

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

May 26, 2023

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

Ref: 21OD-043

OAHU

Request to Approve Settlement Regarding Enforcement Action for Unauthorized Encroachment and Commercial Activities on State Lands, Hawaii Administrative Rules Chapter 13-221, and Hawaii Revised Statutes, Section 171-6, against Chris Sanger and Duke's Lagoon LLC at Duke Kahanamoku Beach, Honolulu, Oahu, Tax Map Key: (1) 2-3-037: portions of 021.

BACKGROUND:

At its meeting of May 14, 2021, under agenda item D-9, the Board found that Chris Sanger and Duke's Lagoon LLC (collectively "Respondents") violated sections in Hawaii Administrative Rules and Hawaii Revised Statutes regarding unauthorized commercial activity and unauthorized encroachment, respectively, and fined the Respondents a total amount of \$65,242.30, including reimbursement of administrative costs involved in the enforcement action.

The report portion of the 2021 approved submittal is attached as **Exhibit 1** while the Board can download the entire submittal, including all the photos attached therein from the link provided below.¹

After the 2021 Board meeting, counsel for the Respondents contacted the Department of the Attorney General ("AG") for a potential settlement of the case. It was staff's understanding that the discussion was moving toward a proposed settlement. However, due to other commitments on both sides, no written agreement was ever prepared. The settlement was further delayed after counsel for both the State and Respondents left their respective offices.

Recently, new counsel representing the Respondents reached out to AG and continued the discussion for a settlement regarding the subject enforcement action, which was summarized in her letter dated May 2, 2023 (**Exhibit 2**)

¹ <https://dlnr.hawaii.gov/wp-content/uploads/2021/05/D-9.pdf>

PROPOSED SETTLEMENT TERMS:

The Respondents, through their counsel, made the following proposal in full settlement of all claims:

1. Mr. Sanger and Dukes Lagoon LLC, jointly and severally, will pay \$19,000 by cash or check within two weeks of an executed settlement agreement. This \$19,000 constitutes the total fine required to be paid regarding the Enforcement Action.
2. The State agrees that no further enforcement action will be brought against Mr. Sanger and Duke's Lagoon LLC with respect to any and all unauthorized commercial activities on State lands from April 17, 2021 through and including May 14, 2021 in connection with beach chairs, umbrellas, or stand-up paddle boards, and other equipment enumerated in the Board submittal dated May 14, 2021.
3. Each party pays its own fees and costs.

After consulting with the AG, the State countered with the following terms and relayed to the Respondents' counsel:

- A. The Respondents agree not to conduct commercial activities on State lands in the future unless they receive prior written authorization from the Land Board;
- B. The settlement payment shall be in the form of cash or certified check (made payable to the Department of Land and Natural Resources) for the entire \$19,000 settlement—due or exchanged when the Land Division delivers the settlement agreement signed by the Chairperson of the Board;
- C. Subject to Land Board approval, and any changes to what the Board previously approved would need to go back to the Board.

Respondent's counsel agreed via her email and followed up with some questions on the timing and the party to draft the settlement agreement.

Attached hereto as **Exhibit 3** is the agreed upon Settlement Agreement. Staff believes a negotiated settlement of this matter is in the best interests of the State as the pursuit of collection actions requires the expenditure of additional State resources with an uncertain outcome. There are no other pertinent issues or concerns. Staff recommends the Board authorize the proposed settlement agreement as described above.

RECOMMENDATION: That the Board:

1. Approve settlement on the terms stated above and further subject to;
 - A. The settlement payment shall be in the form of cash or certified check (made payable to the Department of Land and Natural Resources) for the entire \$19,000 settlement—due or exchanged when the Land Division delivers the settlement agreement signed by the Chairperson of the Board;
 - B. The State agrees that no further enforcement action will be brought against Mr. Sanger and Duke’s Lagoon LLC with respect to any and all unauthorized commercial activities on State lands from April 17, 2021 through and including May 14, 2021 in connection with beach chairs, umbrellas, or stand-up paddle boards, and other equipment enumerated in the Board submittal dated May 14, 2021;
 - C. The Respondents agree not to conduct commercial activities on State lands in the future unless they receive prior written authorization from the Land Board;
 - D. Each party pays its own fees and costs; and
 - E. Review and approval by the Department of the Attorney General.
2. Authorize the Chairperson and the Department of the Attorney General to negotiate final terms of the settlement and execute a settlement agreement.

Respectfully Submitted,

Barry Cheung

Barry Cheung
District Land Agent

APPROVED FOR SUBMITTAL:



Dawn Chang, Chairperson

PCM

RT

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

May 14, 2021

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

OAHU

Enforcement Action for Unauthorized Encroachments and Commercial Activities on State Lands, Hawaii Administrative Rules Chapter 13-221, and Hawaii Revised Statutes, Section 171-6, against Chris Sanger and Duke’s Lagoon LLC at Duke Kahanamoku Beach, Honolulu, Oahu, Tax Map Key: (1) 2-3-037: portions of 021.

