

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

January 26, 2024

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

PSF No.:23OD-086

OAHU

Grant of Term, Non-Exclusive Easement, Immediate Right-of-Entry and Revocable Permit to Robert Howard Merriman and Cynthia Louise Merriman for Seawall and Filled Land Located at Kaneohe, Koolaupoko, Oahu, Identified as Tax Map Key: (1) 4-4-021: seaward of 034 & 035.

APPLICANT:

Robert Howard Merriman and Cynthia Louise Merriman, husband and wife, as tenants by the entirety of the abutting residential parcel.

LEGAL REFERENCE:

Sections 171-13, 171-16(d), 171-17, 171-53(b), and 171-55, Hawaii Revised Statutes (“HRS”), as amended.

LOCATION:

Portion of filled land located in Kaneohe, Koolaupoko, Oahu, identified by Tax Map Key: (1) 4-4-021: seaward of 034 and 035, as shown on **Exhibits A-1** and **A-2**.

AREA:

3,400 square feet, more or less, to be reviewed and approved by the Department of Accounting and General Services, Survey Division.

ZONING:

State Land Use District: Conservation
City & County of Honolulu LUO: Residential A [for the abutting private property]

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act
DHHL 30% entitlement lands pursuant to the Hawaii State Constitution: No

CURRENT USE STATUS:

Unencumbered with unauthorized easements.

TERM, NON-EXCLUSIVE EASEMENT:

CHARACTER OF USE:

Right, privilege and authority to use, maintain, repair, replace, and remove existing seawall and filled land over, under, and across State-owned land.

COMMENCEMENT DATE:

To be determined by the Chairperson

CONSIDERATION:

One-time payment to be determined by independent appraisal establishing fair market value, subject to review and approval by the Chairperson.

TERM:

Twenty-five (25) years.

The Land Division has reduced the term for which shoreline easements are granted from 55 to 25 years in response to sea level rise projections disclosed in the Hawaii Sea Level Rise Vulnerability and Adaptation Report adopted by the State Climate Change Mitigation and Adaptation Commission and pursuant to the recommendation of the Office of Conservation and Coastal Lands. Landward migration of the shoreline is currently occurring as a direct result of sea level rise. This will progressively expose immobile shoreline structures to an evolving combination of destructive effects from erosion, chronic flooding, and wave inundation. The intention of the term reduction is two-fold: (1) to reduce the potential for accidents and liabilities resulting from dysfunctional shoreline structures by more frequently reviewing and managing shoreline structures and (2) to

facilitate a general process of managed retreat from the shoreline.

MONTHLY RENTAL FOR RIGHT-OF-ENTRY AND REVOCABLE PERMIT:

Monthly rental amount \$1180.00 for right-of-entry and revocable permit has been calculated by staff and has been reviewed and approved by the Chairperson. **(Exhibit B)**

REMOVAL BOND:

Applicant shall be required to post a removal bond in an amount to be determined by Land Division in consultation with Engineering Division, subject to approval by the Chairperson.

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

In accordance with Hawaii Administrative Rules ("HAR") §§11-200.1-15 and -16 and the Exemption List for the Department of Land and Natural Resources, reviewed and concurred on by the Environmental Council on November 10, 2020, the subject request is exempt from the preparation of an Environmental Assessment pursuant to General Exemption Type 1, which applies to “[o]perations, repairs or maintenance of existing structures, facilities, equipment, or topographical features, involving minor expansion or minor change of use beyond that previously existing.” Specifically, the subject request is exempt under Part 1, Item 39, which exempts the “[c]reation or termination of easement, covenants, or other rights in structures or land.” The subject request is a de minimis action that will probably have minimal or no significant effect on the environment and should be declared exempt from the requirements of section 1-200.1-17, HAR.

DCCA VERIFICATION:

Not applicable. Applicants are individual, residential landowners and are not required to register with DCCA for this purpose.

APPLICANT REQUIREMENTS: Applicant shall be required to:

1. Provide survey maps and descriptions according to State DAGS standards at Applicants’ own cost;
2. Pay monthly rent as determined by the Department and approved by the Board in consideration of the right-of-entry and revocable permit;
3. Post a removal bond in an amount to be determined by Land Division in consultation with Engineering Division and subject to approval by the Chair;
4. Pay for an appraisal to determine one-time payment in consideration of the easement;

5. Pay for publication of public notice at least once statewide and in the City & County of Honolulu by publication pursuant to section 171-16(d), HRS; and
6. Remove all encroaching structure or items in the event that the easement is not consummated.

