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June 21, 2023

VIA HAND DELIVERY
Ms. Dawn N. S. Chang
DLNR Main Office, Kalanimoku Building
1151 Punchbowl Street
Honolulu, Hawaii 96813

Re: Notice of Default and Settlement Demand for Lessor Under General Lease S-5844 ("Lease") by and between State of Hawaii, and its Board of Land and Natural Resources ("Lessor") and WHR, LLC ("Lessee")

Dear Chairman Chang:

Glenn H. Uesugi, Esq. and I represent WHR LLC and Tower Development, Inc. in the above referenced matter. Enclosed please find WHR, LLC's Notice of Default and Settlement Demand for Lessor Under General Lease S-5844 ("Lease") by and between State of Hawaii, and its Board of Land and Natural Resources ("Lessor") and WHR, LLC ("Lessee").

There is a board meeting scheduled for Friday, June 23, 2023 regarding reasonable consent request for the new replacement mortgage to pay off the existing mortgage. We sincerely feel that the State of Hawaii's approval of this new mortgage is in the best interests of all parties, including but not limited to the State of Hawaii. It is reasonable for the State of Hawaii to consent to the replacement loan, especially since there is absolute zero downside risk in approving the replacement $50 million loan for the existing $50 million loan.

My client stands ready and willing to come to a reasonable resolution of this matter. Please contact me at your earliest convenience to discuss.

Thank you for your attention to this matter. We look forward to hearing from you soon.

Very truly yours,

MICHAEL JAY GREEN

MJG: ka
Enclosure

cc: Governor Joshua Green (w/ enclosure)

NOTICE OF DEFAULT

June 21, 2023

State of Hawaii
Department of Land and Natural Resources
PO Box 621
Honolulu Hawaii 96809
Attn: Administrator R. Tsuji

Re: Notice of Default of Lessor Under General Lease S-5844 ("Lease") by and between State of Hawaii and its Board of Land and Natural Resources (collectively "Lessor") and WHR, LLC ("Lessee")

Dear Governor and Chair Chang,

This office has been retained by WHR, LLC ("Lessee"), which is the owner of the Grand Naniloa Resort, a DoubleTree by Hilton located in Hilo, Hawaii ("Naniloa"). Time is of the essence for resolution of the Naniloa new $50,000,000 Mortgage consent request to the DLNR as Lessor ("Lessor") since the foreclosure sale date has been set for July 26, 2023. The Chairperson and BLNR have been asked by Lessee and ownership of the Naniloa for more than 12 months to approve a new $50M replacement Mortgage to pay off the existing $50M Mortgage. The State has not a single downside risk in approving this replacement Mortgage. This new Mortgage will avoid the foreclosure sale of the Naniloa and allow the successful ownership group to continue its good works in the Hilo community and the State of Hawaii. However, there seems to be a mess created by certain staff members within DLNR that have resulted in a Default of Lessor. Thus, please address the Defaults identified herein promptly:

1. **Notice of Default**. Pursuant to the rights granted to WHR LLC, as "Lessee" under General Lease S-5844 ("Lease"), the State and DLNR are hereby served with this Notice of Default dated June 20, 2023 ("Notice of Default") with respect of Lessor's numerous defaults as identified herein. This Notice of Default outlines specifically the bad faith actions of Mr. Tsuji's that have resulted in Lessor's default for failure to comply with Sections 20.a. and Sections 37 of the Lease.

a. Section 20.a. expressly obligates a process for a "***written consent of the Chairperson***, which ***consent shall not be unreasonably withheld***" relating to new mortgage requested by Lessee.

b. Section 37 expressly obligates DLNR to act timely for mortgages, since the Lease states, **"Time is of the essence in all provisions of this lease."**

2. **Respectfully Request DLNR and Chairperson Comply With Sections 20.a and 37 of the Lease and Take Immediate Steps to Cure Past Defaults.** Lessee respectfully requests and demands the following actions be taken in order to avoid (x) the foreclosure sale on July 26, 2023, and (y) the filing of a lawsuit by Lessee against Lessor for damages and losses caused by Lessor's default, which are in excess of $50,000,000. Unless the following actions are implemented to avert a lawsuit on or before 3:00 p.m. June 23, 2023, Lessee will have no alternative but to protect its interests and take legal action:

a. Immediate Settlement Meeting. Lessee respectfully requests an immediate settlement meeting with Attorney General on or before June 22, 2023, between Attorney General and Michael Greene to discuss a resolution and cure of the Lessor's numerous defaults identified herein and the Notice of Default attached hereto as Exhibit "A".

