DWB 1 LLC)

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

On this 4th day of April, 2005, before me personally appeared Daniel Jay Roberts and to me personally known, who, being by me duly sworn or affirmed, did say that such person(s) executed the foregoing instrument as the free act and deed of such person(s), and if applicable, in the capacity shown, having been duly authorized to execute such instrument in such capacity.



Greg S. Honda, Notary Public,
above mentioned State

My Commission expires: 7/30/2007

A 000853

EXHIBIT "A"

Beach Reserve A

Tax Map Key: (1) 3-9-002-029

Real property situated at Maunalua, Koolaupoko, Oahu, Hawaii

Being a portion of the Beach Reserve of Maunalua Beach Subdivision, Section A, being also portion of Royal Patent 4475, Land Commission Award 7713, Apana 30 to Victoria Kamamalu and more particularly described as follows:

FIRST: Beginning at the most northerly corner of this parcel of land, being the most westerly corner of Lot 3 of Maunalua Beach Subdivision, Section A, the coordinates of said point of beginning referred to Government Survey Triangulation Station "KOKO HEAD 3" being 6,042.04 feet North and 2,094.35 feet West and thence running by azimuths measured clockwise from True South:

- | | | | |
|----|--------------|--------|--|
| 1. | 330° 30' | 87.70 | feet along- Lot 3 of Maunalua Beach Subdivision, Section A; |
| 2. | 328° 49' 30" | 172.64 | feet along Lot 4, Lane A, and Lot 5 of Maunalua Beach Subdivision, Section A; |
| 3. | 334° 30' | 451.37 | feet along Lot 6, Lane B, Lots 7 and 8, Lane C, Lots 9 and 10, Lane D and Lot 11 of Maunalua Beach Subdivision, Section A; |
| 4. | 346° 29' | 179.10 | feet along Lot 12, Lane E, and Lot 13 of Maunalua Beach Subdivision, Section A; |
| 5. | 79° 00' | 20.00 | feet along the remainder of said Beach Reserve to the High Water Mark; |

6. Thence along said High Water Mark, the direct azimuth and distance between points on said High Water Mark being:

155° 33' 09" 875.93 feet;

A 000854

7. 228' 10' 18.00 feet along Lot 2-B of Maunalua Beach Subdivision, Section A, to the point of beginning.

SECOND: Hereby conveying the foregoing and any other right, title or interest of Grantor in the following to the extent that such is not included in the foregoing description:

1. Any interest of Grantor in lands and improvements included in Tax Map Key No. (1) 3-9-002-029;

2. Any interest of Grantor in lands and improvements located between (a) the east (makai) boundaries of the following lots within the Maunalua Beach Subdivision, Section A: Lots 3 through 13 inclusive, and Lanes A through E, inclusive and (b) the mauka boundary of the State's submerged seaward property.

TOGETHER WITH all accreted lands and all rights with respect thereto, including the right to assert the existence of such lands.

SUBJECT, HOWEVER, TO all encumbrances, whether recorded or unrecorded.

END OF EXHIBIT "A"

G:\Client Files\Maunalua Bay Beach Ohana\Beach Reserve A Exhibit A 4-25-2005.wpd

A 000855

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EXHIBIT "B"

All of those certain parcels of land (being portion of the land(s) described in and covered by Royal Patent 4475, Land Commission Award 7713, Apana 30 to v. Kamamalu) hereafter identified, situate, lying and being at Maunaloa, City and County of Honolulu, State of Hawaii, and comprising portions of Block 1, Section A of the Maunaloa Beach Subdivision as shown on Bishop Estate Map 1227 -C filed in the Office of Trustees of the Estate of Bernice Pauahi Bishop, Deceased:

Lot Numbers

1-B	7
2-B	8
3	9
3-A	10
4	11
4-A	12
5	13
6	A-E, inclusive

END OF EXHIBIT "B"

EXHIBIT "C"
AGREEMENT AND LIEN

1. Grantee shall not sell, convey or otherwise transfer any interest in the Property, except as follows:

a. Grantee may convey the fee simple interest in that portion of the Property immediately abutting an Abutting Lot (a "Beach Reserve"), to the owner of said Abutting Lot ("Lot Owner"), upon the following conditions:

(i) The Lot Owner must be a member of Grantee ("Member"), if Grantee legally exists as of the date of the conveyance.