JUSTIFICATION FOR REVOCABLE PERMIT:

The land disposition recommended to the Board in this matter is an orderly process that uses a series of permits structured to allow for immediate use and occupancy and proceed on a direct course to a to a long-term lease, subject to conditions that benefit the State. The land disposition presented in the present submittal as one of the two options recommended to the Board is a three-stage process encompassing:

1. Issuance of a right-of-entry permit for a period of up to six months. This allows the Applicants to immediately legitimize occupancy of the public land in question, begin repair and maintenance of the encroaching seawall and filled land without undue delay and without cost to the State, and begin preparations for the Applicants' obligations under future land dispositions.¹ The right-of-entry permit includes requirements for payment of monthly rent, provision to the Department of a removal bond or equivalent securitized funds, indemnification of the State, and provision of liability insurance by the Applicants. The purpose of the removal bond is to ensure that there are funds available to remove the encroachment from State land in the event that the Legislature or Governor does not approve the easement authorized by the Board.
2. Issuance of a revocable permit for no longer than one year. This allows Land Division time to complete the administrative processes that underlie the grant of easement including approval of the easement contract by the Department of the Attorney General, completion of the appraisal (at the Applicants' cost) to determine the lump-sum payment for value of the easement, and statewide publication of notice of the land disposition while the Applicants maintain the same obligations for rent payments, removal costs, indemnification, and provision of liability insurance.
3. Issuance of an easement. This final step cannot be executed without prior completion of the prerequisites stated above. Therefore, the interim disposition through revocable permit is necessary.

The interim revocable permit step is limited in its duration and essential in its utility. While the revocable permit is in effect, the Applicant assumes the costs of maintaining the subject

¹ The Applicants' obligations under a revocable permit and easement include obtaining a survey to confirm the size of the disposition area, obtaining a cost estimate for removing the shoreline protection structure which determines the amount of the removal bond, and procurement through Land Division of an appraisal to determine the lump-sum value of the easement.

parcel of State land and the liability for any damages caused on or by the Applicants' use of the land during the often-lengthy process of consummating the easement.

REMARKS:

The Applicants are owners of the residential properties located at TMK: (1) 4-4-021:034 and 035, which abut a portion of filled land located within the State Shoreline Conservation District. The filled land has an approximate area of 3,400 square feet; contains landscaping, trees, and personal property; and is enclosed on two sides by a seawall that connects to fencing which surrounds the back side of the residential property along the record boundaries of the two parcels.

The purpose of the present submittal is to resolve this encroachment on State land through issuance of an easement preceded by a right-of-entry permit and revocable permit.

The Applicants submitted a Shoreline Encroachment Information Sheet and supporting documentation to the Office of Conservation and Coastal Lands (OCCL). In response, OCCL determined that the encroachments were likely constructed in 1939 pursuant to Department of Army Permit No. 800.6-152 and are therefore a "legal fill." Since the encroachment was constructed pursuant to a valid permit prior to the enactment of Conservation District rules, OCCL determined that the encroachment is non-conforming. **(Exhibit C)**

After the OCCL determination, the Applicants contacted Land Division seeking an easement for the filled land and seawall.

The filled land at issue is, for practical purposes, part of the back yard of the subject residential property. It is approximately the same grade and height and is covered with the same grass lawn and landscaping as the abutting residential parcel. **(Exhibit D)** The filled land is bounded on the makai (west) side and the north side with the concrete masonry seawall encroachment. The seawall connects on the north and south sides to fences which fully enclose the residential property and the filled land within a gated yard. There is no practical means of public access available to the filled land. **(Exhibit E)**

There is no beach in the area where the filled land is located. The encroaching seawall constitutes the shoreline boundary of the filled land and OCCL has found that the tidal area is a mixture of reef rubble and dredged material. Public recreation such as fishing, diving, surfing, and boating takes place offshore of the parcel. There is a public shoreline access right of way located approximately 300 feet north of the subject property at the end of Malae Place, a nearby neighborhood street.

The subject property is located in a residential area and is bounded on both sides by other residential properties that also include filled land and seawalls, which were likely constructed under the same 1939 Department of Army permit. Removal of the subject encroachments would not increase access to the shoreline and may have a negative effect on the surrounding residential properties.