b. Require Disclosure to BLNR of The Governing Lease Terms For "Reasonable Consent" and "Factors That Determine Reasonable Consent" for New Mortgages. Lessee respectfully requests DLNR staff advise both BLNR and Chairperson of the Lease terms that govern "reasonable" consent of any new Mortgage for the Naniloa (note, Mr. Tsuji has intentionally ignored complying with and in fact has not even explained in the Reports to BLNR and Chair the governing Lease Sections 20.a and 37. Moreover, Mr. Tsuji has failed to identify the factors of a "reasonable Mortgage" that are standard in the industry and have been fully explained in communications to Mr. Tsuji but ignored 100%. The reasonableness factors set forth in Section 4 below clearly indicate Lessee's Mortgage is reasonable. However, Mr. Tsuji ignores all of these applicable factors and does not even analyze or explain them in any denial reports to the BLNR. Thus, the Chairperson has received inaccurate reports and false reports (by the omissions). Thus, DLNR has failed to comply with the Lease obligations for over a year due to Mr. Tsuji's intentional omissions of the reasonableness factors related to Lessee's consent request.

c. Immediate removal and replacement of Russell Tsuji. Lessee demands the immediate removal and replacement of Russell Tsuji from any oversight or involvement of Lessor consent requests for any new Naniloa Mortgage or BLNR hearings until a complete investigation is completed as to his involvement in interfering with the Naniloa's consent applications to refinance the Naniloa with a new reasonable Mortgage. There is an appearance that Mr. Tsuji has self-interests to cause (x) a foreclosure and (y) a denial of the consent requests (as seen in his reports to BLNR), based on these self-interests. It is our hope we do not need to explore this in future litigation. Mr. Tsuji has also blatantly and intentionally misinformed the BLNR, intentionally omitted the governing Lease provisions from BLNR Reports, intentionally omitted positive facts that would allow for reasonable approval by BLNR, intentional made misrepresentations to the BLNR regarding known facts and has shown he is incapable of being impartial or objective (and is frankly personally biased against the ownership) and unable to act in the best interests of Hilo, Island of Hawaii and this great State of Hawaii.

d. Appoint Big Island/Hilo Representative Gordon Height or alternative staff that has the ability to act impartial and unbiased in the best interest of the State. Lessee believes replacement staff, whether Gordon Height or otherwise, will have the ability to act impartial and look at the expert factors and easily conclude the new Mortgage is reasonable and should be consented to by the Chairperson.

e. Immediate Investigation for Intentional Interference by Russell Tsuji, and/or other Staff That Have Intentionally Misled Chairperson, DLNR and BLNR and Interfered with respect to Lessee's New Mortgage Consent Request for the Naniloa From January 1, 2022, until the present. Based on information and belief, it is our understanding that certain staff within DLNR have omitted positive information that would support approval of the New Mortgage and/or provided false information to Chairperson, BLNR and DLNR including Russell Tsuji, to interfere with the success of Lessee in gaining consent of the new replacement Mortgage.

3. **Background.** In April, 2022, Lessee started the request for consent of a new Mortgage, to solve a foreclosure risk arising from Covid shutdowns. If the Mortgage subject to the consent request is "reasonable," the Chairperson is required to consent to the new Mortgage. Due to continued recommended denials by Russell Tsuji and BLNR, when in fact the new Mortgages are reasonable, ownership is now faced with a foreclosure sale date of July 26, 2023. A foreclosure would be

4. catastrophic with over $50M in damages and losses to ownership. A foreclosure would be caused solely due to Lessor's Defaults of the Lease, primarily **Lessor's obligation to reasonably consent to Lessor's/Naniloa's new Mortgage requests in a timely fashion**. Notwithstanding the obvious Defaults of Lessor, it is absolutely bad faith that "reasonable consent" has not yet recommended by Lessor, staff and specifically Mr. Russell Tsuji.

