

STATE OF HAWAI‘I
DEPARTMENT OF LAND AND NATURAL RESOURCES
OFFICE OF CONSERVATION AND COASTAL LANDS
Honolulu, Hawai‘i

April 10, 2026

Board of Land and
Natural Resources
State of Hawai‘i
Honolulu, Hawai‘i

Regarding: Request for Approval of Proposed Settlement Agreement in Conservation District Contested Case OA 24-05, relating to a fence at the Marconi Point Condominiums at the property identified by Tax Map Key No. (1) 5-6-003:053.

The Board may go into Executive Session pursuant to Section 92-5(a)(4) Hawai‘i Revised Statutes, in order to consult with its attorney on questions and issues pertaining to the Board’s powers, duties, privileges, immunities, and liabilities.

Attachment: Proposed Settlement Agreement

Appendix: Text Summary of Attachment

Background

The parties of the above-listed contested case request to be placed on a Board of Land and Natural Resources’ agenda for its review, approval or non-approval, and execution of the attached proposed settlement agreement.

On April 26, 2024, as agenda item K-1, the Department of Land and Natural Resources’ Office of Conservation and Coastal Lands (“OCCL”) requested that the Board of Land and Natural Resources (“Board”) impose administrative fines and other penalties against the Association of the Unit Owners of Marconi Point Condominium (“Petitioner”) related to an unauthorized boundary fence on its property, among other alleged violations on the same property. Petitioner’s legal counsel requested a contested case hearing on their behalf at the meeting and followed up with a written petition. <https://dlnr.hawaii.gov/wp-content/uploads/2024/04/K-1.pdf>.

On July 12, 2024, OCCL requested that the Board approve the appointment and selection of a hearing officer to conduct all hearings for the above-described alleged violations. <https://dlnr.hawaii.gov/wp-content/uploads/2024/07/K-3.pdf>.

Agenda Item K-1 at the April 26, 2024, meeting had several violations outlined therein. The remaining violations have either been settled by this Board or are in the process of the contested

case hearing¹. For ease of understanding, I outlined the relevant provisions of the attached submittal in red boxes that are applicable to the instant submittal².

OCCL and the Petitioners reached a proposed settlement agreement in lieu of the hearing and now this Board's approval of the settlement agreement.

Recommendation

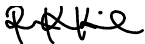
1. That the Board approve the proposed Settlement Agreement by and between Association of Unit Owners of Marconi Point Condominium, a Hawai'i nonprofit corporation, and the State of Hawai'i, Department of Land and Natural Resource, by and through it's Office of Conservation and Coastal Lands.

Respectfully submitted,

S Michael Cain

Michael Cain, Administrator
Office of Conservation and Coastal Lands

Approved for submittal:



Ryan K.P. Kanaka'ole, Acting Chairperson
Board of Land and Natural Resource

¹ The Board settled the violations relating to Ms. Kan's property on Unit 1 of the Marconi Point Condominiums on July 12, 2024 and the unauthorized fences on Unit 1 have been removed. The remaining violations relating to alleged unauthorized land uses in the Conservation District and the take of the endangered Hawaiian yellow-faced bee against LKG HI Properties, LLC, Greystone HI Investments, LLC, Sushil Garg, and Benjamin Lessary are being adjudicated in a contested case hearing.

² Some photograph exhibits that are irrelevant to the instant settlement have been deleted to reduce the size of the Board packet

Attachment: Proposed Settlement Agreement

In accordance with accessibility requirements, a text summary of this document has been prepared and is provided in Appendix A.

JOSH GREEN, M.D.
GOVERNOR



ANNE E. LOPEZ
ATTORNEY GENERAL

MATTHEW S. DVONCH
FIRST DEPUTY ATTORNEY GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
Ka 'Oihana O Ka Loio Kuhina
425 QUEEN STREET
HONOLULU, HAWAII 96813
(808) 586-1500

Re: Conservation District Contested Case OA 24-05, relating to a fence at the Marconi Point Condominiums

Dear Acting Chairperson and Members of the Board of Land and Natural Resources,

The parties of the above-listed contested case request to be placed on a Board of Land and Natural Resources' agenda for its review, approval or non-approval, and execution of the attached proposed settlement agreement.

On April 26, 2024, as agenda item K-1, the Department of Land and Natural Resources' Office of Conservation and Coastal Lands ("OCCL") requested that the Board of Land and Natural Resources ("Board") impose administrative fines and other penalties against the Association of the Unit Owners of Marconi Point Condominium ("Petitioner") related to an unauthorized boundary fence on its property, among other alleged violations on the same property. Petitioner's legal counsel requested a contested case hearing on their behalf at the meeting and followed up with a written petition.

On July 12, 2024, OCCL requested that the Board approve the appointment and selection of a hearing officer to conduct all hearings for the above-described alleged violations.

Agenda Item K-1 at the April 26, 2024, meeting had several violations outlined therein. The remaining violations have either been settled by this Board or are in the process of the contested case hearing.¹ For ease of understanding, I outlined the relevant provisions of the attached submittal in red boxes that are applicable to the instant submittal.²

OCCL and Petitioner reached a proposed settlement agreement in lieu of the hearing and now this Board's approval of the settlement agreement.

If this matter is placed on a Board agenda, counsel for both OCCL and the Petitioner will be present to answer any questions the Board members may have.

Respectfully,

Danica L. Patel
Deputy Attorney General

Attorney for the Department of Land
and Natural Resources, Office of
Conservation and Coastal Lands

¹ The Board settled the violations relating to Ms. Kan's property on Unit 1 of the Marconi Point Condominiums on July 12, 2024 and the unauthorized fences on Unit 1 have been removed. The remaining violations relating to alleged unauthorized land uses in the Conservation District and the take of the endangered Hawaiian yellow-faced bee against LKG HI Properties, LLC, Greystone HI Investments, LLC, Sushil Garg, and Benjamin Lessary are being adjudicated in a contested case hearing.

² I deleted some photograph exhibits that are irrelevant to the instant settlement to reduce the size of the Board packet.

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is made and entered into this _____ day of _____, 2026 ("Effective Date"), by and between ASSOCIATION OF UNIT OWNERS OF MARCONI POINT CONDOMONIUM ("Association"), a Hawaii nonprofit corporation, and the STATE OF HAWAII, DEPARTMENT OF LAND AND NATURAL RESOURCES ("DLNR"), by and through its Office of Conservation and Coastal Lands ("OCCL"). The Association and DLNR are collectively referred to herein as the "Parties" and individually as a "Party".

This Agreement is subject to the approval of the Board of Land and Natural Resources ("BLNR" or the "Board") and if not so agreed to by the Board, shall be deemed void.

BACKGROUND

- A. DLNR initiated the actions DLNR File Nos. OA-24-05 and OA-24-06 ("Enforcement Actions") regarding an alleged unauthorized boundary fence ("Boundary Fence") constructed within the State Conservation District at the property identified by Tax Map Key No. (1) 5-6-003:053 (the "Property") at a Board of Land and Natural Resources meeting on April 26, 2024;
- B. The Association manages and maintains the shared common elements of the Property;
- C. The Boundary Fence exists on a common element of the Property at the boundary between the Property and a property identified by Tax Map Key No. (1) 5-6-003:54;
- D. DLNR alleges that the Boundary Fence was extended from its original end location through the Conservation District to approximately the boundary between the sandy beach and the Property;
- E. On April 26, 2024, at the Board of Land and Natural Resources' meeting, the Association, by and through its counsel, requested a contested case hearing on the Enforcement Action, pursuant to Hawaii Revised Statutes Chapter 91; and
- F. The Association and DLNR seek to settle this matter and wish to avoid further burden, expense, and inconvenience of further proceedings.

