September 26, 2025
Testimony on D-3

Chair Chang and members of the board,

Today, you are being asked whether to sign a stipulated judgment. But before doing so, you need context, which the staff submittal fails to provide.

Historical Background

Once upon a time, before the hotel at Kāhala was built, the area looked like this:

In the early 1960s, the Kāhala Hilton Hotel Company, Inc., Bishop Estate, and others requested approval from the State to dredge a swimming area and expand a beach abutting property they possessed in the Wai‘alae-Kāhala area. To convince the Honolulu City Council to rezone the property, the trustees of Bishop Estate issued a public statement in which they pledged to “create a good beach.” The trustees pledged, “All this beach seaward from the Estate’s land court makai boundary would belong to the State and the public would have free access to it[.]” In 1963, the developers agreed “to construct such beach and swimming area for and on behalf of the State.” The State of Hawai‘i entered into an agreement with the developers, recorded in the Land Court, in which all the parties understood and agreed that the filled and reclaimed lands “**shall be used as a public beach**.”[1]

After dredging and filling, the sandy beach stretched from the ocean to the edge of the hotel property:

[1] “Title to and ownership of all filled and reclaimed lands and improvements **seaward of the makai boundaries of Land Court Applications Nos. 828** and 665 shall remain in and vest in the State of Hawaii and **shall be used as a public beach**.” The hotel is on lot 228 of Land Court Application 828.

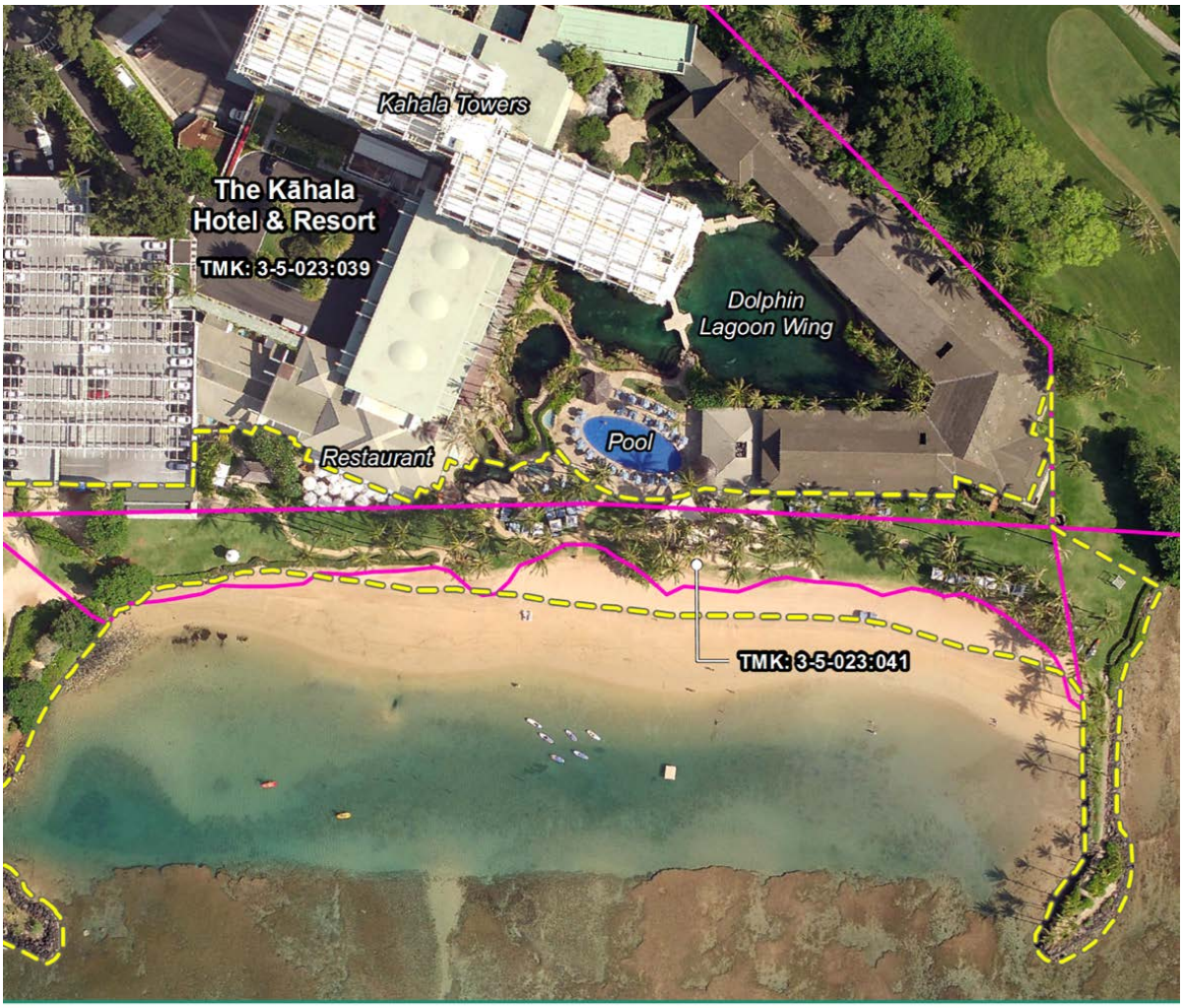
The beach now juts out from the natural coastline. Everything makai of the mauka base of the groin on the right side of the photograph was filled.