5. **Reasonableness Factors.** WHR submitted reasonable factors (received from Colliers as an expert), as shown in graph below. This graph compares (a) the Naniloa 2018 Mortgage consented to by Chair Case to (b) the current 2023 proposed Mortgage. The chart indicates it is the same lender as 2018--Wells Fargo, b) it is the same loan amount as 2018--$50M, c) it is the same term loan as 2018--5 years and (d) the Naniloa Net Income is at a record $7.8M in 2022 versus $4.9M pre-covid in 2018, more than $2M higher. Yet, Mr. Tsuji concludes the new Mortgage "is not sustainable". ***Mr. Tsuji needs to answer the question: "How was a $50M Mortgage sustainable in 2018, but is not in 2023 when there is more than $2M more income in 2022 and 2023?"*** Mr. Tsuji's avoided all of this discussion and merely recommends "denial" of the Naniloa new Mortgage because "it is not sustainable" without any factual support. In all of his reports, Mr. Tsuji doesn't analyze any of the expert/reasonable factors—he usurps his public duty to be impartial and ignores the reasonableness factors.

If Mr. Tsuji were to analyze the reasonableness factors for a new Mortgage in the best interest of the State, he would be required to admit to the Chairperson and BLNR the new Mortgage that have been proposed by Lessee are "reasonable." He would also have to disclose to the Chairperson and BLNR that the key factors are the new Mortgage has less than a 60% Loan-to-Value ("LTV") and 1.4 Debt Service Coverage Ratio ("DSCR") which easily dictate the new Mortgage proposed by the Naniloa is "clearly reasonable". This would then necessitate the Chairperson to consent to the new Mortgage. Wells Fargo, and prior proposed lenders such as UBS in May 2023 and Sculptor in June 2022, should have had their loans approved as well and the failure to approve prior new Mortgage requests constitute defaults under the Lease. These prior Mortgage consent requests were easily sustainable by the Naniloa and clearly the industry factors mandated they were "reasonable". Thus, Mr. Tsuji intentionally ignored the expert factors in his possession.

Had Mr. Tsuji acted impartial and in the best interest of the State since May 2022, through the hearing on May 12, 2023, through the present proposed hearing scheduled for June 23, 2023, we would not be subject to a foreclosure sale. Had anyone impartial reviewed the facts of our applications of a new Mortgage, we would have, by now, received a consent to a new Mortgage from the Chairperson.