Comments on this proposed land disposition were requested from the following agencies: DLNR Division of Aquatic Resources, DLNR State Historic Preservation Division, DLNR Office of Conservation and Coastal Lands, City & County of Honolulu Department of Planning and Permitting, and the Office of Hawaiian Affairs. The City & County of Honolulu Department of Planning and Permitting stated that it has no objections to this proposed disposition. OCCL responded that it has no objections and supports this easement.

Pursuant to the 1939 Department of Army permit and correspondence with OCCL, the filled land and seawall were permitted at the time they were originally constructed. Therefore, staff does not recommend a fine for unauthorized encroachment.

Applicant has not had a lease, permit, easement or other disposition of State lands terminated within the last five years due to non-compliance with such terms and conditions.

RECOMMENDATION: That the Board:

1. Declare that, after considering the potential effects of the proposed disposition as provided by Chapter 343, HRS, and §§11-200.1-15 and -16, HAR, this project is expected to have minimal or no significant effect on the environment and is therefore exempt from the preparation of an environmental assessment as a de minimis action.
2. Authorize the continued applicability of the subject requests in the event of a change in the ownership of the abutting parcels described as Tax Map Key: (1) 4-4-021:034 and 035, provided that the succeeding owner has not had a lease, permit, easement or other disposition of State lands terminated within the last five (5) years due to non-compliance with such terms and conditions.
3. Authorize the issuance of a right-of-entry permit to Robert Howard Merriman and Cynthia Louise Merriman covering the subject area for encroachment purposes under the terms and conditions cited above, which are by this reference incorporated herein and further subject to the following:
 - A. The standard terms and conditions of the most current right-of-entry permit form, as may be amended from time to time;
 - B. Posting of a removal bond during the effective period of the right-of-entry permit;
 - C. Removal of the subject encroachment, if required, within the period determined by the Chairperson;
 - D. Commencement of the right-of-entry on the Board date, for a term of one year or until the issuance of the revocable permit described in

- recommendation 4 below, whichever is sooner; provided that the Chairperson may extend the right-of-entry for additional one-year periods for good cause shown; and
- E. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.
4. Authorize the issuance to Robert Howard Merriman and Cynthia Louise Merriman of a revocable permit covering the subject area for encroachment purposes, under the terms and conditions cited above, which are by this reference incorporated herein and further subject to the following:
- A. The standard terms and conditions of the most current revocable permit form, as may be amended from time to time;
 - B. Posting of a removal bond during the effective period of the revocable permit;
 - C. Removal of the subject encroachment, if required, within the period determined by the Chairperson;
 - D. Review and approval by the Department of the Attorney General; and
 - E. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.
5. Subject to the Applicant fulfilling all of the Applicant Requirements listed above, authorize the issuance to Robert Howard Merriman and Cynthia Louise Merriman of a 25-year term, non-exclusive easement covering the subject area for encroachment purposes under the terms and conditions cited above, which are by this reference incorporated herein and further subject to the following:
- A. The standard terms and conditions of the most current term shoreline encroachment easement document form, as may be amended from time to time;
 - B. The easement shall run with the land and shall inure to the benefit of the real property described as Tax Map Key: (1) 4-4-021;034 and 035, provided however: (1) it is specifically understood and agreed that the easement shall immediately cease to run with the land upon the expiration or other termination or abandonment of the easement; and (2) if and when the easement is sold, assigned, conveyed, or otherwise transferred, the Grantee shall notify the State, as Grantor, of such transaction in writing, and shall notify the Grantee's successors or assigns of the insurance requirement in writing, separate and apart from the easement document;

- C. Posting of notice at least once statewide and once in the City & County of Honolulu in accordance with section 171-16(d), HRS;
- D. Review and approval by the Department of the Attorney General;
- E. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State; and
- F. Any shoreline hardening policy that may be adopted by the Board prior to execution of the grant of easement.