The filled and reclaimed land, owned by the State, is now TMK parcel (1) 3-5-023:041 ("**Lot 41**"). The makai edge of Lot 41 is the shoreline, and the mauka edge borders the Kāhala Hotel. The mauka edge of Lot 41 runs to the base of the groin. Lot 41 is both formerly submerged land and ceded land. The area makai of the base of the groin is the filled and reclaimed lands that "shall remain in and vest in the State of Hawaii and shall be used as a public beach."

Nevertheless, the hotel—which has gone by various names and had various owners—has a long and troubled history of attempting to exclude members of the public from the area makai of hotel property. Your files document this shameful history.

In the 1980s, the hotel grassed over the portion of the sandy beach on Lot 41. Although primarily (but not entirely) covered in grass now, a sandy beach lies beneath Lot 41's turf.

Here is an aerial depiction of the area. Lot 41 is outlined in pink, parallel to the shoreline:



For five decades, BLNR has authorized the owners of the hotel to use Lot 41 for "recreational purposes" or for "recreational and maintenance purposes" through a series of revocable permits valid for one year. Between 1986 and 1993, the revocable permit required the hotel to pay $855 per month, purchase insurance, keep the area clean, and maintain it. It also barred commercial uses and required public access and use.

Resorttrust received a revocable permit valid from July 1, 2016 through June 30, 2017 to use Lot 41 for "**only**: recreational and maintenance purposes."

According to the sworn declaration of then-Administrator of DLNR's Land Division, BLNR has "never authorized commercial use of the revocable permit property."

2017-2018

In 2017, Resorttrust Hawaii attempted to stop me from walking across Lot 41.

In May 2018, a group of citizens documented numerous violations of the revocable permit, asked BLNR Chair Suzanne Case to investigate violations of the revocable permit, and urged her to

take enforcement action. The hotel operated the Seaside Grill restaurant, sold, and served food and alcohol, rented clamshell lounge chairs and cabana structures, and hosted weddings on Lot 41. Each cabana structure occupied a ten foot by ten-foot area and was more than eight feet high. The restaurant occupied nearly two thousand square feet of Lot 41. Here is what the area "to be used as a public beach" looked like:

A sign on Lot 41 stated that portions of Lot 41 were for the exclusive use of registered hotel guests.

Despite the blatant violation of the permit, your staff saw no violations.