Accordingly, the Parties agree as follows:

AGREEMENT

- 1. Settlement Terms.
 - a. The Association shall remove the portion of the Boundary Fence that was extended through the Conservation District. The Parties agree that the end of the Boundary Fence should be where the Conservation District Boundary is within the Property.

Settlement Agreement between Association of Unit Owners of Marconi Point Condominium and Department of Land and Natural Resources, State of Hawai'i

- b. The Association and OCCL shall work in good faith to determine where the Conservation District Boundary is within the Property, with reference to the September 20, 1971 Land Use Commission decision and where the shoreline, as defined in HRS Chapter 205A, currently exists.
 - c. The Association will bear all costs for removal of the portion of the Boundary Fence.
 - d. The Association agrees to provide OCCL with copies of:
 - i. Receipts for the work conducted to remove the portion of the Boundary Fence through the Conservation District;
 - ii. Information on where the materials were disposed of or reused.
 - e. The Association agrees to consult with OCCL and the United States Fish and Wildlife (“USFWS”) to determine a time and manner for removing the portion of the Boundary Fence through the Conservation District that will not adversely affect the Laysan albatross that nest in the area and any other species that may be identified as potentially impacted by this action by OCCL or the USFWS.
 - f. The DLNR agrees to waive all fines sought in the Enforcement Action against the Association, and any other potentially liable parties, for the Boundary Fence violation.
 - g. The Association waives its right to a contested case hearing regarding the Enforcement Actions and all allegations against it contained in the Enforcement Actions.
 - h. Each side is to bear their own attorneys’ fees and costs.
 - i. The DLNR will close the Enforcement Actions, as they relate to the Association, upon confirmation that the portion of the Boundary Fence extending through the Conservation District has been removed and it has been provided with the documentation in paragraph 1.d. The DLNR will provide the Association with written confirmation that the Enforcement Actions, as it relates to the Association, have been closed and that there are no further pending violations in the Enforcement Actions that implicate the Association.
2. Contested Case Proceedings. The Parties agree to execute this Agreement in lieu of a HRS Chapter 91 contested case proceeding for the Enforcement Actions. The Associations’ request for a contested case hearing at the April 26, 2024, Board meeting and written petition are deemed withdrawn.
- By executing this agreement, the Association waives its right to a contested case or any other means to contest the Enforcement Action and no further contested case hearing will be provided to the Association should they not comply with the terms of this Agreement. In the event that this Agreement is not effectuated, the contested case proceedings shall

Settlement Agreement between Association of Unit Owners of Marconi Point Condominium and Department of Land and Natural Resources, State of Hawai'i

proceed as if this Agreement had not been made. In such an event, the Agreement shall not be presented as evidence by either Party or considered by any tribunal in any current or future administrative or court proceeding related to this matter.

3. Agreement Not Binding Until Duly Approved by the Board. This Agreement shall not be binding on any Party unless and until it is approved by the Board. In the event the Agreement is not approved by the Board, this Agreement and all related discussions, communications, and documents exchanged shall be subject to Rule 408 of the Hawai'i Rules of Evidence. If this Agreement is not approved by the Board, then all admissions and statements herein are withdrawn, and they shall have no legal import and are not binding on the Parties.
4. No Admission of Fault, Liability, or Guilt. This Agreement shall not be construed or considered as an admission of any fact, event, circumstance, fault, liability, guilt, or obligation, unless and to the extent expressly provided in this Agreement.
5. No Reliance. The Parties represent and warrant that they have access to adequate information regarding the terms of this Agreement, the scope and effect of the releases set forth herein, and all other matters encompassed by this Agreement necessary to make an informed, knowledgeable, and independent decision regarding this Agreement. The Parties represent and warrant that they have had an opportunity to obtain legal advice from the attorney of their choice, that they have read the terms of this Agreement and that they fully understand the terms of this Agreement. The Parties further acknowledge and represent that they have not relied on the inducements, promises, representations, or statement of fact or opinion made by any party, person or entity.
6. Entire Agreement. This Agreement contains the entire agreement of the Parties about the subject matter hereof. Prior negotiations related to this agreement and drafts of this agreement will not be considered in interpreting this Agreement and are merged herein.
7. Amendments. This Agreement may not be altered, amended, modified, or otherwise changed, in any respect whatsoever, except by a writing duly executed by all the Parties to this Agreement. Each Party hereby acknowledges and agrees that it will make no claim at any time that this Agreement has been orally altered or modified in any respect whatsoever.
8. Binding on Successors and Related Entities. This Agreement will inure to the benefit of, and will be binding upon, each of the Parties for each, and all predecessors, successors, and assigns, and upon all persons or entities claiming by, through, or under any Party.
9. Cooperation. The Parties agree to fully cooperate with one another to carry out this Agreement, including executing any further documents or taking further steps that any other Party may reasonably request in connection with the same.

Settlement Agreement between Association of Unit Owners of Marconi Point Condominium and Department of Land and Natural Resources, State of Hawai'i

10. No Party Deemed Drafter. The Parties agree that no Party to this Agreement will be claimed or deemed to be the drafter of this Agreement should any dispute arise over its interpretation.
11. Authority. By signing this Agreement, the Parties warrant and represent that this Agreement has been validly authorized and constitutes a legally binding and enforceable obligation for them.
12. Electronic Signatures. This Agreement may be executed in counterparts. Duplicate, unexecuted pages may be discarded, and the remaining pages assembled as one instrument. Electronically transmitted signatures (*e.g.*, by email or facsimile) shall be effective for all purposes.
13. Severability. Should any provision of this Agreement be declared or be determined by any court to be illegal or invalid, the validity of the remaining parts, terms, or provisions will not be affected thereby, and the illegal or invalid part, term, or provision will be deemed not to be a part of this Agreement.
14. Fees. Each Party shall bear its own costs related to this Agreement, including but not limited to attorney's fees, filing fees, realty fees, due diligence costs, and title reports. The Parties agree to not seek attorney's fees and costs arising from this Agreement.
15. Governing Law; Jurisdiction; Venue. This Agreement shall be construed in accordance with the laws of the State of Hawai'i. The Circuit Court of the First Circuit shall have jurisdiction over the Parties for the purpose of enforcing or interpreting the terms of this Agreement. In the event that the Association fail to remove the portion of the Boundary Fence from the Conservation District, OCCL will promptly initiate an action in the Circuit Court of the First Circuit, State of Hawai'i, to enforce the terms of this Agreement.
16. Headings. The headings in this Agreement are for convenience only and in no way limit, alter, or affect the matters in this Agreement or the paragraphs captioned.

To evidence the Parties' agreement to this Agreement, each Party has executed it and delivered it effective as of the date indicated under that Party's signature.

Signature Pages Follow

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Settlement Agreement between Association of Unit Owners of Marconi Point Condominium and Department of Land and Natural Resources, State of Hawai'i

Approved by the Board of Land and Natural Resources on _____, 2026.