(ii) Such conveyance is made for no consideration other than (aa) reimbursement by the Member of its pro rata share of Grantee's costs and expenses relating to the Property, plus interest at the rate of ten percent (10%) per annum from the date that such costs or expenses were incurred (collectively, the "Costs"), and (bb) if Grantee no longer exists of the date of such conveyance, then a payment equal to the "Membership Fee" (together with interest thereon) which otherwise would have been chargeable in accordance with paragraph 2.a below. The amounts received in lieu of Membership Fees will be used solely for the costs and expenses of owning and maintaining the Property, and for no other purpose.

(iii) The Member expressly agrees in the conveyance document from Grantee to the Member, that the Beach Reserve may continue to be used by the public for access, customary beach activities and related recreational and community purposes, in perpetuity, but subject to reasonable rules established by Grantee as set forth in this Deed, as expressed in paragraph 3.b below.

Failure to satisfy all of the foregoing conditions shall render such sale, transfer or conveyance void.

b. Grantee may convey the Property in fee simple to all Members of Grantee as tenants in common, or to a non-profit entity beneficially owned by all Members ("Entity"), upon the following conditions:

(i) Such conveyance is made for no consideration other than the Costs.

(ii) The Members or the Entity (as the case may be) expressly agrees in the conveyance document from Grantee to the Members or the Entity, that the Property may continue to be

used by the public for access, customary beach activities and related recreational and community purposes, in perpetuity, but subject to reasonable rules established by Grantee, as set forth in this Deed.

Failure to satisfy all of the foregoing conditions shall render such sale, transfer or conveyance void.

2. Any Lot Owner may become a Member after the date of recordation of this Deed, upon satisfaction of the following conditions:

a. The Lot Owner shall pay to Grantee a membership fee of Twenty-Five Thousand and No/100 Dollars (\$25,000.00), together with interest thereon at the rate of ten percent (10%) per annum from the date of recordation of this Deed (the "Membership Fee"). Grantee agrees that the Membership Fee will be used solely for the costs and expenses of owning and maintaining the Property, and for no other purpose.

b. The Lot Owner has recorded or shall record at its sole cost and expense, a Declaration of Covenants covering the Abutting Lot, in the form attached hereto as Exhibit C-1.

3. Except for the conveyances of Beach Reserves to Members or the Entity, as described in Section 1 above, all other sales, transfers or conveyances (including by agreement of sale or condemnation) by Grantee of the Property or any Beach Reserve, or any portion thereof or interest therein, shall be subject to the following conditions:

a. At the time of such sale, transfer or conveyance, Grantee shall pay to Grantor an amount equal to the purchase price, condemnation proceeds and other consideration received by Grantee, less all costs and expenses incurred by Grantee in connection with the Property (the "KS Consideration"); provided, however, that if such conveyance is by condemnation occurring after the seventh (7th) anniversary of the date of recordation of this Deed, then the amount payable by Grantee to Grantor shall be one-half (½) of the KS Consideration. To the extent that Grantee improved the Property, and such improvements were recognized as adding value to the Property by the person or condemning authority acquiring the Property from Grantee, the Grantee may deduct such amount from the KS Consideration. If the condemning authority files an action to acquire all or any portion of the Property, and Grantor is not named as a party in the action, Grantee shall, within thirty (30) days of becoming aware of the filing of the action, notify Grantor in writing of the filing of the action and support any request made by Grantor to intervene in the action. Grantee's support of Grantor's request to intervene in the action shall, at a minimum, include a written

statement to or filing with the court that: (i) Grantor should be allowed to appear, plead and defend with respect to Grantor's interest in the property that is the subject of the action, and (ii) Grantor is, within the meaning of Hawaii Revised Statutes Section 101-21, a person having a claim or interest in the property sought to be condemned, or in the damages for the taking thereof.