PURPOSE:

Enforcement action for unauthorized encroachments and commercial activities on State lands pursuant to Hawaii Administrative Rules and Hawaii Revised Statutes against Chris Sanger and Duke’s Lagoon LLC (collectively “Respondents”) at Duke Kahanamoku Beach, Honolulu, Oahu, Tax Map Key: (1) 2-3-037: portions of 021.

LEGAL REFERENCE:

Subsections 171-6(12) and (15), Hawaii Revised Statutes (HRS), and Sections 13-221-3 and 35, Hawaii Administrative Rules (HAR), as amended.

BACKGROUND:

Duke Kahanamoku Beach is located between Fort DeRussy Beach and the Duke Kahanamoku Lagoon at the western end of Waikiki, and further identified by TMK (1) 2-1-037:021. See map attached as **Exhibit A**. In July 2012, Hilton Hawaiian Village LLC (HHV) obtained a 15-year beach concession agreement¹ from the Board to conduct commercial beach activities specified in the agreement, including rental of beach chairs and umbrellas.

¹ A copy of the beach concession agreement is attached to the DOCARE report attached as Exhibit D-2. The concession agreement allows the concessionaire to set up a 14’x14’ stand to rent beach equipment including chairs and umbrellas on the Duke Kahanamoku Beach. The concessionaire is not allowed to preset chairs or umbrellas or perform surf instructions on the beach. HHV does not set up such stands but instead stores and rents its equipment from its private hotel lands.

APPROVED BY THE BOARD OF
LAND AND NATURAL RESOURCES
AT ITS MEETING HELD ON
May 14, 2021 uo.

EXHIBIT 1

Though rental of beach chairs and umbrellas is allowed under the concession agreement, the concessionaire is not allowed to preset beach chairs or umbrellas on the beach before customers have rented the items.

Regardless of the method in which items are rented, e.g. online or in-person, placing of any beach umbrellas and chairs is only allowed when a customer is present at the time such beach chairs and umbrellas are placed on the beach (whether by the customer themselves or the customer with the assistance of the vendor for the customer's immediate use). Once the customer stops using the umbrellas and chairs, the items are to be removed from the beach by the vendor.

Complaints

In the summer of 2019, Land Division (LD) received complaints from HHV regarding unauthorized commercial activities on the subject beach. HHV identified the responsible party as Chris Sanger (Sanger) who owns and operates a business called Duke's Lagoon LLC inside the adjacent Ilikai Tower. Sanger and Duke's Lagoon LLC had been warned and asked to cease and desist any unauthorized commercial activities on State lands. See letter dated August 27, 2019 attached hereto as **Exhibit B**.

In March 2021, LD received complaints from HHV regarding presetting of beach umbrellas and chairs and unauthorized commercial activities (rental of beach chairs and umbrellas) by Sanger on Duke Kahanamoku Beach.

In addition, HHV's counsel sent a letter dated March 24, 2021 (**Exhibit C**) enclosing photos regarding Sanger's unauthorized activities on the beach.

LD requested the Division of Conservation and Resources Enforcement (DOCARE) to conduct an investigation regarding the complaints and LD staff participated in the investigation on two days. DOCARE documented its investigation in its reports attached to the submittal.

Staff Investigation

During the investigation conducted in March 2021, HHV supplemented its complaint to DOCARE by providing additional photos of umbrellas on the beach. Some umbrellas were apparently seen unused in the photos.

On March 29, 2021, around 6:40 am, DOCARE observed that a stack of beach chairs and umbrellas were loaded from a truck parked in the adjacent Ala Wai Harbor parking lot which stalls are intended for harbor and ocean recreation users, and not commercial operation.² Staff understands Sanger then carts the chairs and umbrellas from the parking lot to the sidewalk and rolls them mauka toward the HHV hotel site.

² Staff understands the Division of Boating and Ocean Recreation is also evaluating any permit and rule violations in relation to the intended uses of the parking area as discussed at the Board's meetings of 5/23/2008 and 1/8/2020.

Around 7:00 am, Sanger was seen digging the sand to set up beach umbrellas. Although a few customers were observed using the umbrellas at around 7:08 am, the majority of customers began using the remaining umbrellas between 8:10 am to 9:00 am.