APPROVED AS TO FORM:

DANICA L. PATEL
Deputy Attorney General
Attorney for DLNR

Dated: _____

STATE OF HAWAII

By: _____
RYAN K.P. KANAKA'OLE
Acting Chairperson
Board of Land and Natural Resources
Dated: _____

By: _____
RILEY SMITH
Hawai'i Island Member
Dated: _____

By: _____
JAMES CARPIO
Member
Dated: _____

By: _____
KAREN ONO
Member
Dated: _____

By: _____
WESLEY KAIWI YOON
Member
Dated: _____

By: _____
DENISE ISERI-MATSUBARA
Member
Dated: _____

By: _____
CALVIN YOUNG
Member
Dated: _____

Signatures continued on next page

Settlement Agreement between Association of Unit Owners of Marconi Point Condominium and Department of Land and Natural Resources, State of Hawai'i

THE ASSOCIATION OF UNIT OWNERS OF MARCONI POINT CONDOMINIUMS

By _____

Its _____

Dated: _____

APPROVED AS TO FORM:

H. MAXWELL KOPPER
Attorney for The Association of Unit Owners of
Marconi Point Condominiums

Dated: _____

**STATE OF HAWAI‘I
DEPARTMENT OF LAND AND NATURAL RESOURCES
OFFICE OF CONSERVATION AND COASTAL LANDS
Honolulu, Hawai‘i**

April 26, 2024

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

REGARDING: Request for Administrative Fines and Other Penalties for Conservation District Enforcement OA 24-14 Regarding the Alleged Unauthorized Clearing of Land, Unauthorized Removal of 106 Trees, Unauthorized Spreading of Mulch, **Unauthorized Fence Lines** and Encroachment and Removal of Resources Upon State Land Located at and Makai of Tax Map Key: (1) 5-6-003:053

The Board may go into Executive Session pursuant to Section 92-5(a)(4), Hawaii Revised Statutes, in order to consult with its attorney on questions and issues pertaining to the Board's powers, duties, privileges, immunities, and liabilities.

AGAINST: Sushil Garg, manager of LKG HI Properties, LLC, and manager of Greystone HI Investments, LLC, and Benjamin Lassary, Vice President of RCA Trade Center Inc. For the Alleged Unauthorized Clearing of Land, Unauthorized Removal of 106 Trees, Unauthorized Spreading of Mulch, and Encroachment and Removal of Resources Upon State Land

AGAINST: Yue-Sai Kan Trust (Yue-Sai Kan, Trustee)
Yue-Sai Kan, individually

For the Alleged Unauthorized Fence Lines on Unit 1

AGAINST: **Association of Unit Owners of Marconi Point Condominium and/or Makai Ranch, LLC¹**
For the Alleged Unauthorized Boundary Fence

LANDOWNERS: State of Hawai‘i (submerged land)

Owners of Units within the Marconi Point Condominium Property Regime

LOCATION: Kahuku, Ko‘olauloa, O‘ahu

¹ When the fence was erected, the Marconi Point Condominium Property Regime had not been turned over to a management agency or an association of unit owners and was still within the “developer control period.” Makai Ranch, LLC, is the developer.

- TAX MAP KEY:** (1) 5-6-003:053 Upon and Makai of
- SUBZONES:** General and Resource (submerged land)
- EXHIBITS:**
- A Location Map and 4/23/2021 Aerial
 - B Mōlī Existing on Site
 - C Observation of Area
 - D 1971 LUC action/Various Maps of the Conservation District
 - E Attorney General Op. No. 17-1
 - F West Boundary Fence
 - G Certified Shoreline Photos
 - H Driving on the Beach
 - I Workers & Equipment
 - J Noticer of Alleged Violation
 - K Email from Garg
 - L Marconi Coastal Vegetation Impacts
 - M Damage to State Resources
 - N Before and After Comparison
 - O Wave Run Up
 - P Sea Grant 12/22/2023 Drone
 - Q Map of Boundary Fence Area
 - R Offending Fences
 - S Correspondence to Yue Sai Kan
 - T Penalty Schedule

SUMMARY

In mid-October 2023, the Office of Conservation and Coastal Lands (OCCL) received complaints regarding vegetation clearing in the shoreline area at the Marconi Point Condominium Property Regime (CPR). OCCL conducted a site inspection with other departmental staff, and active work in the shoreline was observed. OCCL staff verified that the coastal strand of vegetation was significantly altered. The coastal vegetation provides important critical habitat to native and endangered species. In addition, the vegetation provides important ecosystem functions and potential coastal hazard mitigation. Other alleged unauthorized land uses, such as fence lines, in the Conservation District were also observed.

This report will focus on the alleged unauthorized land uses in the Conservation District and damages to public lands

DESCRIPTION OF AREA (EXHIBITS A, B & C)

The subject area is located along the currently undeveloped² northern shoreline of O'ahu within the ahupua'a of Kahuku in the district of Ko'olauloa. The subject property is under

² The entire property is comprised of approximately ninety (90) acres and has been divided into thirty-two (32) units. The units have been sold off to individual owners. OCCL staff notes that the

a Condominium Property Regime (CPR) with the remnants of the historic Marconi Radio Station to the south (mauka) of the subject area. Turtle Bay Resort and its conservation easement area (Kalaeokauna'oa or Kahuku Point), located in Honakaoe ahupua'a, is to the west; submerged State land and the Pacific Ocean is to the north; vacant private land is to the East with the US Fish & Wildlife James Campbell National Wildlife Refuge beyond.

The shoreline makai of the subject property is utilized for camping, fishing, recreation, and reflection by humans. Turtles are known to nest in the area and haul out on the shoreline.³ OCCL staff has been to this area on at least four occasions. Staff has observed 'ilio holo i ka uaua (Hawaiian monk seal) basking in the sun, four mōlī (Laysan albatross) chatting and dancing, while nearby another mōlī protects its chick in a shallow nest on the ground. Mōlī gliding in the wind above and offshore, while a ūlīlī (wandering tattler) hurries along the shoreline. A single mōlī sat in the corner of a right angle behind two perpendicular fences. A dead shearwater was observed on the front of a sand dunes. The putrid smell of a blob of dead whale permeated the air as staff inspected its spine that was baking in the sun, while surfers caught waves offshore.

CONSERVATION DISTRICT (EXHIBIT D)

The unauthorized land uses took place on the fast lands (mauka of the shoreline) that lies in the General subzone of the Conservation District and the submerged lands (makai of the shoreline), that lies in Resource subzone of the Conservation District.

The State Land Use Commission at its September 17, 1971, meeting, pursuant to its consideration of petition A71-286 retained in the Conservation District, "150-foot inland from the upper reaches of the wash of waves." Therefore 150-foot inland from the shoreline lies within the General subzone.

The submerged lands makai of the shoreline in the Resource subzone of the Conservation District, are "owned by the State and held in public trust for the people of the State." See Attorney General Op. No. 17-1. **(Exhibit E)**

ALLEGED UNAUTHORIZED LAND USES

Relating to grading, removing, harvesting, extraction of any material or natural resource on land (vegetation clearing in the Conservation District and State Land)

On October 14-15, 2023, the OCCL received three separate complaints regarding vegetation clearing and potential disturbance to the endangered nalo meli maoli (Hawaiian yellow-faced bee), mōlī, and their habitats at the Marconi Point CPR.

property developers are currently in litigation against the City and County of Honolulu in the United States District Court regarding developing the land without a Special Management Area permit.

The case is *Makai Ranch, LLC, Marconi Farms, LLC, MP Unit 21, LLC, and RCA Trade Center Inc. v. City and County of Honolulu, Department of Planning and Permitting, et. al.*, under case number 1:2023cv00230.

³ <https://www.northshoreland.org/kalaeokaunaoa-kahuku-point/>

On October 17, 2023, Department staff conducted a site visit to the subject property, which, due to its remote nature, required staff to hike two miles to the area from the Turtle Bay Hotel's parking lot and public shoreline access area, across the Hotel's Conservation Easement to the property.

From the beginning of the property boundary line with the Conservation Easement, at what staff believes to be an unauthorized boundary fence⁴ (**Exhibit F**) the coastal vegetation consisting of naupaka and beach heliotrope had been removed, cut to the ground and pulverized into mulch. Staff observed remnants of pruned Heliotrope, where robust trees and native naupaka shrubbery once covered the ground, as illustrated in the certified shoreline photos of 2023 and other department documentation of the area. (**Exhibit G; Exhibit A**)

Staff continued along the shoreline and noticed tire tracks on the beach. At approximately three fourths of the way along the property, staff came across four workers actively utilizing vegetation removal equipment consisting of chainsaws, machete, and other equipment. At that time, the workers appeared to be within the General subzone of the Conservation District. A chipper, excavators, and other vegetation removal, mulching, or loading equipment were parked nearby within the Conservation District. (**Exhibit H, I**)

An oral request to stop work was made by Department staff but initially was rebuffed. Upon locating the supervisor ("Ben"), department staff reiterated their request to stop work immediately. Following further discussions with the supervisor, staff notes that the land clearing work did stop.