b. The grantee in such sale, transfer or conveyance shall expressly agree in the conveyance document from Grantee to such grantee, that the Property or Beach Reserve or portion thereof, which is currently being used by the public for access, customary beach activities and related recreational and community purposes, may continue to be used for such purposes in perpetuity, but subject to reasonable rules established by Grantee as set forth in this Deed. The grantee in such sale is not required to permit any activities which alter the above-referenced status quo, and will not be required to provide, modify or remove any improvements in order to satisfy the covenants contained in this paragraph. In addition, if such grantee owns an Abutting Lot, then the grantee shall have recorded or simultaneously records at its sole cost and expense, a Declaration of Covenants covering the Abutting Lot, in the form attached hereto as Exhibit C-1.

c. In order to secure the obligations set forth in this Agreement, a lien on the Property shall exist in favor of Grantor, which lien shall be prior and superior to all other liens except for real property taxes. The lien may be foreclosed by Grantor in like manner as a mortgage of real property. Any judgment rendered in any action filed by Grantor to collect unpaid sums shall include all costs and expenses incurred by Grantor in connection with such action, including reasonable attorneys' fees. Grantor may bid on the Property at foreclosure, and acquire and hold, lease, mortgage and convey the same. An action to recover a money judgment for unpaid sums shall be maintainable without foreclosing or waiving the lien securing the same. The order of application of payments received from such foreclosure or action shall be as follows: (1) attorneys' fees, costs and other expenses; (2) unpaid amounts due to Grantor hereunder; and (3) the balance, if any, to Grantee. If any deficiency remains after such payments are applied, then Grantee shall be personally liable therefor, together with all costs and expenses (including reasonable attorneys' fees) incurred by Grantor in collecting such deficiency.

4. The provisions of this Agreement shall run with the Property, and shall automatically terminate (i) with respect to a Beach Reserve, upon Grantee's conveyance of the fee simple interest in such Beach Reserve to a Member or the Entity as provided in Section 1, or (ii) with respect to a conveyance

described in Section 3, upon such conveyance and the payment to Grantor of the KS Consideration. Grantor agrees to execute a recordable form of release and discharge of the lien ("**Release**") at the request of Grantee, upon a satisfactory showing by Grantee that all obligations secured by the lien have been satisfied, and upon payment by Grantee to Grantor of a reasonable documentation and review fee, and of all costs of recording the Release.

END OF EXHIBIT "C"

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A 000860

34

WHEREAS, the obligations hereunder are intended to run with the land.

NOW, THEREFORE, for good and valuable consideration, the receipt of which is hereby acknowledged, Declarant hereby declares that Declarant's Property shall hereafter be held, leased, mortgaged, conveyed, used, occupied and improved subject to the following covenants.

1. Declarant acknowledges and agrees that under the Declaration of Protective Provisions described in Exhibit "A" attached to the Deed, KS has an easement for access purposes over Lane _____ described in said Exhibit "A" (the "Lane"), together with the right to grant to the State of Hawaii or the City and County of Honolulu, an easement over the Lane for such purposes. Without limiting or otherwise affecting said right, and in order to preserve public rights and uses of the Lane, Declarant hereby agrees that with respect to Declarant's undivided interest in the Lane, the public may use the Lane for pedestrian and pedestrian-related ingress and egress to the beach in perpetuity (the "Permitted Use"), but subject to reasonable rules established and amended by the owners of the Lane from time to time to ensure that the public does not interfere unreasonably with the use and enjoyment by Declarant of the Property ("Rules"), so long as the Rules do not circumvent the Permitted Use. Declarant understands that no improvements are required to be provided, modified or removed in order to satisfy the covenants contained in this paragraph.