On March 30, 2021, Sanger was again seen setting up the beach chairs and umbrellas around 7:00 am, and the umbrellas were not in use by customers until an hour later around 8:00 am.³

On April 9, 2021, around 7:45 am, DOCARE observed that there were 18 beach chairs on the subject beach. Beach umbrellas were also seen placed between the beach chairs. No customers were seen occupying the beach chairs. DOCARE told Sanger that the presetting of beach chairs and umbrellas on the State beach was a violation, that Sanger had to remove the items from the beach immediately and that he could face possible fines from the Board. In addition to the report attached as **Exhibit D-1**, DOCARE also took a video [DOCARE-040921] of the site on that morning which can be downloaded from the following link <https://dlnr.hawaii.gov/ld/videos-4-28-2021/>.⁴

Further, reports prepared by DOCARE for investigations conducted during the month of March 2021 are also attached as **Exhibits D-2** and **D-3**.

On April 14, 2021, the Department sent the Respondents a demand (**Exhibit E**) to cease and desist all unauthorized activities on State lands.

On April 16, 2021, LD received email from HHV's counsel (**Exhibit F**) attaching videos of Sanger's activities on the beach. The videos [HHV-01 to 04-041621] can be downloaded from <https://dlnr.hawaii.gov/ld/videos-4-28-2021/>.

On the beach, there is a concrete walkway which is under a term, non-exclusive easement issued by the Board to HHV for beach sidewalk. Immediately makai of the beach sidewalk is the hotel private property. In the video, a stack of beach chairs was seen near the sidewalk, which is considered an unauthorized encroachment.

Staff now brings the violations for unauthorized commercial activities and encroachments on State lands to the Board for disposition.

3 Sometime in late March and early April before the 9th, Respondent Chris Sanger called Administrator Tsuji to complain about Barry Cheung and DOCARE targeting his operations. Upon inquiry from Administrator Tsuji, Chris Sanger denied presetting chairs or umbrellas on the beach and said he only takes chairs out with a guest present and ready to use the chair. Sanger also denied any type of surf instruction on the beach. Sanger claimed to know the DLNR rules on the beach and stated he's been operating on Waikiki beaches for many years.

4 Administrator Tsuji immediately called Chris Sanger after the April 9th incident, but Sanger did not return the call until the following week. When Sanger finally did return Administrator Tsuji's call, he did not deny the chairs and umbrellas were unoccupied as clearly shown in DOCARE's video but stated he did not "pop" or open the umbrellas. Administrator Tsuji advised Sanger he will have the opportunity to provide that excuse or justification to the Land Board.

Section 13-221-3, HAR, provides: “Any person violating this chapter for which a penalty is not otherwise provided shall be fined not more than \$500 per day and shall be liable for administrative costs and damages incurred by the department”.

Section 13-221-35, HAR, provides: “No person shall engage in commercial activities of any kind without a written permit from the board or its authorized representative”. Commercial activity is defined to include activities whose area of operation is outside the boundaries of the unencumbered State lands. HAR Section 13-221-2, as amended.

Subsection 171-6(12), HRS states the Board may “[b]ring such actions as may be necessary to remove or remedy encroachments upon public lands. Any person causing an encroachment upon public land shall:

- (A) Be fined not more than \$1,000 a day for the first offense;
- (B) Be fined not less than \$1,000 nor more than \$4,000 per day upon the second offense and thereafter;
- (C) If required by the board, restore the land to its original condition if altered and assume the costs thereof;
- (D) Assume such costs as may result from adverse effects from such restoration; and
- (E) Be liable for administrative costs incurred by the department and for payment of damages . . .”

LD considers presetting of beach chairs and umbrellas without any authorization an illegal encroachment. Staff recommends the Board find the Respondents in violation of Section 13-221-35, HAR and Subsection 171-6(12), HRS and impose fines against the Respondents jointly and severally. Further staff recommends that the Board assess two sets of fines against the Respondents for each of two encroachments that consist of the presetting of the beach chairs and umbrellas on the beach area, and the storage of commercial equipment near the sidewalk. Staff believes that treating each encroachment individually is appropriate because the Respondents utilized two separate areas of public lands simultaneously to conduct its unauthorized commercial activity. In addition, staff recommends the Board order the reimbursement of administrative costs (including staff time and fringe benefits) shown in **Exhibit G** related to this enforcement action pursuant to Subsection 171-6(15), HRS.⁵

⁵ HRS 171-6(15) authorizes the Board to set, charge, and collect reasonable fines for violation of **this chapter [i.e., Chapter 171] or any rule adopted thereunder** and expressly provides that any remedies provided for in this paragraph are cumulative in addition to any other remedies allowed by law. Staff submits that the cumulative remedies language of HRS 171-6(15) should be interpreted broadly to be consistent Act 215 (SLH 2008) and the legislative findings “that in recent years, there has been an increase in the intentional violations of and blatant disregard for state natural resource laws” and “increasing penalties for civil violations of the State’s natural resource laws is an effective means of deterring unlawful behavior by imposing serious consequences for such violations. The purpose of this Act is to increase civil penalty fine amounts for violations on public lands and to clarify penalties for encroachment on public lands.” See generally, *Plia’a 400 LLC v. Board of Land and Natural Resources, et al.*, 128 Haw. 497 (2012), unpublished decision.