Staff observed that the Heliotrope and native naupaka populations had been extensively cleared and mulched in both the fast lands/General subzone and submerged land/Resource subzone of the Conservation District.

On October 19, 2023, a Notice of Alleged Violation was issued to all property owners within the CPR for the unauthorized land uses in the Conservation District. (**Exhibit J**)

On October 30, 2023, staff met with Sushil Garg⁵ in response to the alleged unauthorized work and Notice. Mr. Garg stated that he had hired "Ben" through the previous owner, as Ben was familiar with the property. Mr. Garg expressed a concern regarding the dry brush and fire. Mr. Garg stated that he did not know about the importance of the vegetation. The meeting was followed up by an email from Mr. Garg to staff. (**Exhibit K**)

On January 31, 2024, a site inspection was performed by DOFAW and OCCL staff to further assess the area of disturbance. DOFAW investigated the disturbance to the yellow-faced bees and their habitat and OCCL investigated the disturbance to vegetation throughout the Conservation District. The vegetation that had been mulched on-site and spread over the ground throughout the Conservation District now were in piles. Without

⁴ OCCL staff is unable to locate any records of approved-permits with the City and County of Honolulu that would allow the construction of the boundary fence between the Turtle Bay properties and the subject property. Based on OCCL staff review of prior certified shorelines, which include photographs, staff believes the unauthorized boundary fence was likely constructed in 2022.

⁵ Sushil Garg is the managing agent of LKG HI Properties, LLC, which owns a majority of the beachfront properties at the CPR.

the coastal vegetation, it appears the reach of the surf was much more landward as evidence by the distribution of the mulch.

OCCL has concerns about siting mulch in the Conservation District because of the possibility of invasive coconut rhinoceros beetle (CRB) infestation. OCCL sifted the mulch and observed bugs, ants, a centipede, but no large CRB grub that would indicate the presence of a CRB infestation. DOFAW staff conducted a drone survey of the area to document the extent of the vegetation damage and staff counted trees and stumps for GIS location. Staff alleges that about 2-acres of land that lies within the Conservation District was disturbed. 106 stumps of Heliotrope were counted, with about 40 stumps appearing makai of the shoreline. **(Exhibits L, M, N)**

Staff notes that the vegetation (naupaka and beach Heliotrope) removed is an important part of a natural and healthy beach, dune, and backshore environment. Since the alleged unauthorized clearing and tree removal has taken place, the reach of the surf or highest wash of the waves appears to be much further mauka/landward. Drone footage taken on December 22, 2023, illustrates this by examining and comparing past drone footage taken on October 31, 2023. This is further evidenced in drone photos, taken on December 22, 2023, which show the upper limit of debris left by the highest wash of waves that appears to contain, but not limited to, the recently mulched coastal vegetation and on the ground inspection of the wash of waves of January 31, 2024. **(Exhibits O & P)**

Relating to unauthorized structures in the Conservation District

During OCCL's site inspections of October 2023 through January 2024, staff observed two fence lines that extend into the Conservation District and a fence line that parallels the shoreline. The OCCL has no record of correspondences, applications, or authorizations for fences within the Conservation District for this property. Further the offending fence lines appear to have been created in 2022. There is no record of a certified shoreline at this moment in time to ensure the fence line(s) could be properly sited outside of the Conservation District.

OCCL staff notes, based on consultation with DOFAW and the U.S. Fish and Wildlife Service, any fence-line in this area without proper authorization is likely to adversely affect the Mōlī that nest in this area. For more information, see the staff submittal relating to the taking of the mōlī named Ho'okipa under the Division of Forestry & Wildlife's agenda items.

Fences that have been erected in this area without proper authorization cannot be fully analyzed as to whether they comply with the Conservation District rules and considered impacts to the mōlī because there are no documented permits or plans for such fences.

Boundary Fence (Exhibits F, Q)

The subject fence is located at the boundary between TMK 5-6-003:54 (owned by Turtle Bay) and the subject parcel. The area where the fence extends into the Conservation District is noted as "easement 1 (10 ft. wide) for private beach access (0.221 acre more or less)." The easement is considered a "common element" of the CPR for all owners to utilize.

OCCL staff cannot locate any State or county records that would indicate that this fence has any permits from the State or the City and County of Honolulu's Department of Planning and Permitting. OCCL's jurisdictional authority ends at the Conservation District boundary, so OCCL can only seek enforcement relating to this fence within the Conservation District.

OCCL did not authorize any fence to be placed within the Conservation District at this location. As the easement upon which the fence is located is a "common element" of the CPR, the entire CPR is responsible for this violation.

Fences on Unit 1 (Exhibit R)

There are two fence lines on this unit. One appears to be a shade cloth fence that extends into the Conservation District. The other fence line appears to be a wrought iron fence running parallel to the shoreline. On January 31, 2024, staff observed numerous mōlī on the property socializing. At the western property boundary, a solitary moli was observed behind the iron wrought fence of Unit 1.

OCCL cannot locate any State or county records that would indicate that these fences have any permits from the State or the City and County's Department of Planning and Permitting. OCCL's jurisdictional authority ends at the Conservation District boundary, so OCCL can only seek enforcement relating to this fence within the Conservation District.

OCCL did not authorize any fence to be placed within the Conservation District at Unit 1 of the CPR. Ms. Yue-Sai Kan, a Trustee of the Yue-Sai Kan Trust, was made aware of the Conservation District, and its restrictions, in correspondence from OCCL dated August 16, 2022. **(Exhibit S)**

APPLICABLE LAWS

The Board has statutory authority to impose civil administrative fines for the above-discussed violations, as further discussed below.

The Board is authorized to recover money due the State for damage done to any public lands by wrongful entry and occupation or by wrongful removal therefrom or destruction of any property. HRS § 171-7(7).

Land uses in the Conservation District are regulated by Hawai'i Revised Statutes (HRS) Chapter 183C and the administrative rules promulgated thereunder, which are found in Hawai'i Administrative Rules (HAR) Chapter 13-5.

The Department, through OCCL, regulates land use in the Conservation District by the issuance of permits and site plan approvals. HRS §183C-6. Permit(s) or approval(s) by the department or board for land use(s) in the Conservation District must be obtained *before* proceeding with any land use. HAR §13-5-6(d).

This Board and the Department are statutorily required to enforce land use regulations on Conservation District lands, including the collection of fines for violations of land use. HRS § 183C-3.

Land uses, and associated permit or site plan approvals required by the State, in the General and Resource subzones of the Conservation District are governed by HAR §13-5-22.⁶ Land use, for purposes of HAR Chapter 13-5, means:

- (1) The placement or erection of any solid material on land if that material remains on the land more than thirty days, or which causes a permanent change in the land area on which it occurs;
- (2) The grading, removing, harvesting, dredging, mining, or extraction of any material or natural resource on land;
- (3) The subdivision of land; or
- (4) The construction, reconstruction, demolition, or alteration of any structure, building, or facility on land. HAR § 13-5-2.

In addition to the general definition of "land use," HAR Chapter 13-5 further describes specific land uses allowed within the Conservation District and what level of departmental review for such uses is required.

Staff notes that this submittal proposes resolution for unauthorized land uses within the Conservation District and removing State resources in violation of State law and administrative rule. There are other Federal and Honolulu County laws that may be applied to these circumstances to regulate and further enforce upon the unauthorized activities that may be occurring on the property that are beyond the scope of the department's authority.