Any dispute regarding the Rules which cannot be resolved by mutual agreement, shall be submitted to binding arbitration before one neutral arbitrator agreed to by the parties within thirty (30) days following notice from the party requesting arbitration of the dispute. If the parties are unable to agree upon an arbitrator, then the arbitrator shall be selected under the Arbitration Rules, Procedures and Protocols of Dispute Prevention & Resolution, Inc., or a similar organization in effect at the time ("DPR's Rules"). The decision of the arbitrator shall be final and binding on both parties, their respective legal representatives, successors and assigns, and judgment may be entered thereon in an appropriate court of law pursuant to Hawaii Revised Statutes Chapter 658A, as amended ("Chapter 658A"). The parties each shall pay one-half (½) of the arbitrator's fees, and the dispute resolution organization's charges. The parties agree that the arbitrator shall have the authority to award attorneys' fees and costs, and if the arbitrator decides not to award attorneys' fees and costs, the parties shall each bear its own expenses of arbitration, including their own attorneys' fees and costs. Notwithstanding any provision contain in DPR's Rules or Chapter 658A, the parties and the arbitrator shall be bound by the following: (a) the

arbitrator shall not have the authority to determine an award of punitive damages or other exemplary relief and the parties waive any right to seek the same, (b) the arbitrator shall not have the authority to determine any dispute involving other parties, (c) the parties waive any right to discovery and each party agrees that it shall not request that the arbitrator issue a subpoena to compel a deposition or other discovery, and (d) the arbitrator shall issue its decision based on submissions by the parties without the need for a hearing. In furtherance of the foregoing, each party hereby voluntarily and knowingly waives and relinquishes any right to a trial by jury in any action, proceeding or counterclaim brought by any party against the other as to any dispute regarding the Rules.

2. Declarant further agrees that Declarant shall use its best efforts to cause the other owners of undivided interests in the Lane to execute declarations of covenants in the same form as this Declaration, and until such declarations are recorded, Declarant agrees to take all actions against such other owners as required to enforce the public's Permitted Use of the Lane, including without limitation, court action.

3. Declarant and its successors, assigns, agents and representatives, generally, fully completely and unconditionally, absolutely and irrevocably agree to indemnify, defend and hold harmless, and to release, acquit and forever discharge KS and its trustees, officers, directors, attorneys, agents, affiliates, employees, subsidiaries, divisions, representatives, successors and assigns, of and from any and all claims, demands, causes of actions, obligations, damages and liabilities of every kind and nature whatsoever, in law, equity or otherwise, known or unknown, suspected or unsuspected, disclosed or undisclosed, contingent or matured, asserted or unasserted, which Declarant or any other person may have, arising out of or relating to (i) any breach of Declarant's covenants contained in this Declaration of Covenants, (ii) any lack or prohibition of public access through the Lane to the beach, and (iii) any failure by KS to enforce any provision of this Declaration, Declarant hereby acknowledging that KS has no responsibility therefor.

The covenants of Declarant contained herein shall run with the Property, shall be jointly and severally binding upon the person, or persons identified above as "Declarant" and their respective successors and assigns, and shall run in favor of and inure to the benefit of the person or persons identified above as "KS" and KS' successors in trust and assigns. The covenants of Declarant regarding Permitted Use of the Property shall also run in favor of and inure to the benefit of the public, including without limitation, the Maunalua Bay Beach Ohana #29 (the "Ohana"), the Portlock Community Association, the City and County of Honolulu and the State of Hawaii. Notwithstanding the

foregoing, (a) the covenants of Declarant contained herein shall terminate as to any portion of the Property that is conveyed in any condemnation action, provided that such conveyance shall not operate to release Declarant from any claims with respect thereto and which accrued prior to such conveyance, and further provided that such termination of Declarant's covenants shall not affect the remainder of the Property not so conveyed, and (b) upon any conveyance of fee title to the Property, if the grantee in writing assumes Declarant's covenants hereunder, then the grantor thereof shall be released from liability therefor (except for claims which accrued prior to such conveyance), from and after the date of such conveyance.

The use herein of the singular in reference to a party shall include the plural and the use of a pronoun of any gender shall include all genders. The term "person" shall include an individual, partnership, association or corporation, as the context may require.

This instrument has been approved by the Trustees of the Estate of Bernice Pauahi Bishop in their fiduciary capacities as said Trustees, and not in their individual capacities. No personal liability or obligations under this instrument shall be imposed or assessed against said Trustees in their individual capacities.

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

IN WITNESS WHEREOF, Declarant has executed these presents this ____ day of _____, 2005.

"Declarant"

END OF EXHIBIT "C-1"