RECOMMENDATION: That the Board fine Respondents in the amount of \$62,000.00 plus award administrative costs in the sum of \$3,242.30, jointly and severally as follows:

1. Impose a fine against Chris Sanger and Duke's Lagoon LLC jointly and severally in the amount of **\$500** for a single offense (April 9, 2021 violation) of unauthorized commercial activity on State lands in violation of Section 13-221-35, HAR.
2. Impose a fine against Chris Sanger and Duke's Lagoon LLC jointly and severally in the amount of **\$1,000** for a first offense of unauthorized encroachment (for placing the chairs and umbrellas on the beach on April 9, 2021) on State lands pursuant to Section 171-6(12), HRS.
3. Impose a fine against Chris Sanger and Duke's Lagoon LLC jointly and severally in the amount of **\$1,000** for a first offense of unauthorized encroachment (for storing commercial equipment (beach chairs/umbrellas) near the sidewalk on State lands on April 9, 2021) pursuant to Section 171-6(12), HRS.
4. Based on the evidence presented in HHV's video of April 16, 2021, impose a fine against Chris Sanger and Duke's Lagoon LLC jointly and severally in the amount of \$500 per day from the day after DOCARE's warning on April 9 to April 16, 2021 (date of HHV's complaint and video), (7 days for a total of **\$3,500**) for unauthorized commercial activity on State lands in violation of Section 13-221-35, HAR.
5. Based on the evidence presented in HHV's video of April 16, 2021, impose a fine against Chris Sanger and Duke's Lagoon LLC jointly and severally in the amount of \$4,000 per day for a second encroachment offense for placing the chairs and umbrellas on the beach after DOCARE's warning on April 9 to April 16, 2021 for a total of **\$28,000**, for unauthorized encroachment on State lands in violation of Subsection 171-6(12), HRS.
6. Based on the evidence presented in HHV's video of April 16, 2021, impose a fine against Chris Sanger and Duke's Lagoon LLC jointly and severally in the amount of \$4,000 per day for a second encroachment offense for storing commercial equipment (beach chairs/umbrellas) near the sidewalk on State lands from the day after DOCARE's warning on April 9 to April 16, 2021 for a total of **\$28,000**, for unauthorized encroachment on State lands in violation of Subsection 171-6(12), HRS.
7. Find Chris Sanger and Duke's Lagoon LLC jointly and severally liable for the administrative costs associated with administrative work related to this enforcement action described above, pursuant to Subsection 171-6(15), HRS, as itemized below and as shown on attached Exhibit G:

DOCARE Officer:	\$2,358.13
DOCARE Chief:	\$368.52
District Land Agent:	<u>\$515.65</u>
Total Costs:	\$3,242.30

8. Order that Chris Sanger and Duke's Lagoon LLC shall pay the fines and the administrative costs stipulated above within ten (10) days of the date of the Board's action.
9. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interest of the State.

Respectfully Submitted,

Barry Cheung

Barry Cheung
District Land Agent

APPROVED FOR SUBMITTAL:

Suzanne D. Case

RT

Suzanne D. Case, Chairperson

Land Board Meeting: May 14, 2021; D-9: Approved as submitted.

Approved as submitted. See attached page.

Land Board Meeting: May 14, 2021; D-9: Approved as submitted.

Approved as submitted.¹ Counsel orally requested a contested case. Contingent upon respondent filing a timely written request for contested case, the Board approved the contested case and authorized the Chairperson to procure a Hearings Officer.

¹ Although the Board did not approve staff's amended recommendation to add an additional 24 days of violation through May 11 (the day Mr. Sanger was taped operating as usual on Hawaii News Now) which would have brought the total fines to \$170,000.00, the Board was willing to entertain a subsequent staff submittal seeking additional violations and fines for continued violations of law.

MK LAW LLC

820 Mililani Street, Suite 701
Honolulu, Hawai'i 96813
(808) 864-8896

May 2, 2023

Via US regular mail and e-mail
Julie China, Esq.
Land and Transportation Division
425 S. Queen Street Room 300
Honolulu, Hawai'i 96813

Re: Settlement offer regarding Department of Land and Natural Resources *Enforcement Action for Unauthorized Encroachments and Commercial Activities on State Lands, Hawaii Administrative Rules Chapter 13-221, and Hawaii Revised Statutes, Section 171-6, against Chris Sanger and Duke's Lagoon LLC at Duke Kahanamoku Beach, Honolulu, Oahu, Tax Map Key: (1) 2-3-037: portions of 021, dated May 14, 2021 ("Enforcement Action")*

Dear Ms. China:

Chris Sanger and Dukes Lagoon LLC (collectively, "Mr. Sanger") jointly and severally were fined \$65,242.30 for presetting beach chairs and umbrellas and placing beach chairs near a sidewalk for eight days in 2021 (from April 9, 2021 to April 16, 2021).¹

That Enforcement Action² was presented to the Board of Land and Natural Resources ("Board") on May 14, 2021. The same day, the Board orally approved the \$65,242.30 fine described therein.³ Since then, Mr. Sanger never received any written confirmation that he needed to pay the fine. Mr. Sanger's prior attorney attempted to reach a settlement with the State and therefore Mrs. Sanger expected to receive a settlement offer but none has been forthcoming.