Notice of Default
State of Hawaii/DLNR
June 20, 2023

REASONABLE FACTORS OF EXPERTS 2018 MORTGAGE V. 2023 MORTGAGE

Colliers International - Factors to Determine if a Hotel Loan/Mortgage is Reasonable & Sustainable					
	Reasonableness Factors	2023 New Loan (DLNR Reviewing)	2018 Loan (DLNR Approved)	Reasonable?	Comments
1	Wells Fargo Lender Qualifications?	Wells Fargo	Wells Fargo	**Very Reasonable**	A Very Qualified CMBS Lenders and Same as 2018
2	Loan Structure?	CMBS	CMBS	**Very Reasonable** given CMBS structure is the standard often used for hotels	2023 proposed loan has the Exact Same CMBS Loan structure: 5 Year, Fixed Rate Loan (Note: CMBS Loans have the Highest Level of Underwriting B/C the loan is in a Securitized Pool and Subject to Rating Agency Review)
3	Term of the Loan	5 Years	5 Years	**Reasonable**	80% of all commercial hotel are 5 years or less. The loan approved in 2018 has the same term as 2023.
4	Loan to Value (LTV) ?	52.85% = $50M/$94.6M	49.5% = $50M/101M	**Very Reasonable** given anything under 60% is very conservative	Hotel Loans Historically Average 70%+/- LTV and are "reasonable", but the 2018 and 2023 Loan are both lower than 60% LTV, which makes them more than reasonable.
5	Debt Coverage Ratio (DCR)	1.40	1.40	**Very Reasonable** given 1.25 is rough standard in the industry	A DCR of 1.25 is known by Mr.Tsuji to be a reasonable norm, as stated in DLNR Meeting Minutes on 6.9.2022 (7 hours 23 minutes). Mr. Tsuji omits to disclose this the 6/23/23 Report. Why? Becuase Mr. Tsuji would have to then admit the Mortgage is sustainable and reasonable. The higher the ratio over 1.25, the more sustainable the loan/mortgage is. Our loan is at least a 1.4 DCR meaning the hotel income is 140% greater than the total annual loan payments, and thus better than the market and higher than the 1.25 Mr. Tsuji testified in the past as a norm. The 2022 Income evidences the income coverage over the debt service is at or above a DCR of 1.4 and, thus, easily sustainable. Why doesn't Russell advise the BLNR to very postive fact that proves the loan is sustainable? In fact, Russell does not provide a single factor showing the Mortgage is not sustainsable by the Hotel.
6	Does the Income support the Loan Payments	Yes	Yes	**Very Reasonable** given $7.7M 2022 Net Income covers the approximate $4M annual loan payments	There is Annual Net Income of approx. $2-3M per year surplus over the loan payments during the loan term. Both UBS and Wells Fargo would not approve a loan that does not have income to support loan payments.
7	Is the Interest Rate Reasonable?	Yes, the SOFR 5 year swap interest rate index is the market norm	5.72%	**Reasonable** given the market. Any rate between 7-8% is reasonable in this market	A of June 21, 2023, the Index of 5 Year Swap is at 3.737 plus 415 equals 7.887%, which is higher than 2018 due to the market interest rate changes, but the interest rate is the market rate today. Wells Fargo interest rate proposal is a very reasonable given the market and given we lost the UBS loan due BLNR taking us off of the June 9 agenda.
8	Is the Interest Rate Fixed?	Yes	Yes	**Very Reasonable**	This is a 5 year SOFR Swap rate. Mr. Tsuji's prior report illustrates confusion of a SOFR and SOFR Swap rate. What is a SOFR Swap: "SOFR Swap rate is a swap where a counterparty pays a fixed-rate on an annual basis...This rate is a common benchmark for pricing fixed-rate CMBS and other fixed-rate loans" (Source: Chatham Financial).
9	Appraiser Qualifications	HVS	HVS	**Very Reasonable** especially given same appraiser as 2018	Same Institutional Qualified Appraiser in 2018 and 2023. Independently hired by UBS and Wells Fargo due to HVS's market expertise.
10	Manager of WHR Experience	Yes	Yes	**Very Reasonable**	WHR has been a leader in taking Naniloa to $7.7M in revenues post Covid. WHR is now appointing Benjamin Rafter and Springboard to take the Naniloa to even greater heights.
11	Cash Commitment to Cure the Foreclosure	Yes	NA	**Very Reasonable**	WHR has committed to fund difference between the loan amount and payoff of Rialto $64M, which means the Naniloa company owners are willing to invest $15M+ to close the new Wells Fargo Loan/Mortgage. Moreover, Ben Rafter testified, he will backstop this amount. Thus, the ownership is behind the Naniloa 100%.
12	Russell Tsuji Term: Is the loan sustainable?	Yes	Yes	**Very Reasonable**	Russell Tsuji has not evidence in his 6/23/23 Report any fact that contests a single factor in items 1-11 or demonstrates these factors are unreasaonble. Thus, he can't opine that the Mortgage is unreasonble. Based on the reasaonbleness factors 1-11 herein, the Mortgage and Wells Fargo loan are clearly reasonable and clearly sustainable. Moreover, any commercial mortgage expert would opine the Wells Fargo mortgage is clearly sustainable and reasonble.

6. **No Negative Factors of the New Mortgage Cited by Staff or BLNR.** Lessee has asked Mr. Tsuji to identify any factors that would indicate the new Mortgage is unreasonable in order that Lessee may address them. To date, not a single negative factor has been pointed out by Mr. Tsuji that justifies denial of our consent request. Mr. Tsuji clearly can't find a factor that justifies a conclusion the new Mortgage is "unreasonable", especially given there is not a single downside to the State in approving a replacement $50M Mortgage. However, Mr. Tsuji, with legal support, concludes the new Mortgage should be denied upon every Lessor request.

7. **Experts Conclude the Naniloa's new Mortgage is Reasonable.** Experts have opined that the new Mortgage proposed by Lessee is reasonable, including the Receiver George Van Buren, Colliers International Jordi deHoyas, Colliers International Mark Bratton and other hotel industry experts that have extensive mortgage experience including Ben Rafter (CEO and President of Springboard Hospitality) and Michael Paulin (founder and CEO of Aqua Hotels). Even after the experts opined that a $54M new Mortgage was reasonable, Lessee made a good faith gesture to lower the new Mortgage to $50M. Thus it is more reasonable today than before. Yet Mr. Tsuji doesn't acknowledge any of the expert opinions or factors they list in support of their expert opinions.

8. **Conclusion.** Mr. Tsuji's intentional disregard of the Lease terms has resulted in numerous and repeated Lease defaults by Lessor during 2022 and 2023 for failing to consent based on the reasonable standard in the Lease. He has single handedly caused a foreclosure sale of the Naniloa to be set for July 26, 2023, unless the State and Chairperson step in and consent to the new $50M replacement mortgage. A reasonable consent recommendation by Mr. Tsuji in the reports could have solved all Covid impacted issues and eliminated all existing outstanding loan amounts that went into default based on Hawaii State Covid shutdown.