Instead of taking any kind of enforcement action, staff at DLNR and BLNR worked with Resorttrust Hawaii to attempt to legitimize all the illegal commercial activities that had been taking place on Lot 41 other than the weddings. On August 6, 2018, Resorttrust Hawaii's attorney asked BLNR to allow the hotel to have a restaurant, rental cabana structures, rental clamshell lounge chairs, and storage on Lot 41. A DLNR staff submittal recommended that BLNR authorize all the uses that Resorttrust requested. The staff submittal contained no analysis as to how much demand there is for public use of Lot 41. It failed to mention that Lot 41 is dedicated to be used as a public beach. Its "justification for revocable permit" was that it is "needed to regulate the hotel's improvements and activities at the subject location." Its "justification" did not mention public recreational use, the public trust, or any impact upon them. BLNR simply responded to a request from a hotel to allow it to use public trust land for commercial purposes.

At the September 14, 2018 BLNR meeting on the hotel's request for a new revocable permit, numerous individuals, neighborhood boards and non-profit organizations submitted written testimony in opposition to the request. But **this board treated them with disdain.**

BLNR voted to approve a new revocable permit that authorized Resorttrust Hawaii to preset cabana structures, clam shell loungers, restaurant seating, and beach chairs on Lot 41 for Resorttrust's guests.

The general public was authorized to use Lot 41 **only** "to the extent the area is not in use as allowed by the Revocable Permit." BLNR allowed Resorttrust to exclude members of the public from a portion of public trust ceded land that BLNR had understood and agreed "shall be used as a public beach."

The Intermediate Court of Appeals Decision

The Intermediate Court of Appeals ruled that "the State, through Defendant-Appellee the Board of Land and Natural Resources (or BLNR), did not fulfill its duty regarding Lot 41, which is part

of the returned crown and government lands (or ceded lands) the State holds in trust." *Frankel v. BLNR*, 155 Hawai'i 358, 361, 564 P.3d 1157, 1160 (App. 2025) cert. rejected SCWC-20-0000603 (June 19, 2025). It held:

> [T]he record does not establish that the Board complied with the three procedural requirements for agency public trust decisionmaking relevant here - (1) starting with the presumption in favor of public use, (2) considering alternatives, and (3) providing clarity in its decision. Thus, the Board's decision compromised a public trust resource, ceded lands, without the required "level of openness, diligence, and foresight" our state law requires.

Id. at 381, 564 P.3d at 1180. In other words, you screwed up when you allowed the hotel to exclude members of the public from ceded land dedicated to be used as a beach.

More Recently Hotel Reduced its Occupation But Continues to Violate the Law

In response to enforcement action taken by the City (not BLNR) and to complaints, Resorttrust Hawaii reduced its uses of Lot 41 over the course of several years.

But it continued to violate the terms of its permit. It repeatedly preset more than the 70 chairs that BLNR authorized to be preset on Lot 41. **These violations were repeatedly brought to BLNR's attention, to no avail.** When faced with protests at Mauna Kea, BLNR sent law enforcement personnel to arrest Hawaiians attempting to protect public land. But when a corporation repeatedly violated permit conditions, DLNR and BLNR did nothing.

In 2023, the state legislature prohibited the presetting of commercial beach equipment on any beach under DLNR's jurisdiction (unless newly promulgated DLNR rules authorize them). 2023 Haw. Sess. Laws Act 227. "No commercial vendor shall preset commercial beach equipment on any beach under the jurisdiction of the department unless the customer is physically present for the immediate use of the commercial beach equipment." HRS § 200-3.5. Act 227 (2023) applies to Lot 41. The grassy portion of Lot 41 is a public beach in fact and in law. HRS §§ 200-1, 205A-1, 171-151, 171-42.