¹ <https://dlnr.hawaii.gov/wp-content/uploads/2021/05/D-9.pdf>; May, 14, 2021, *Board of Land and Natural Resources meeting*, time 4:40-47, available at <https://www.youtube.com/watch?v=KGeuNvJWQTA>

² <https://dlnr.hawaii.gov/wp-content/uploads/2021/05/D-9.pdf> at 3.

³ <https://dlnr.hawaii.gov/wp-content/uploads/2021/05/D-9.pdf>; May, 14, 2021, *Board of Land and Natural Resources meeting*, time 4:40-47, available at <https://www.youtube.com/watch?v=KGeuNvJWQTA>.

EXHIBIT 2

Julie China, Esq.

May 2, 2023

Page 2 of 6

Our firm has taken over that responsibility and hereby offers the following conditions in exchange for full settlement of all claims.

1. Mr. Sanger and Dukes Lagoon, LLC, jointly and severally, will pay \$19,000 by cash or check within two weeks of an executed settlement agreement. This \$19,000 constitutes the total fine required to be paid regarding the Enforcement Action.
2. The State agrees that no further enforcement action will be brought against Mr. Sanger and Duke's Lagoon, LLC with respect to any and all unauthorized commercial activities on State lands from April 17, 2021 through and including May 14, 2021 in connection with beach chairs, umbrellas, or stand up paddle boards, and other equipment enumerated in the Board submittal dated May 14, 2021.
3. Each party pays its own fees and costs.

There are three reasons the State should accept this offer. First, Mr. Sanger sold all his beach chairs and umbrellas in 2021. He has not operated or rented chairs and umbrellas for almost two years. And when he rented them, it was only for a short time. As discussed in the May 14, 2021 hearing,⁴ Mr. Sanger at most had rented beach chairs and umbrellas for two months—from March 2021 to May 2021.

Second, the Board's goal is not to bankrupt the citizens of Hawai'i, but to ensure justice.⁵ A \$65,242.30 fine for eight days of placing umbrellas and chairs, sometimes minutes before they were used, and having beach chairs on the sidewalk is egregious and does not promote fairness.

Third, Mr. Sanger is a proud lifelong resident that served his country and contributes to society. He is born and raised in Hawai'i and is part Hawaiian. He was a search and rescue diver in the United States Navy where he conducted numerous rescues before he was honorably discharged. He provides a service to Hawai'i by sharing the Hawaiian culture and teaching locals and tourists alike water safety. He is not destroying Hawai'i's resources, environment, or culture.

Below is a breakdown of the \$19,000 payment offer and why it is reasonable in lieu of the \$65,242.30 fine.

⁴ <https://dlnr.hawaii.gov/wp-content/uploads/2021/05/D-9.pdf>; May, 14, 2021, *Board of Land and Natural Resources meeting*, available at <https://www.youtube.com/watch?v=KGeuNvJWQTA>.

⁵ Hawaii Administrative Rules § 13-1-1 ("These rules shall be construed to secure the just, speedy, and cost effective determination of every proceeding.").

The Enforcement Action listed seven itemized costs.⁶

Mr. Sanger will pay (1) and (4) described in the Enforcement Action in their entirety for a total of \$4,000:

1. Impose a fine against Chris Sanger and Duke's Lagoon LLC jointly and severally in the amount of \$500 for a single offense (April 9, 2021 violation) of unauthorized commercial activity on State lands in violation of Section 13-221-35, HAR.
4. Based on the evidence presented in HHV's video of April 16, 2021, impose a fine against Chris Sanger and Duke's Lagoon LLC jointly and severally in the amount of \$500 per day from the day after DOCARE's warning on April 9 to April 16, 2021 (date of HHV's complaint and video), (7 days for a total of \$3,500) for unauthorized commercial activity on State lands in violation of Section 13-221-35, HAR.⁷

As to (2) and (3) Mr. Sanger will pay \$500 each for a total of \$1,000. The Enforcement Action describes items (2) and (3) as follows:

2. Impose a fine against Chris Sanger and Duke's Lagoon LLC jointly and severally in the amount of \$1,000 for a first offense of unauthorized encroachment (for placing the chairs and umbrellas on the beach on April 9, 2021) on State lands pursuant to Section 171-6(12), HRS.
3. Impose a fine against Chris Sanger and Duke's Lagoon LLC jointly and severally in the amount of \$1,000 for a first offense of unauthorized encroachment (for storing commercial equipment (beach chairs/umbrellas) near the sidewalk on State lands on April 9, 2021) pursuant to Section 171-6(12), HRS.⁸

The fine for items (2) and (3) is unreasonable. HRS § 171-6(12) provides that the fine for a first offense "shall be no more than \$1,000 a day[.]" It is unreasonable to impose the maximum fine when Mr. Sanger allegedly only placed umbrellas up a few minutes or hours before individuals used them, and he left chairs close to a sidewalk. The \$1,000 maximum penalty does not

⁶ <https://dlnr.hawaii.gov/wp-content/uploads/2021/05/D-9.pdf> at 5-6.