9. **State Support of Ownership**. As the State, DLNR, Mayor Roth, and entire Hilo community is aware, the Naniloa ownership is an example of community driven leadership with a focus on helping the community of Hilo at every turn. The Naniloa ownership has made significant contributions to the Hilo community including revitalizing Banyan Drive with its 30M+ restoration of the Naniloa, bringing Hilton to Hilo, supporting Merrie Monarch and the Polynesian Voyaging Society in many of the community driven endeavors in addition to many other cultural and community contributions over the past 10 years. Isn't it about time the State and DLNR act in good faith to assist the Naniloa to refinance the hotel with a new Mortgage consistent with the Lease terms and conditions?

10. **Demand**. Demand is hereby made for the State and DNLR, and specifically Chairperson (as required in Section 20.a of the Lease) to cure the Default and further consent to the new $50M replacement Mortgage and complete the consent in a timely manner to allow the Chairperson to provide a consent in respect of the proposed new mortgage on or before June 23, 2023, which will allow the ownership to avert a foreclosure sale scheduled for July 26, 2023.

Lessor's failure to cure the defaults will result in a claim for damages and losses in excess of $50M.

We endeavor to reach a mutually acceptable resolution and timely consent of Lessee's New Mortgage.

WHR LLC, as Lessee under General Lease S-5844

KOBAYASHI SUGITA & GODA, LLP
Attorneys at Law

June 21, 2023

Chair Dawn N.S. Chang and
Members of the Board of Land and Natural Resources
Board of Land and Natural Resources
P.O. Box 621
Honolulu, Hawai‘i 96809-0621
blnr.testimony@hawaii.gov

Re: Written Testimony in Support of Conservation District Use Application (CDUA) OA-3913 State of Hawaii - Diamond Head Breakwater Safety Project Seaward of Tax Map Key: (1) 3-1-041:005, Kaalawai, Honolulu, Oahu;
BLNR Meeting June 23, 2003, Agenda Item K-2

Dear Chair Dawn N.S. Chang and Members of the Board of Land and Natural Resources:

This letter is written to the Board of Land and Natural Resources ("**Board**") on behalf of my client, the Doris Duke Foundation for Islamic Art ("**DDFIA**") in support of the proposed CDUA application of the State of Hawaii ("**State**") referenced above, which will be considered by the Board at the Board meeting on June 23, 2003. I write this letter to provide comments regarding certain legal issues which have arisen in prior discussions of similar applications regarding such a project and may arise regarding this application.

I am the former Attorney General of the State of Hawaii, having served under Governor Neil Abercrombie from 2011 through 2014. I have been a practicing lawyer for the past 45 years, since 1978. I served as the President and Director of the Hawaii State Bar Association, Lawyer Representative for the U.S. Court of Appeals of the Ninth Circuit, Northwest Regional Governor of the National Asian Pacific American Bar Association, Vice Chair of the Hawaii Supreme Court Rule 19 Committee on Judicial Performance, Chair and Director of the Aloha Tower Development Corporation, and on numerous Bench Bar Committees. I served as a Co-Vice Chair on the recent Task Force on Civil Justice Improvements, which revised the Civil Rules for Hawaii's Circuit Courts.

I have appeared in court many, many times, both in state and federal courts and have handled many cases involving the defense of claims against property owners regarding allegations of catastrophic personal injuries. In the 1990s, I personally defended DDFIA against a lawsuit brought by a Mr. Corpuz, who dived into the ocean area where the breakwater is located and fractured his neck, becoming a quadriplegic. That case and incident, along with others, have previously been cited as reasons to allow the modification of the breakwater. In addition, when I served as Attorney General, I oversaw the handling of numerous lawsuits against the State claiming that the State was responsible for the personal injuries sustained by various individuals, even where explicit warning signs had been clearly posted and maintained.

I offer my comments regarding three legal issues which are important for the Board to consider regarding the CDUA. First, approval of the CDUA would significantly reduce and possibly eliminate the potential for serious injury for members of the public and would reduce the potential risk to the State. Some other public comments have incorrectly stated that the State, as the current owner of the breakwater, does not have a significant risk of liability if someone were to injure themselves by jumping or falling from the breakwater. Second, other public comments have incorrectly claimed that the Board is somehow precluded from considering the CDUA because of prior proceedings where a similar project was not approved, citing to possible legal doctrines of "*stare decisis,*" res judicata and/or collateral estoppel. Third, one of the public commentators has claimed that the State has sovereign immunity for any negligence claims which might be brought for personal injury. This is not true, as the State has waived sovereign immunity for tort claims.