Staff has assessed the land uses in the Conservation District at the subject property and identified the unauthorized land uses to be as follows:

Laws relating to grading, removing, harvesting, extraction of any material or natural resource on land (vegetation clearing in the Conservation District and State Land)

Tree removal is identified as a land use regulated under HAR §13-5-22 ("Selective removal of individual trees...for non-commercial purposes provided that each tree is replaced on a one-to-one-basis with trees that are appropriate to the site location with preferences to trees that are endemic or indigenous to Hawai'i"). Tree removal in the Conservation District requires site plan approval by the department prior to any work being conducted. HAR §§13-5-22(b)(2), P-11(B-1).

"Site plan" means a plan drawn to scale, showing the actual dimensions and shape of the property, the size and locations on the property of existing and proposed structures and open areas including vegetation and landscaping. HAR §13-5-2.

Basic land management, including routine weed control, clearing of understory, and tree pruning, utilizing chemical and mechanical control methods, which involves no grubbing or grading, in accordance with state and federal laws and regulations, in an area greater

⁶ "[A]ll identified land uses and their associated permit or site plan approval requirements listed for the protective and limited subzones also apply to the resource subzone, unless otherwise noted." HAR § 13-5-24(a).

"[A]ll identified land uses and their associated permit or site plan approval requirements listed for the protective, limited, and resource subzones also apply to the general subzone, unless otherwise noted." HAR § 13-5-25(a).

than one acre, is identified as a land use regulated under HAR §13-5-22. This type of basic land management in the Conservation District requires site plan approval by the department prior to any work being conducted. HAR §§13-5-22(b)(2), P-13(B-1). Further, the rules state that the department or board reserves the right to require departmental or board approval if it is determined that the proposed action may cause significant negative secondary impacts on natural or cultural resources, or the surrounding community.

Clearing land for fire pre-suppression and prevention is also an identified land use regulated under HAR § 13-5-22. This type of land management requires both a site plan approval by the department *and* a fire buffer plan approved by the department. HAR §§13-5-22(b)(2), P-13(B-3).

“Land” is defined as all real property, fast or submerged, and all interests therein, including fauna, flora, minerals, and all such natural resources, unless otherwise expressly provided. HAR §13-5-2.

“Grubbing” means the removal of vegetation by scraping, dislodging, or uprooting vegetation that breaks the topsoil. *Id.*

Mulch spreading is a “land use not otherwise identified” in HAR §13-5-25(G-2)(D-1). Any land use not otherwise identified in the administrative rules requires a board permit and potentially a management plan. HAR §13-5-25(c)(4).

“Management plan” means a project or site-based plan to protect and conserve natural and cultural resources. HAR §13-5-2.

Further, the basic of definition of “land use” includes the placement of any solid material on land that remains on the land for more than thirty days. HAR §13-5-2.

The spreading of mulch is inconsistent with the framework of the Conservation District that is designed to preserve the State’s fragile natural ecosystems and is contrary to the prohibition on waste and disposal facilities in the Conservation District. HRS §§ 183C-1, 183C-4.

Destruction and removal of any tree or shrub is prohibited on public property. HAR §13-221-28(d).

The shoreline below the high-water mark is State land. The removal of vegetation on State land constitutes unauthorized land use on State land. The Board is authorized to set, charge, and collect reasonable fines for engaging in any prohibited use of public lands or conducting any prohibited activity on public lands. HRS §171-6(15).

Laws relating to unauthorized structures in the Conservation District

The construction of a fence within or that extends into the Conservation District is identified as a land use regulated under HAR §13-5-22. If it is a new fence, a departmental permit is required prior to constructing said fence. HAR §13-5-22(P-13)(C-1). If the fence is constructed or placed as an accessory to existing facilities or uses, site plan approval by the department is required prior to construction. HAR §13-5-22(P-9)(B-1).

Further, the construction of a fence in the Conservation District meets the basic definition of "land use," which includes the placement or erection of any solid material on land if that material remains on the land for more than thirty days. HAR §13-5-2.

PENALTIES

Any person, firm, government agency, or corporation violating any provision of the Conservation District statutes or rules is subject to the penalties prescribed in HRS § 183C-7.⁷

HRS 183C-7 provides that any person violating HRS Chapter 183C or HAR Chapter 13-5 shall be fined not more than \$15,000 per violation, in addition to administrative costs, costs associated with land or habitat restoration, and damages to public land or natural resources, or any combination thereof.

The Board may set, charge, and collect the fine based on the value of the natural resource that is damaged, the market value of the natural resource damaged, and any other factor it deems appropriate, such as the loss of the natural resource to its natural habitat and the environment and the cost of restoration or replacement. These remedies are cumulative and in addition to any other remedy allowed by law. HRS § 183C-7(b).

In December 2010, the Board adopted the Conservation District Violation Penalties Schedule Guidelines and Assessment of Damages to Public Land or Natural Resources, to provide guidance in the assessment of administrative sanctions and promote consistency within the department. This violation penalty schedule applies to the instant matter. **(Exhibit T)**

OCCL staff treats each case individually when assessing penalties for violations of Conservation District laws using the Penalty Schedule Guideline and looks at factors that can allow for upward or downward adjustments. See HAR §13-1-70.

Penalties relating to grading, removing, harvesting, extraction of any material or natural resource on land (vegetation clearing in the Conservation District and State Land)

Tree removal

Naupaka is considered a native "shrub." Heliotrope is an invasive species tree, however, it provides necessary and critical habitat for numerous native species, including the indigenous and endangered yellow-faced bee.

The removal of any invasive tree is to be considered as removal/clearing of vegetation. Penalty Schedule Guideline at 5.

Departmental staff counted 106 tree stumps within the cleared area. If each tree were cleared individually over time, this could be a minor harm to the resource. However, based on the high number of trees cleared and their importance to the endangered yellow-faced bee, OCCL staff finds that the tree removal at the CPR's shoreline area constitutes **major harm to the resource** and the penalty range shall be \$10,000-\$15,000.

⁷ "Any person, firm, government agency, or corporation violating any of the provisions of this chapter or permits issued pursuant thereto shall be punished as provided in chapter 183C, HRS." HAR §13-5-6(a).

Basic Land Management / Vegetation removal

The clearing of the naupaka, heliotropes, and other vegetation at the CPR's shoreline area was approximately two acres. Based on table 3 of the Penalty Schedule Guidelines, removal of more than 10,000 square feet of vegetation constitutes **major harm to the resource** and provides that the penalty range shall be \$10,000-\$15,000. Penalty Schedule Guideline at 6.

Two acres is 87,120 square feet.

Mulch Spreading

The mulch in this instance was the pulverized naupaka, heliotrope, and invertebrates that lived within the plants.

Mulch spreading is a "land use not otherwise identified" in HAR §13-5-25(G-2)(D-1). Any land use not otherwise identified in the administrative rules requires a board permit and potentially a management plan. HAR §13-5-25(c)(4). Therefore, the spreading of the mulch at the CPR shoreline area constitutes **major harm to the resource** and provides that the penalty range shall be \$10,000-\$15,000.

Removal/Destruction of Tree or Shrub on State Land

The removal or destruction of any tree or shrub from State land is prohibited. As the landowner and his agent(s) did not even attempt to obtain permission from the State to remove and destroy these trees and shrubs, the staff finds that this violation constitutes **major harm to the resource**. The penalty for removing or destroying any tree or shrub from public lands is a \$500 fine, in addition to administrative costs and damages incurred by the department. HAR §13-221-3.