Respectfully Submitted,



Rebecca L. Anderson
Shoreline Specialist

APPROVED FOR SUBMITTAL:



Dawn S. N. Chang, Chairperson

KEM

RT

TMK (1) 4-4-021:034 and 035



EXHIBIT A-1

TMK (1) 4-4-021:034 and 035



EXHIBIT A-2

JOSH GREEN, M.D.
GOVERNOR | KE KIA'ĀINA

SYLVIA LUKE
LIEUTENANT GOVERNOR | KA HOPE KIA'ĀINA



STATE OF HAWAI'I | KA MOKU'ĀINA 'O HAWAI'I
DEPARTMENT OF LAND AND NATURAL RESOURCES
KA 'OIHANA KUMUWAIWAI 'ĀINA

P.O. BOX 621
HONOLULU, HAWAII 96809

DAWN N.S. CHANG
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE
MANAGEMENT

LAURA H.E. KAAKUA
FIRST DEPUTY

M. KALEO MANUEL
DEPUTY DIRECTOR - WATER


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

To: Dawn N. S. Chang, Chairperson
Through: Russell Y. Tsuji, Administrator
From: Land Division, Appraisal Section
Date: November 27, 2023
Subject: Robert Howard Merriman and Cynthia Louise Merriman Shoreline Revocable Permit

A shoreline revocable permit valuation was prepared for the property below and is summarized as follows:

Reference: PSF No. 23OD-086
Applicant: Robert Howard Merriman and Cynthia Louise Merriman
TMK: (1) 4-4-021:034
Area: 3,400 square feet, more or less
Effective Date: Upon Board Approval
Recommended Value: **\$1,180 per month**

The undersigned finds that the valuation was completed in accordance with the assignment.



Dawn N. S. Chang, Chairperson

Nov 27, 2023

Date

EXHIBIT B

TMK	440210340000
Assessed Land Value (\$)	2213900
Land Area (sf)	10631
Unit Rate Land Value (\$/sf)	208.2494591
50% Off For Submerged Lands	104.1247296
Encroachment Area (sf)	3400
Encroachment Land Value (\$)	354024.0805
Annual Rent @ 4 to 8%	0.04
Recommended Annual Value	14160.96322
Monthly rent	1180.080268

JOSH GREEN, M.D.
GOVERNOR | KE KIA'ĀINA

SYLVIA LUKE
LIEUTENANT GOVERNOR | KA HOPE KIA'ĀINA



KA MOKU'ĀINA 'O HAWAII'
DEPARTMENT OF LAND AND NATURAL RESOURCES
KA 'OIHANA KUMUWAIWAI 'ĀINA
OFFICE OF CONSERVATION AND COASTAL LANDS
P.O. BOX 621
HONOLULU, HAWAII 96809

DAWN N.S. CHANG
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KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

REF:OCCL:CM

Encroachment: OA 23-08

Robert and Cynthia Merriman
[REDACTED]
Kaneohe, HI 96744

May 4, 2023

SUBJECT: Determination of Shoreline Encroachment for Seawall and Filled Lands
Located at [REDACTED], Kaneohe, Oahu; Tax Map Key (TMK):
(1) 4-4-021:seaward of 034

Dear Mr. and Mrs. Merriman,

The Department of Land and Natural Resources (DLNR), Office of Conservation and Coastal Lands (OCCL), has reviewed the Shoreline Encroachment Information Sheet package seeking to resolve an encroachment on State Lands seaward of the subject property. Your package included the information sheet, a shoreline survey map identifying the encroachment, an aerial photo dated February 8, 1968, and photos of your property. The survey map identified approximately 2,500 square feet of encroaching area consisting of a seawall and filled land built on State submerged lands.

Based on the information provided and review of a January 20, 2004 memorandum from OCCL to Land Division having no objections to the subject encroachments and supporting a disposition, it appears that although the seawall and filled land may have been constructed makai of the high-water line, the encroachments appear to be a "legal fill" that may have been done in 1939 under a Department of Army Permit no. 800.6-152 (see **Exhibit 1**) prior to the Conservation District rules being promulgated. The OCCL regulates land use within the Conservation District pursuant to the Hawaii Administrative Rules, Chapter 13-5. The OCCL has determined that since the seawall and filled land areas were constructed prior to the Conservation District rules, the encroachments are considered non-conforming.

Since the encroachments are determined to be non-conforming, it does not require a Conservation District Use Permit (CDUP) from our office, but please be advised that any future proposed work and/or repair to the structure may require a review and possibly authorization from the Department or the Board of Land and Natural Resources. For more information regarding the rules and regulations of the Conservation District, please

EXHIBIT C

Robert and Cynthia Merriman
Seawall and filled lands

Encroachment OA 23-08

review the Hawaii Administrative Rules, Chapter 13-5, on our website at <https://dlnr.hawaii.gov/occl/files/2013/08/HAR-13-5-2021.pdf>.

Although a CDUP is not required for the seawall and filled land area, a land disposition may be needed to resolve the encroachments. Please contact the Land Division to assess whether a disposition may be needed.