A. Approval of the CDUA Would Reduce the Potential for Serious Injury and the Potential Risk to the State of Hawaii as a Landowner of the Breakwater.

Under Hawaii law, prudent landowners must consider issues related to risks of injury by visitors to the property, and warn of dangers which exist on the property. This is particularly true in regard to areas where the general public frequently visit, regardless of whether the public is invited or not. While there is some statutory protection for private landowners who allow their property to be used for recreational use, such protections generally are not absolute.[1]

The Hawaii Supreme Court has summarized the legal obligations of a landowner by stating that "an occupier of land has a duty to use reasonable care for the safety of all persons reasonably anticipated to be upon the premises, regardless of the legal status of the individual."[2] The court subsequently expounded by stating: "[I]f a condition exists upon the land which poses an unreasonable risk of harm to persons using the land, then the possessor of the land, if the possessor knows, or should have known of the unreasonable risk, owes a duty to the persons using the land

[1] See, e.g., HRS §520-3, 6
[2] *Pickard v. City and County of Honolulu*, 51 Haw. 134, 135, 452 P.2d 445, 446 (1969).

to take reasonable steps to eliminate the unreasonable risk, or adequately to warn the users against it." [3] Further, this concept has ultimately resulted in a number of rulings in Hawaii courts which address the potential liability of a landowner and its obligations to use reasonable care.

One such case is *Levy v. Kimball*,[4] in which the plaintiff had slipped and fallen off a seawall owned by the State of Hawaii, which "had acquired an easement over [a] seawall for the express purpose of providing a path for public travel."[5] The Hawaii Supreme Court held that the dangerous condition of the seawall imposed upon the State, at minimum, a duty to warn of the obvious danger of slipping and falling off the seawall while using it as a thoroughfare, for which purpose it was provided by the State. *Id.* at 500, 443 P.2d at 145.

Further, the Hawaii Supreme Court has noted that even the plaintiff's subjective knowledge of the fact that a condition is dangerous is not necessarily sufficient to preclude a claim for damages by the injured party. Instead, the court found that "a landowner retains a duty to the plaintiff if the plaintiff's injury was foreseeable."[6] Further, the court noted that the issue as to the foreseeability by the landlord was one to be decided by the jury, stating: "the characterization of the danger as known or obvious is fact-intensive and depends on the circumstances involved in each case. We believe such an assessment should be reserved for the jury, unless reasonable minds could not differ."[7]

Plaintiffs' attorneys, relying upon case law such as that discussed above, frequently claim in lawsuits that landowners were negligent for failing to warn persons who visit their lands of foreseeable dangers on their lands. Such attorneys frequently retain experts to testify that the landowners failed to provide adequate warnings, even where signs have been clearly posted or other precautions taken. Whether signs or other precautions are adequate is generally held by the courts to be a question of fact, which requires a jury or judge trial. As such, these claims generally result in settlement or a landowner having to take a case all the way to trial, with the risk of an adverse verdict.

The CDUA contains substantial information that prior efforts, such as erecting a fence and posting warning signs, have been unsuccessful to discourage jumping and other unsafe and risky behavior by members of the public. Consequently, the removal of the breakwater and the placement of a rock revetment at the base of the seawall in the area, as contemplated by the CDUA, appear to be necessary physical modifications which will eliminate certain hazards and discourage and reduce the likelihood of visitors to the area jumping from the breakwater and/or the seawall, thus reducing the likelihood of future injuries. By reducing the prospect of future injuries, these

[3] *Corbett v. Ass'n of Apartment Owners of Wailua Bayview Apartments*, 70 Haw. 415, 417, 772 P.2d 693, 695 (1989).
[4] 50 Haw. 497, 443 P.2d 142 (1968).
[5] *Id.* at 498, 443 P.2d at 144.
[6] *Id.* at 144, 267 P.3d at 1249 (2011).
[7] *Id.* at 146, 267 P.3d at 1251 (2011).

physical modifications will also have the benefit of reducing the potential risks facing the State as a landowner.

B. Under Hawaii Law, Administrative Agencies are to Review Permit Applications on their Merits and Are Not Precluded From Making Decisions Which Differ From Prior Decisions.