In addition to the fines, administrative costs, and damages provided for above, when there is damage to or theft of natural resources, the Board may also charge and collect a fine that is appropriate considering the value of the natural resource that is damaged or the subject of theft. In arriving at an appropriate fine, the Board may consider the market value of the natural resource damaged and any other factor it deems appropriate, such as the loss of the natural resource to its natural habitat and environment and the cost of restoration or replacement. These remedies are cumulative. HRS § 171-6(15).

Penalties relating to unauthorized structures in the Conservation District

Fence Construction

Construction of a fence or placement of any solid material within the Conservation District requires a departmental permit. Land uses identified to have a permit prerequisite, such as construction of a fence, constitute **major harm to the resource** and the penalty range shall be \$10,000-\$15,000.

DISCUSSION

Staff notes that while the landowners could have applied for permits or authorization for the above-discussed land uses, it would be highly unlikely that the land uses would have

been allowed in the Conservation District due to the impact the land uses would have on wildlife, including but not limited to native and endangered species. Land uses in the Conservation District are discretionary for the purpose of conserving, protecting, and preserving the important natural and cultural resource of the State through appropriate management and use to promote their long-term sustainability.

Vegetation and Tree Removal

The removal of 106 heliotrope trees, numerous naupaka, and other vegetation has caused substantial adverse impacts to the existing natural resources within the ecosystem. The naupaka and heliotrope trees constituted one of three known habitats of yellow-faced bees. The biggest threat to their extinction is habitat loss and alteration. See *DOFAW Submittal*. OCCL is aware that other native species utilized the vegetation, such as shearwaters that are likely to burrow in the sand under the vegetation.

OCCL staff notes that naupaka, and other shoreline vegetation, is critical to maintain shoreline ecosystems with sandy dunes. The vegetation clearing that occurred at the CPR has already adversely affected the shoreline—by removing the stabilizing shoreline vegetation, the highest wash of the waves now goes far beyond where it did previously and will have long-term effects on erosion in the area if it is not remediated soon and properly.

Further, approximately 40 of the 106 tree stumps appear to be on State unencumbered land. At no time did the department, or any authorized representative, give anyone permission to enter State land clear vegetation and remove and destroy approximately 40 trees.

Given that 40 of the 106 trees removed were makai of the shoreline, in 40 instances an unauthorized action upon State land was committed.

Given the number of trees removed, the type of trees and vegetation, the function of the flora as habitat to endangered species, ecosystem services, and potential coastal hazard mitigation, the maximum penalty shall be recommended for the removal of 106 trees; and the clearing of 2-acres of land.

Mulch Spreading

Mulch was spread over approximately 2-acres of the area of clearing. Mulch is known as a breeding site for the invasive Coconut Rhinoceros Beetle (CRB) that is detrimental to palms, bananas, pineapple, kalo and potentially other crops. Further, the mulch that was spread was the pulverized material of the cleared vegetation and contained the remains of numerous endangered and indigenous yellow-faced bees.

The spreading of the mulch created a complicated situation for OCCL staff—OCCL would typically advise a violator to remove unauthorized mulch, however, at site visits DOFAW and USFWS staff observed the yellow-faced bees being attracted to the mulch. This is likely because the bees' pheromones from their nests and pulverized individuals were attracting them to the mulch. So, as the mulch could contain eggs or other parts of the bees, and there was no sign of a CRB infestation, OCCL staff recommended that the landowner consult with a biologist, USFWS, and DOFAW prior to removing the mulch. OCCL staff believes the mulch is still in place.

Removal/Destruction of Tree or Shrub on State Land

The land clearing on state land was conducted without State permission. Further, as demonstrated by the DOFAW staff submittal, this clearing resulted in the loss of extremely important habitat for endangered, indigenous, yellow-faced bees and seabirds. From OCCL's perspective, the vegetation was extremely important to maintain the integrity of the shoreline and the ecosystem as a whole.

Fencing

The fence lines are detrimental and interfere with the life cycle of the mōlī (Laysan albatross) creating separation, anxiety, and trauma to the protected bird. Fences block the adults when caring for their egg and young as they take turns watching over the nest. When the birds are ready to leave the nest, fences may block the flight path of the very important initial first flight. Staff notes that more information regarding the impact the land uses had on the yellow faced bee, albatross, and other native or endangered wildlife will be provided by DOFAW's agenda items.

Certified Shoreline Considerations

Due to the unauthorized tree removal and land clearing on both State land and the subject property, it appears the shoreline has migrated mauka. To ensure the preservation and protection of the Conservation District, staff recommends that a new certified shoreline be sought to clearly demarcate the Conservation District Resource and General Subzones, which roll with the highest wash of the waves inland (mauka) 150-feet from the shoreline.

The most recent shoreline certification for the CPR property was recently certified on October 30, 2023. **(See Exhibit H)** Certification of the shoreline is valid for twelve months from the date of certification. HAR § 13-222-11(a). OCCL staff respectfully requests that the Board authorize the department to review the certified shoreline due to the extreme change in topography of the area.

FINDINGS

Based on the above summarized information, OCCL staff has concluded the following regarding the alleged unauthorized land uses:

1. That Mr. Sushil Garg and Mr. Benjamin Lassary did in fact authorize, cause, or allow the removal of the 106 trees within the Conservation District General and Resource subzones, which includes 40 trees on state land, without legal authority to do so;
2. That Mr. Sushil Garg and Mr. Benjamin Lassary did in fact authorize, cause, or allow the clearing of approximately two-acres of Conservation District land;
3. That Mr. Sushil Garg and Mr. Benjamin Lassary did in fact authorize, cause, or allow the clearing of 40 trees and vegetation on state land, without legal authority to do so;

4. That Mr. Sushil Garg and Mr. Benjamin Lassary did in fact authorize, cause or allow the spreading of mulch over approximately two-acres of land;
5. That the unauthorized tree and vegetation removal has caused the shoreline to migrate mauka/landward;
6. That the unauthorized tree and vegetation removal has caused irreparable harm to the shoreline ecosystem;
7. That the Condominium Property Regime of Marconi Point Condominiums at TMK: (1) 5-6-003:053 did in fact authorize, cause, or allow the boundary fence on the west side of the property to be constructed in the Conservation District, without legal authority to do so; and
8. That the Yue-Sai Kan Trust/Yue-Sai Kan, Trustee, did in fact authorize, cause, or allow two fence lines in the Conservation District, without legal authority to do so; and
9. That the unauthorized fences authorized, caused, or allowed by the Yue-Sai Kan Trust/ Yue-Sai Kan, Trustee, and the Condominium Property Regime of Marconi Point Condominiums are harmful to the ecosystem(s) within the Conservation District.

As SUCH, STAFF RECOMMENDS AS FOLLOWS:

That the Board adopt the findings and conclusions set forth above and impose the following administrative fines:

1. Regarding unauthorized removal of trees and vegetation:

- a. Pursuant to HRS §183-7, Mr. Sushil Garg and Mr. Benjamin Lassary are fined \$1,590,000 for violating the provisions of HAR §13-5-25 for the removal of 106 Heliotrope trees;
- b. Pursuant to HRS §183-7, Mr. Sushil Garg and Mr. Benjamin Lassary are fined \$15,000 for violating the provisions of HAR §13-5-25 for clearing of over 1-acre of land;
- c. Pursuant to HRS §183-7, Mr. Sushil Garg and Mr. Benjamin Lassary are fined \$15,000 for violating the provisions of HAR §13-5-25 for the spreading of mulch over 1-acre of land;
- d. Pursuant to HRS, §171-6(15), Mr. Sushil Garg and Mr. Benjamin Lassary are fined \$20,000 for removing or destroying 40 Heliotrope trees on unencumbered State lands;