⁷ <https://dlnr.hawaii.gov/wp-content/uploads/2021/05/D-9.pdf> at 5.

⁸ <https://dlnr.hawaii.gov/wp-content/uploads/2021/05/D-9.pdf> at 5.

serve DLNR's or the Board's purpose. A \$500 payment for each item is much more reasonable.

As to (5) and (6), Mr. Sanger will pay \$7,000 each (instead of \$28,000 each), for a total of **\$14,000.00**. The Enforcement Action describes (5) and (6) as follows:

5. Based on the evidence presented in HHV's video of April 16, 2021, impose a fine against Chris Sanger and Duke's Lagoon LLC jointly and severally in the amount of \$4,000 per day for a second encroachment offense for placing the chairs and umbrellas on the beach after DOCARE's warning on April 9 to April 16, 2021 for a total of \$28,000, for unauthorized encroachment on State lands in violation of Subsection 171-6(12), HRS.

6. Based on the evidence presented in HHV's video of April 16, 2021, impose a fine against Chris Sanger and Duke's Lagoon LLC jointly and severally in the amount of \$4,000 per day for a second encroachment offense for storing commercial equipment (beach chairs/umbrellas) near the sidewalk on State lands from the day after DOCARE's warning on April 9 to April 16, 2021 for a total of \$28,000, for unauthorized encroachment on State lands in violation of Subsection 171-6(12), HRS.

There are two reasons that the State should consider a \$14,000 total payment (\$1,000 payment per day per offense, versus \$4,000 fine per day per offense) for (5) and (6). First, HRS §171-6(12) provides that a person can be “fined *no less than \$1,000 no more than \$4,000* per day upon the second offense and thereafter[.]” No justification was provided as to why the Board and the Enforcement Action imposed the maximum amount, \$4,000 per day.

Second, and more importantly, the alleged activity from April 10-16, 2021 does not constitute a second “offense” under Hawai`i law. The facts as depicted in the Enforcement Action show that any activity from April 10-16, 2021 cannot be construed as second offenses.

A DLNR employee, Werner Taniguchi, orally informed Mr. Sanger on April 9, 2021, that Mr. Sanger “could” be facing possible fines.⁹ Mr. Taniguchi did not issue

⁹ <https://dlnr.hawaii.gov/wp-content/uploads/2021/05/D-9.pdf> at 5; Exhibit D-1 at p.3.

any citation on April 9, 2021.¹⁰ Also on April 9, 2021, another DLNR employee, Robert Paulele, submitted his report indicating that Mr. Sanger engaged in no illegal activity, and that he so informed Mr. Sanger.¹¹

The only written notice to Mr. Sanger was issued on April 14, 2021, indicating that Mr. Sanger “preset” beach umbrellas and chairs.¹² No evidence was presented as to when Mr. Sanger received this April 14, 2021 written notice. It is inconsistent with Hawai`i law and due process that merely orally advising someone, without providing a citation, that they “could” be fined constitutes a first “offense” and any subsequent incident is a second offense.

Indeed, at the May 14, 2021 Board hearing, Mr. Yuen, and the Board, appeared to believe Mr. Sanger was issued a citation on April 9, 2021.¹³ Mr. Yuen questioned whether Mr. Sanger could be fined as a second offense level for the days after April 9, 2021.¹⁴ Ms. Chow responded that there has been some debate on the issue, “because of the adoption of first and second violations[,]” but believed that he could be.¹⁵

The statute does not define “offense”. Additionally, Mr. Sanger was not given any violation or written notice of any first offense until on or after April 14, 2021. As such, we ask the State to reduce the payment for items (5) and (6) from \$56,000 to \$14,000.00.

Lastly, Mr. Sanger requests that (7), the fines relating to the “administrative work”, be waived in the interest of justice. The Enforcement Action describes (7) as follows:

7. Find Chris Sanger and Duke's Lagoon LLC jointly and severally liable for the administrative costs associated with administrative work related to this enforcement action described above, pursuant to Subsection 171-6(15), HRS, as itemized below and as shown on attached Exhibit G:

DOCARE Officer: \$2,358.13
DOCARE Chief: \$368.52

¹⁰ <https://dlnr.hawaii.gov/wp-content/uploads/2021/05/D-9.pdf> at 5; Exhibit D-1 at p.3.