Another issue that has been raised in some public comments regarding the CDUA is whether the Board is somehow precluded from granting the CDUA because of its prior denial of a similar application in 2019. The doctrine of *stare decisis* is, in general, a principle that provides that when a question of law has already been settled by the court of last resort, i.e. the Hawaii Supreme Court for Hawaii State law issues, it forms a precedent which is not afterward to be departed from or lightly overruled.[8] However, the Hawaii Supreme Court has noted that an administrative agency is free to determine how much precedential effect to give prior adjudicatory matters,[9] so that the principle of *stare decisis* does not prohibit or bar a decision by the Board regarding the CDUA in this matter.

As the United States Supreme Court stated, the decision to proceed by "general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency."[10] Similarly, the Hawaii Supreme Court has affirmed the position that "agencies are allowed the broad discretion to choose whether to develop policy by rule-making or adjudication."[11]

In *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759, 765-66 (1969), the United States Supreme Court held that *stare decisis* is subject to a "qualified role . . . in the administrative process."[12] Thus, while an agency has the ability to make its decisions precedential, it also has the ability to reconsider prior decisions. The reasons for authorizing an agency to move in a different direction from a previous decision are plentiful, as the United States Supreme Court stated:

> [P]roblems may arise in a case which the administrative agency could not reasonably foresee, problems which must be resolved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a

[8] *Robinson v. Ariyoshi*, 65 Haw. 641, 653, 658 P.2d 287, 297 (1982) ("Under the rule of stare decisis, where a principle has been passed upon by the court of last resort, it is the duty of all inferior tribunals to adhere to the decision, without regard to their views as to its propriety, until the decision has been reversed or overruled by the court of last resort or altered by legislative enactment.").
[9] *In re Application of Hawaiian Elec. Co., Inc.*, 81 Hawai`i 459, 467, 918 P.2d 561, 569 (1996), as amended (July 11, 1996).
[10] *S.E.C. v. Chenery Corp.*, 332 U.S. 194, 203 (1947).
[11] 81 Haw. 459, 918 P.2d 561 (1996).
[12] *Id.*

> particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain the power to deal with the problems on a case-to-case basis if the administrative process is to be effective. There is thus a very definite place for the case-by-case evolution of statutory standards.[13]

Here, we understand that the Board has actually ruled to deny a prior CDUA for a similar project on one occasion. Although a second CDUA for such a project was submitted, we understand it was withdrawn before any action by the Board. There is no indication in the prior denial by the Board of a single CDUA regarding a similar project that there was an intention to make such a decision precedential or forever unchanging. With respect to the State's request in this matter, neither the general principle of *stare decisis* nor any pronunciation of precedent by the Board relative to its prior decisions precludes the Board from considering this CDUA on its merits despite a prior denial. Moreover, circumstances have changed, as 1) the State is now the owner of the breakwater and submerged lands area, and faces potential liability for claims of personal injury; and 2) additional time has passed demonstrating that reasonable efforts short of physical modifications have been unsuccessful in discouraging the risky behavior of some people who come to the area.

Similarly, to the extent that there are any concerns regarding the doctrines of res judicata or collateral estoppel precluding the Board from approving the CDUA, those doctrines would similarly not prevent such an approval.

The doctrine of res judicata provides "that the judgment of a court of competent jurisdiction is a bar to a new action in another court between the same parties or their privies concerning the same subject matter. It precludes the relitigation, not only of the issues that were actually litigated in the first action, but also of all grounds of claim and defense which might have been litigated in the first action but were not litigated or decided."[14] The Hawaii Supreme Court has held that the "doctrines of res judicata and collateral estoppel also apply to matters litigated before an administrative agency."[15]

Under Hawaii law, the doctrine of res judicata applies when: 1) the claim or cause of action asserted in the present action was or could have been asserted in the prior action, 2) the parties in the present action are identical to, or in privity with, the parties in the prior action, and 3) a final judgment on the merits was rendered in the prior action.[16] Res judicata and collateral estoppel principles are applicable to matters litigated before administrative agencies when (1) the

[13] *Chenery*, 332 U.S. at 202-03.
[14] *Santos v. State, Dept. of Transp., Kauai Div.*, 64 Haw. 648, 651–52, 646 P.2d 962, 965 (1982).
[15] *Id.* at 653, 646 P.2d at 966.
[16] *Dannenberg v. State*, 139 Haw. 39, 59, 383 P.3d 1177, 1197 (2016)

administrative agency acts in a judicial capacity, (2) the agency resolves disputed issues of fact properly before it, and (3) the parties have an adequate opportunity to litigate.[17] This standard was echoed by the United States Supreme Court, which stated: "When an administrative agency is acting in a judicial capacity and resolved disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose."[18]