- e. As all of the above-listed actions were taken intentionally by Mr. Benjamin Lassary pursuant to his employment by Mr. Sushil Garg, Mr. Sushil Garg and Mr. Benjamin Lassary shall be held jointly and severally liable for all fines imposed;
- f. Therefore, the total amount of fines that Mr. Sushil Garg and Mr. Benjamin Lassary are jointly and severally liable for constitute \$1,640,000;
- g. The \$1,640,000 in fines for which Mr. Sushil Garg and Mr. Benjamin Lassary are jointly and severally liable for shall be paid to the Department within ninety (90) days;
- h. Mr. Sushil Garg, as the majority landowner of the subject area, shall provide the department with plans for the removal of all mulch spread within the Conservation District within thirty (30) days to obtain the department's approval of such plan;
- i. Mr. Sushil Garg, as the landowner, shall provide plans to restore the Conservation District to its condition prior to the land clearing activities of October 2023 within sixty (60) days to obtain the departments' approval;
- j. A land disposition shall be required and obtained by Mr. Sushil Garg, or his representative(s), to perform restoration work upon State land to restore it to its condition prior to the land clearing activities of October 2023;
- k. In the event that Mr. Sushil Garg, or a future owner of his property, fail to provide the above-listed plans or fail to restore the shoreline to the department's satisfaction, Mr. Sushil Garg shall be liable for the costs incurred by the department to remediate the shoreline; and
- l. That the Board shall authorize the Department of the Attorney General to file a Notice of Pendency of Action with the deed or deed instrument of Mr. Sushil Garg's property at the Bureau of Conveyances, pursuant to HRS §§171-6.4(c), 501-151, & 634-51.

2. Regarding the western boundary fence within the Conservation District:

- a. Pursuant to HRS §183C-7 the landowners of Tax Map Key (TMK): (1) 5-6-003:053 are fined \$15,000 for violating the provisions of HAR §13-5-25;
- b. The landowners of TMK (1) 5-6-003:053 shall pay all fines within ninety (90) days;
- c. The landowners of TMK: (1) 5-6-003:053 shall remove the indicated fence lines within twenty-one (21) days; and

- d. In the event that the landowner(s) of TMK (1) 5-6-003:053 fail to pay all fines or remove all indicated fence lines, that the Board authorize the Department of the Attorney General to seek enforcement and compliance in the Circuit Court of the State of Hawai'i.

3. Regarding the unauthorized fences within the Conservation District:

- a. Pursuant to HRS §187C-7, the Yue-Sai Kan Trust/Yue-Sai Kan Trustee is fined \$30,000 for violating the provisions of HAR §13-5-25;
- b. The Yue-Sai Kan Trust/Yue-Sai Kan, Trustee shall pay all fines within ninety (90) days;
- c. The Yue-Sai Kan Trust/Yue-Sai Kan, Trustee shall remove all indicated fence lines within twenty-one (21) days; and
- d. In the event that the Yue-Sai Kan Trust/Yue-Sai Kan, Trustee fails to pay all fines or remove all indicated fence lines, that the Board authorize the Department of the Attorney General to seek enforcement and compliance in the Circuit Court of the State of Hawai'i.

4. That the Board order a new certified shoreline application to be submitted by the landowner(s) of TMK (1) 5-6-003:053 within ninety (90) days.

- a. The landowners should endeavor to obtain a new certified shoreline as soon as possible to resolve the shoreline boundary uncertainty that was created by the extreme clearing of vegetation at the shoreline;
- b. The Conservation District shall be demarcated within thirty (30) days of the Departments' receipt of the new certified shoreline;

5. That in the event of failure of the above-mentioned landowners or future owners of Tax Map Key: (1) 5-6-003:053, to comply with any order imposed in connection with this enforcement action, they shall be fined an additional \$15,000 per day, pursuant HRS §183C-7 until this order is complied with;

6. That in the event of failure of the above-mentioned landowners or future owners of Tax Map Key: (1) 5-6-003:053, to comply with any order herein, this matter shall be turned over to the Attorney General for disposition, including all administrative costs;

7. That the Board delegate authority to the Chairperson to effectuate the above recommendations, subject to such conditions as may be prescribed by the Chairperson to best serve the interest of the State, without further consultation with the Board, subject to review and approval by the Department of the Attorney General; and

8. The above noted conditions of Enforcement file OA 24-14 shall be recorded with the deed instruments of Tax Map Key: (1) 5-6-003:053 at the Bureau of Conveyances pursuant to HAR §13-5-6(e).

Respectfully submitted,



K. Tiger Mills, Staff Planner
Office of Conservation and Coastal Lands

Approved for submittal:



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

MC



Google Earth Pro 56-1089 Kamehameha Hwy. TMK: (1) 5-6-003:053

Exhibit A Location Map



STATE OF HAWAII

DEPARTMENT OF PLANNING AND ECONOMIC DEVELOPMENT
LAND USE COMMISSION

P. O. BOX 2359 • HONOLULU, HAWAII 96804

September 20, 1971

JOHN A. BURNS
Governor

SHELLEY M. MARK
Director Department
of Planning and Economic
Development

~~WALTER H. S. CHOI~~
GORO INABA

Commission Chairman

~~EDDIE TANGEN~~
EDDIE TANGEN

Vice Chairman

TATSUO FUJIMOTO

~~WALTER H. S. CHOI~~
Executive Officer

COMMISSION MEMBERS

- Alexander J. Napier
- Shelley M. Mark
- Sunao Kido
- Eddie Tangen
- Leslie E. L. Wung
- Tanji Yamamura
- Stanley S. Sakahashi

TO WHOM IT MAY CONCERN:

At its meeting on September 17, 1971, the Land Use Commission considered petition A71-286 initiated by the Commission and voted to affirm and modify the zoning of the following parcels that were rezoned during the 1969 5-year boundary review, which are located within the City and County of Honolulu.

The areas described below were subject to this action:

<u>TAX MAP KEY</u>	<u>OWNER</u>	<u>ACRES</u>	<u>LOCATION</u>
A. <u>RETAINED IN THE URBAN DISTRICT</u>			
5-3-13: 3, 4, & 5	Mary A. Mendes Raymond Rezentes & Wife Lawrence Ching & Wife	3.7 acres	Hauula
B. <u>RETAINED IN THE CONSERVATION DISTRICT</u>			
2-5-20: 77	Wilbert Choi & Wife	18,000 sq. ft.	Makiki
2-5-20: 2, 3, 4, 5, & 6	Wilbert Choi & Wife State of Hawaii	29.1 acres	Makiki
2-3-37: por. 21	State of Hawaii (See Map)	4.4 acres	Waikiki
C. <u>RECLASSIFIED INTO THE URBAN DISTRICT THE AREA BELOW THE 40 FOOT CONTOUR LINE & RETAINED IN THE CONSERVATION DISTRICT THE AREA ABOVE THE 40 FOOT CONTOUR LINE</u> (See Map)			
8-4-01: por. 8 & 9	John T. Waterhouse		Lahilahi Pt., Waianae

To Whom it may Concern:

-2-


September 20, 1971

<u>TAX MAP KEY</u>	<u>OWNER</u>	<u>ACRES</u>	<u>LOCATION</u>
D.	<u>RETAINED IN THE CONSERVATION DISTRICT THE AREA 150 FEET INLAND FROM THE UPPER REACHES OF THE WASH OF WAVES AND RECLASSIFIED INTO THE AGRICULTURAL DISTRICT THE AREA BEYOND THE NEWLY ESTABLISHED CONSERVATION DISTRICT BOUNDARY</u>		

5-6-02: por. 1 9, & 10	James Campbell Estate		Kahuku
5-6-03: 34 & por. 10 & 41	James Campbell Estate & John K. Kaleo		Kahuku
5-7-01: por. 20	James Campbell Estate		Kahuku

Should you have any questions regarding the above actions, please feel free to write us.

Very truly yours,


TATSUO FUJIMOTO
Executive Officer

Encl.