¹¹ <https://dlnr.hawaii.gov/wp-content/uploads/2021/05/D-9.pdf> at Exhibit D-3.

¹² <https://dlnr.hawaii.gov/wp-content/uploads/2021/05/D-9.pdf> at Exhibit E.

¹³ <https://www.youtube.com/watch?v=KGeuNvJWQTA>.

¹⁴ <https://www.youtube.com/watch?v=KGeuNvJWQTA> at 4:37-4:39.

¹⁵ <https://www.youtube.com/watch?v=KGeuNvJWQTA> at 4:39-4:40.

District Land Agent: \$515.65
Total Costs: \$3242.30¹⁶

The Enforcement Action imposed administrative fines because “the cumulative remedies language of HRS 171-6(15) should be interpreted broadly.”¹⁷ But HRS § 171-6(15) provides that the Board can collect “reasonable fines” for a violation. Almost \$66,000 for eight days of placing beach chairs and umbrellas is unreasonable.

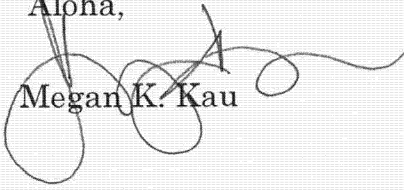
Also, HRS § 171-6(15) provides that a person may be responsible for “administrative costs and expenses incurred by the department and for payment for damages, including but not limited to natural resource damages.” Here, there was no damage to the natural resources.

Lastly, the Enforcement Action cited *Pila'a*¹⁸ in support of imposing the administrative costs.¹⁹ But *Pila'a* is inapposite. There, a landowner graded and filled land and constructed storm drains, resulting in sediment flowing into the beach and bay. A law required the person to be fined administrative costs associated with land and habitat restoration, and the appellate court affirmed fines for costs of the habitat restoration.²⁰ That is certainly not the case here, where all that was done was placing umbrellas and beach chairs on the beach.

Mr. Sanger wants to move on with his life but wants to do the right thing by paying the full amount that is agreed upon. Please consider this proposal and advise by May 9, 2023, if you accept. Time is of the essence in this matter.

If you have any questions, please do not hesitate to call me at [REDACTED] or my associate, Audrey Stanley, at [REDACTED]

Aloha,


Megan K. Kau

cc: client (via email)

¹⁶ <https://dlnr.hawaii.gov/wp-content/uploads/2021/05/D-9.pdf> at 6.

¹⁷ <https://dlnr.hawaii.gov/wp-content/uploads/2021/05/D-9.pdf> at 4 n.5.

¹⁸ *Pila'a 400 LLC Bd. of Land & Nat. Res.*, 128 Hawai'i 497, 291 P.3d 395 (Ct. App. 2012), *aff'd sub nom. Pilaa 400, LLC v. Bd. of Land & Nat. Res.*, 132 Hawai'i 247, 320 P.3d 912 (2014).

¹⁹ <https://dlnr.hawaii.gov/wp-content/uploads/2021/05/D-9.pdf> at 4 n.5

²⁰ *Pila'a 400 LLC v. Bd. of Land & Nat. Res.*, 128 Hawai'i 497, 291 P.3d 395 (Ct. App. 2012), *aff'd sub nom. Pilaa 400, LLC v. Bd. of Land & Nat. Res.*, 132 Hawai'i 247, 320 P.3d 912 (2014)

SETTLEMENT AND RELEASE AGREEMENT

This Settlement and Release Agreement (the "Agreement") is made this _____ day of _____, 2023 ("Effective Date"), by and between Chris Sanger and Duke's Lagoon LLC; and the State of Hawai'i, by its Board of Land and Natural Resources ("Board"), each a "Party" and collectively the "Parties".

Recitals

- A. On May 14, 2021, the State of Hawai'i Department of Land and Natural Resources Land Division submitted an "Enforcement Action for Unauthorized Encroachments and Commercial Activities on State Lands, Hawai'i Administrative Rules Chapter 13-221, and Hawaii Revised Statutes, Section 171-6, against Chris Sanger and Duke's Lagoon LLC at Duke Kahanamoku Beach, Honolulu, Oahu, Tax Map Key: (1) 2-3-037: portions of 021" ("Enforcement Action") (Agenda Item D-9).
- B. The Board heard the Enforcement Action at its May 14, 2021 meeting.
- C. On May 14, 2021, the Board of Land and Natural Resources orally approved of issuing the fine described in the Enforcement Action.
- D. On May 2, 2023, Mr. Sanger sent a settlement offer to resolve this matter to the Department of the Attorney General.
- E. On _____, 2023, the Board approved the settlement.
- F. This Agreement and the terms contained herein are entered to avoid litigation and expenses and does not in any way constitute an admission by the Parties of any wrongdoing or liability of any kind.