As the Hawaii Supreme Court wrote "res judicata and collateral estoppel . . . apply to [only those] matters *litigated* before an administrative agency."[19] In other words, these principles "are tempered . . . by the prerequisite that a plaintiff have a full and fair opportunity to litigate the relevant issues."[20]

In the course of submitting its original CDUA to the BLNR, the Foundation never fully and fairly litigated the relevant issues. Specifically, the Foundation never presented evidence or argument at a contested hearing. Unlike in *Leong v. Hilton Hotels Corp.*,[21] where the court found the plaintiff had fully and fairly litigated by taking advantage of "evidentiary hearings and numerous appeals", the Foundation did not participate in a contested case concerning the issues in its previously-filed CDUA. Instead, soon after its application was denied, the Foundation conveyed the submerged lands at issue to the State, and the Foundation's application was procedurally terminated. For this reason, there was also no final judgment or determination by the Board.[22]

Furthermore, the full and fair litigation of an issue requires appellate review. Not only did the Foundation never present evidence or argument, but the Board's denial was never reviewed by an appellate body. "Hawaii courts [will] not give preclusive effect to [administrative] proceedings" where the decision has gone "unreviewed."[23] The "relative competence and responsibility . . . as between an administrative agency and a court" counsel against giving preclusive effect to any agency determination absent judicial review.[24]

Ultimately, the BLNR's denial was not a final judgment or determination in any sense of finality. Factual findings were not entered, the legal issues had not been litigated, an administrative law judge or similar entity had not issued an opinion on the merits, and no appellate body, either

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[17] *Santos* at 653, 646 P.2d at 966.Id.
[18] United States v. Utah Constr. & Mining Co., 384 U.S. 394, 422, 86 S.Ct. 1545, 16 L.Ed.2d 642 (1966).
[19] *Santos* at 654, 646 P.2d at 966 (1982) (emphasis added).
[20] *Pele Def. Fund v. Paty*, 73 Haw. 578, 600, 837 P.2d 1247, 1261 (1992).
[21] 698 F.Supp. 1496 (D. Haw. 1988).
[22] *See Dannenberg v. State*, 139 Hawaii 39, 60, 383 P.3d 1177, 1198 (2016) (applying res judicata and collateral estoppel only where "the particular issue in question was . . . finally decided") (emphasis added).
[23] *Carroll v. Maui Cnty.*, 866 F.Supp. 459, 464-65 (D. Haw. 1994).
[24] *State v. Alvey*, 67 Haw. 49, 54, 678 P.2d 5, 8-9 (1984).

administrative or judicial, had reviewed any legal or factual aspects of the denial. Because the fairness requirements and legal elements for res judicata and collateral estoppel were not present In the course of the Foundation's initial application, the Board's previous denial has no preclusive effect.

Because each application is based on the case-specific facts of that application, denial of one application in the past will not preclude subsequent consideration and approval of a similar application. Thus, the BLNR has discretion to make a different decision this time.

C. The State of Hawaii Does Not Have Sovereign Immunity as a Landowner of the Breakwater.

One of the comments recently submitted regarding the CDUA claims that the State has sovereign immunity for any claims for personal injury. This comment is wrong. The doctrine of sovereign immunity provides that the State "is immune from suit for money damages, except where there has been a 'clear relinquishment' of immunity and the State has consented to be sued." *Office of Hawaiian Affairs v. State*, 110 Hawai'i 338, 356, 133 P.3d 767, 785 (2006) (quotation marks and citation omitted); *Chun v. Bd. of Trs. of Emps.' Ret. Sys. of Haw.*, 106 Hawai'i 416, 432, 106 P.3d 339, 355 (2005). However, in this case, the State has waived its sovereign immunity by statute under the State Tort Liability Act. HRS § 662-2 reads in full:

> The State hereby waives its immunity for liability for the torts of its employees and shall be liable in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

Because the State is the owner of the breakwater, pursuant to HRS § 662-2 it is liable to persons who might be injured "to the same extent as a private individual under like circumstances". Consequently, the State cannot rely upon the doctrine of sovereign immunity for liability protection, and should take action to reduce the potential risk of injuries in the area by approving the proposed CDUA project.

Thank you for the opportunity to provide these comments in support of CDUA OA-3913.

Very truly yours,

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