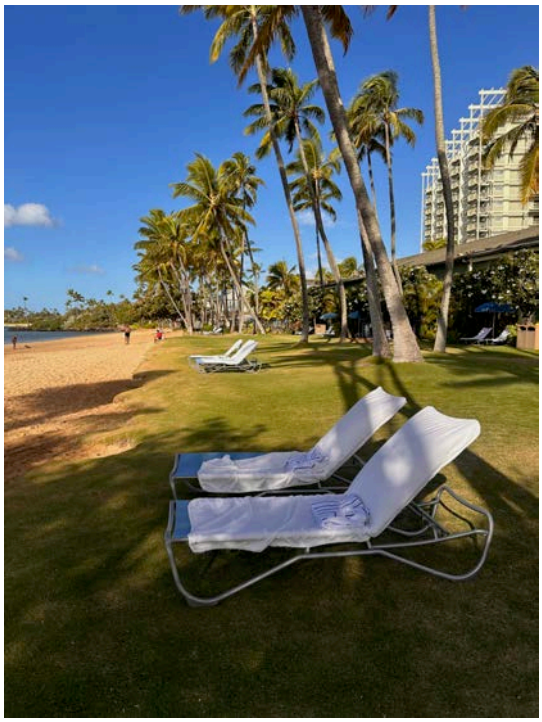
In August 2024, the hotel announced that it was willing to give up its permit that allowed it to preset chairs on Lot 41 for the exclusive use of its guests.

Nevertheless, the hotel continued to preset chairs both on Lot 41 and the sandy beach makai of it. Here are photographs taken on December 24, 2024 at 6:50 a.m.:

This is what things looked like on January 1, 2025:

On January 1, 2025, Resorttrust Hawaii preset chairs on Lot 41 – even though its permit and HRS § 200-3.5 no longer allowed it to do so.

At a BLNR hearing a couple of years ago, Riley Smith said that there would be zero tolerance going forward. Nevertheless, Resorttrust Hawaii continues to illegally preset chairs. Here are photographs from this past Saturday (9/19/25) when employees of the hotel were observed presetting chairs with no guests around:



There is far less presetting going on now, but Resorttrust Hawaii continues to violate the law and its permit.

I missed BLNR's meeting two weeks ago. If I had been there, I would have asked this board to revise the hotel's revocable permit once again. There are continuing problems, including the hotel's deliberate practice of presetting chairs illegally, as well as the hedge that blocks off public access along the Koko Head side of the property.

BLNR's Role Today

The proposed stipulation will not magically solve the problems that continue to fester. But it should help to bring an end to this particular lawsuit. You must decide whether to enter into the stipulated judgment as to count 4. Please understand that you are not obligated to enter into the proposed stipulation. You can propose different conditions or language. If you agree, soon thereafter, it will be filed with the court and then final judgment will be entered. At that point, I will be asking for the defendants in this case to pay my costs. Your attorney thinks that you will not have to pay these costs. She is wrong.

Your attorney wanted to sign a stipulated judgment in *Frankel v. BLNR* without this board ever having met to discuss this litigation. Her position is inconsistent with *Ching v. Case*, 145 Hawai'i 148, 168 , 449 P.3d 1146, 1166 (2019) and article XI section 2 of the state constitution. I refused to sign the proposed stipulated judgment until after this board met to discuss it.

Before signing, please understand that this board and the department staff have repeatedly breached their trust duties when it comes to lot 41. And please understand that your attorneys made arguments on your behalf that have been rejected by the courts.

Finally, this board needs to routinely place litigation matters on its agenda. The Land Use Commission and the Hawaiian Homes Commission are routinely updated on all litigation in which they are parties. Unfortunately, BLNR rarely places litigation items on its agenda. So far this year, this board has lost major cases before the appellate courts. But this board has never been briefed about them. You should receive a briefing as to all litigation in which BLNR is a party – particularly because you have two new board members. And litigation matters should routinely be placed on your agenda so that you can be informed as to the status of these cases and rulings of the courts.

/s/ David Kimo Frankel