Should you have any questions regarding this correspondence, please contact Cal Miyahara of our office at (808) 798-6147 or calen.miyahara@hawaii.gov.

Sincerely,

S Michael Cain


Michael Cain, Administrator
Office of Conservation and Coastal Lands

CC: ODLO
City-Department of Planning and Permitting

Robert and Cynthia Merriman
Seawall and filled lands

Encroachment OA 23-08


LINDA LINGLE
GOVERNOR OF HAWAII



PETER T. YOUNG
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

DAN DAVIDSON
DEPUTY DIRECTOR - LAND

ERNEST Y.W. LAU
DEPUTY DIRECTOR - WATER



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
OFFICE OF CONSERVATION AND COASTAL LANDS
POST OFFICE BOX 821
HONOLULU, HAWAII 96809

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KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

REF:PB:MM

JAN 20 2004

File Number Encroachment: OA-04-18

MEMORANDUM:

TO: Robert M. Ing, Land Agent
Land Division

FROM: Samuel J. Lemmo, Administrator
Office of Conservation and Coastal Lands

**Subject: Shoreline Encroachment (Seawall/Fill) at [REDACTED]
Kaneohe, Oahu, Hawaii, TMK: (1) 4-4-21:34&35**

Office of Conservation and Coastal Lands (OCCL) staff has reviewed the submitted documentation for this case. The encroachment in question is a seawall and fill material located Makai of the homeowner's property line. The structure is Makai of the metes and bounds of the parcel in question and thus constitutes an encroachment onto State of Hawaii land. In the questionnaire, the area of the encroachment is identified as 143 square feet. However, based on the submitted survey map, total area of the encroachment is approximately 2,593 square feet.

OCCL staff was unable to locate any construction permit or other land use authorization permits at the State or at the City and County of Honolulu for the seawall. However, DLNR does not consider the encroachment a Conservation District violation and will not be asking for an after-the-fact Conservation District Use Application to cure this matter.

In June 2000, we issued a letter to the then Oahu District Land Agent (Charlene Unoki) regarding a shoreline encroachment on the abutting parcel #36. In that case, the State was able to sell the land to the abutting property owner because the land was considered to be "legal fill" that was apparently done in 1939 under a Department of the Army Permit # 800.6-152, issued to Kaneohe Ranch. It is likely that this land was part of that historic fill operation, although the abutting landowner has submitted no documentation to that effect.

Exhibit 1

Robert and Cynthia Merriman
Seawall and filled lands

Encroachment OA 23-08

The Board of Land and Natural Resource (BLNR) recently established a policy to allow the disposition of shoreline encroachments by either removal or issuance of an easement. In carrying-out this policy, the Department established criteria to guide decision-making over specific cases. The criteria are as follows:

1. Protect/preserve/enhance public shoreline access;
2. Protect/preserve/enhance public beach areas;
3. Protect adjacent properties;
4. Protect property and important facilities/structures from erosion damages;
and
5. Apply "no tolerance" policy for recent or new unauthorized shoreline structures

In addition, the Department developed a "Shoreline Encroachment Information Sheet" that is intended to provide the State with additional information to guide the Department's decisions on the disposition of shoreline encroachments. This form has been completed and submitted.

Surrounding Land Uses:

The surrounding uses are residential.

Beach Resources:

OCCL determined that the tidal area is a mixture of reef rubble and dredged material. There are no sandy beaches in the area.

Public Access:

There is an easement on the north side of the property, which abuts the Stoutemeyer property.

Effect of Removing the Encroachment on:

Beach Resources: The removal of the encroachment would have no benefit to the public. Public recreation such as fishing, diving, surfing and boating takes place offshore of the parcel.

Public Access: OCCL staff has determined that public access would not be enhanced by removal of the encroachments provided that public access is not prohibited on the north side of the property along the easement.

Affect on Adjacent Properties: Removal of the encroachment would affect the two abutting landowners as the seawall in question also fronts their parcels.

Upon review and careful consideration of the information gathered in this case, staff has determined that the encroachment would have no adverse impacts on natural resources, including beach resources. Therefore, the OCCL has no objections to the encroachment remaining in place. Pursuant to Chapter 171, the

Robert and Cynthia Merriman
Seawall and filled lands

Encroachment OA 23-08

landowner is required to obtain a land disposition for the use of public lands, and may be subject to a \$500 fine for the encroachment. If the landowner does not pursue a disposition, they will be required to remove the encroachment.