NOW, THEREFORE, in consideration of the mutual promises contained herein, the Parties hereby agree as follows.

- Commercial activities on State lands.** Mr. Sanger agrees not to conduct commercial activities on State lands unless he receives prior authorization from the Board of Land and Natural Resources.
- Monetary payment.** Mr. Sanger shall pay the Department of Land and Natural Resources \$19,000 by cash or certified check, due or exchanged upon delivery of this executed Settlement Agreement signed by the Chairperson for the Board.
- No further enforcement action.** The State agrees that no further enforcement action will be brought against Mr. Sanger with respect to any and all unauthorized

commercial activities on State lands from April 17, 2021 through and including May 14, 2021 in connection with beach chairs, umbrellas, or stand up paddle boards, and other equipment enumerated in the Enforcement Action.

4. **Release/Covenant Not to Sue.** The Parties hereby fully, finally, and forever releases, acquit, and discharge each other of all claims of any kind, whether arising at common law, in equity and/or under or by virtue of any statute or regulation, whether known or unknown, in any way resulting from or in any manner arising out of or in any way connected with, directly or indirectly, the May 14, 2021 Enforcement Action, and the corresponding right to sue. In the event this agreement is ever held to be invalid or unenforceable (in whole or in part) as to any particular type of claim or charge or as to any particular circumstances, it shall remain fully valid and enforceable as to all other claims, charges, and circumstances.

5. **No Assignment.** Each Party warrants to the other Party hereto that it has made no assignment, and will make no assignment, of any claim, chose of action, right of action or any right of any kind whatsoever, and that no other person or entity had or has any interest in any of the demands, obligations, actions, causes of action, debts, liabilities, rights, contracts, damages, attorneys' fees, costs, expenses, or losses referred to herein.

6. **Additional Facts.** The Parties hereto each acknowledge that they may hereafter discover facts different from or in addition to those they now know or believe to be true with respect to the releases set forth in this agreement, and they each expressly agree to assume the risk of the possible discovery of additional or different facts, and agree that this agreement shall be and remain effective in all respects regardless of such additional or different facts. It is understood and agreed that this agreement extinguishes claims and causes of action that are known, unknown, foreseen or unforeseen in connection with the issues set forth in the recitals.

7. **No Admission of Liability.** The Parties agree that the benefits called for hereunder, the releases contained herein, and the other terms hereof are not to be deemed or construed as an admission of any wrongful conduct, conversion, bad faith, willful misconduct, breach of contract, breach of duty, liability or fault of any kind whatsoever by any of the Parties hereto, but are to be construed as a compromise of disputed and contested claims.

8. **Joint Participation.** This agreement has been prepared with the joint participation of each Party hereto and their respective counsel, and shall be construed according to their fair meaning, rather than in favor of or against, any one of the Parties hereto or against one of the Parties because such Party was the principal or primary author of such provision.

9. **Represented by Counsel.** Each Party hereto represents and warrants that it has been represented in negotiations leading to the preparation of this Agreement by counsel of its own choice, has read this agreement and had it fully explained to such Party by such counsel, and is fully aware of the contents of this Agreement and of the legal effects of each and every provision hereof.

10. **Entire Agreement.** This agreement contains the entire agreement between the Parties with respect to any claims and supersedes all prior or contemporaneous oral and written agreements, representations, negotiations, correspondence or communications related thereto. There are no terms of this agreement that are not expressly in writing in this agreement and its terms may not be amended orally.

11. **Counterparts.** This agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. A facsimile or scanned signature to this agreement shall be deemed to be and may be relied upon as an original for all purposes.

12. **Governing Law.** This agreement shall be governed by and construed in accordance with the law of the State of Hawai'i. If any part, term, or provision of this agreement is held by the courts to be illegal or in conflict with any law of the State, the validity of the remaining portions or provisions shall not be affected, and the rights and obligations of the Parties shall be construed and enforced as if the agreement did not contain the particular part, term, or provision held to be invalid.

13. **Costs.** Except as otherwise stated herein, each Party shall bear their own respective attorneys' fees and costs.

IN WITNESS WHEREOF, these presents have been executed as of date first written above.

Approved by the Board
of Land and Natural
Resources at its meeting
held on _____..

Chris Sanger, for himself, individually, and
on behalf of Duke's Lagoon LLC

Dawn N. S. Chang
Chairperson
Board of Land and Natural Resources

APPROVED AS TO FORM:

Megan Kau, Esq.
Attorney for Chris Sanger and Duke's Lagoon LLC

Julie H. China
Deputy Attorney General

Settlement and Release Agreement by and between Chris Sanger and Duke's Lagoon LLC; and the State of Hawai'i Board of Land and Natural Resources and the State of Hawai'i Department of Land and Natural Resources