We hope this letter helps resolve some of the outstanding issues. Please feel free to contact me at 587-0381 should you have any questions on this matter.

Aloha,

Samuel J. Lemmo, Administrator
Office of Conservation and Coastal
Lands

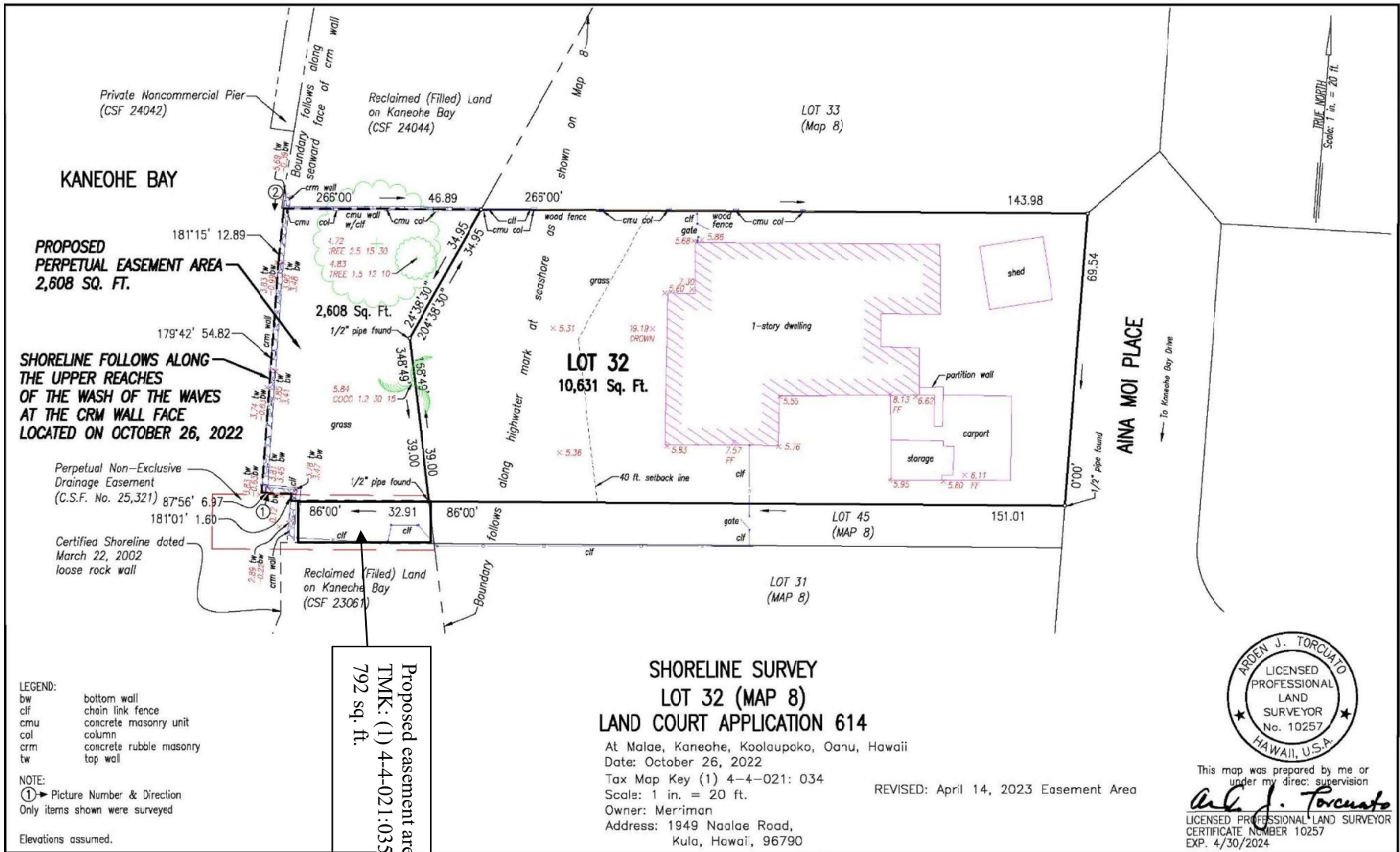
Cc: Oahu Board Member
Chairperson's Office

#1 10/26/2022 1:38 p.m.



#2 10/26/2022 1:41 p.m.





44-4 Aina Moi Place, Kaneohe
F.B. 121:39

11" x 17"

EXHIBIT E