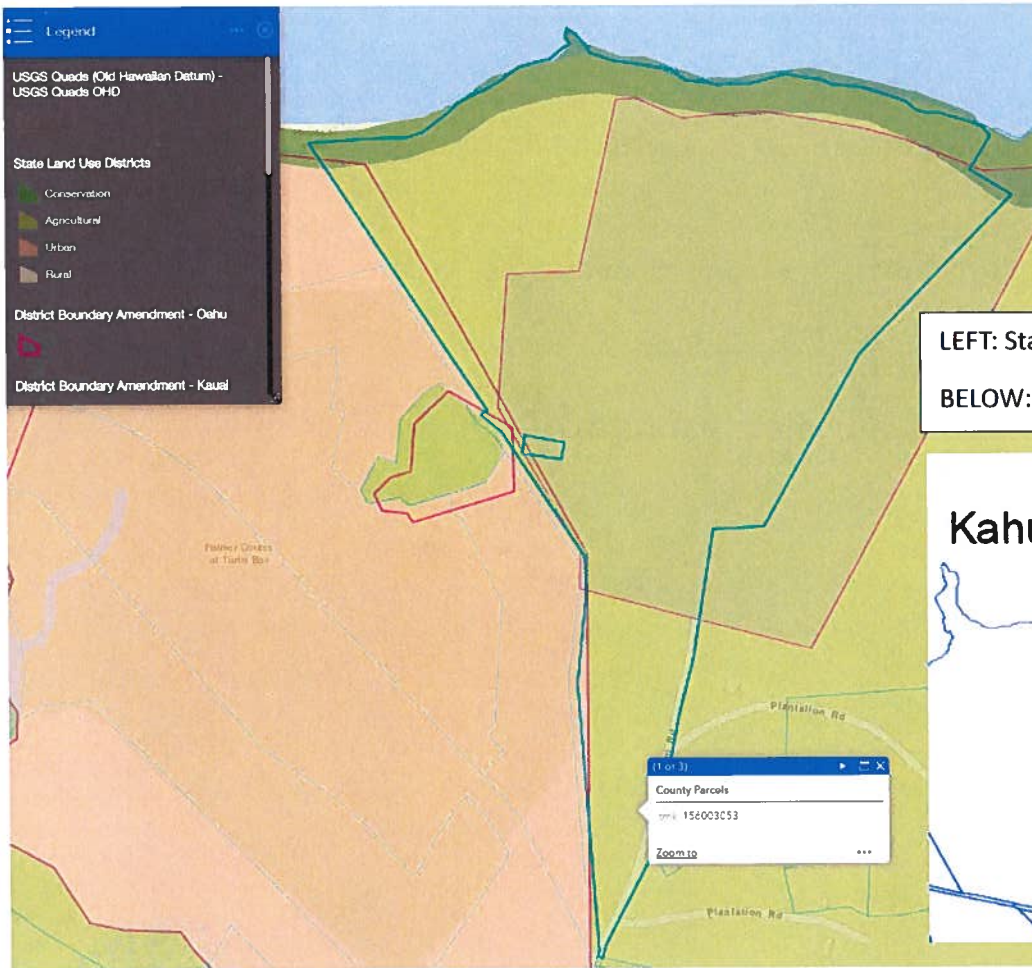
cc: Mary A. Mendes
Raymond Rezentes & Wife
Lawrence Ching & Wife
Mrs. Wilbert Choi
Land Management Div., State of Hawaii
John T. Waterhouse
James Campbell Estate
John K. Kaleo
City Planning Department
Property Assessment, Dept. of Taxation
Property Technical Services, Dept. of Taxation
Tax Maps Recorder, Dept. of Taxation
Planning Office, DLNR
Chairman of the Board, DLNR
Facilities & Auxiliary Svcs. Br., DOE
State Forester, Forestry Division, DLNR
Forestry Division, DLNR
Department of Transportation

To Whom it may Concern:

-3-

September 20, 1971

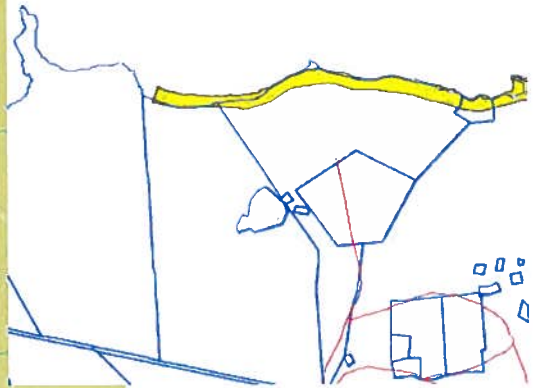
cc: Board of Water Supply
Water Sales Division, Bd. of Water Supply
Planning Division, DPED
Planning Branch, DAGS
Land Use Commission
Office of Ombudsman
Building Department, C & C of Honolulu



LEFT: State Land Use District Map

BELOW: Conservation District Subzone Map

Kahuku Point



Legend

- Oahu Tax Map Key - 2012
- Conservation Subzone**
- Conservation
- GENERAL
- LIMITED
- PROTECTED
- RESOURCE
- SPECIAL

Luc.hawaii.gov

- Street Centerlines
- Street Centerlines
- State Land Use Districts**
- Urban
- Agricultural
- Conservation



<https://dlnr.hawaii.gov/occl/subzone-maps/>

Various Government Agency Maps Indicating the Conservation District

City and County of Honolulu's Parcels & Zoning Information App at <https://www.honolulu.gov/>

DAVID Y. IGE
GOVERNOR



DOUGLAS S. CHIN
ATTORNEY GENERAL

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

RUSSELL A. SUZUKI
FIRST DEPUTY ATTORNEY
GENERAL

December 11, 2017

The Honorable Suzanne D. Case
Chairperson, Board of Land and Natural Resources
State of Hawai'i
1151 Punchbowl Street, Room 130
Honolulu, Hawai'i 96813

Dear Chairperson Case:

RE: Shoreline Encroachment Easements

INTRODUCTION

By memorandum dated August 10, 2017, you asked for our advice regarding the Board of Land and Natural Resource's practice of requiring private owners of coastal properties to obtain easements for structures that were originally constructed on private property but are now located on State-owned land due to the landward migration of the shoreline.

QUESTIONS AND SUMMARY ANSWERS¹

1. What is the dividing line between public and private property with respect to oceanfront property?

Short answer: The State owns all lands makai of the "the upper reaches of the wash of waves, usually evidenced by the edge of vegetation or by the line of debris left by the wash of waves." For convenience, we refer to this description as the

¹ The intent of your memorandum is clear even though it does not directly ask specific questions. We have taken the liberty of setting out questions we believe are raised.

Op. No. 17-1

"shoreline." This use of the term "shoreline" is closely related to but not exactly the same as the "certified shoreline" described in chapter 205A, Hawaii Revised Statutes (HRS). This line (the shoreline) is identical to -- and indeed defines -- the dividing line between public and private property (the ownership line).²

2. How is the ownership line affected when there is landward migration of the shoreline caused by erosion or sea level rise?

Short answer: By definition, if the shoreline moves landward, then the ownership line also moves mauka.³

3. What, if anything, is the effect of statutes that require the Board of Land and Natural Resources (Board) or the Attorney General to approve "acquisition" of real property?

Short answer: The State already owns an inchoate interest in land that might be gained through erosion or sea level rise. Ripening of this inchoate interest is not "acquisition" of land covered by these statutes. This result is fortified by the Supreme Court's decision in *Gold Coast Neighborhood Ass'n v. State*, 140 Haw. 437, 403 P.3d 214 (2017). The Court held that the statutes do not "imperatively require" abrogation of common law rules or "evinced an express legislative intent to do so."

4. Does this result violate private owners' due process rights or constitute a "taking" of private property?

Short answer: No. The Hawai'i Supreme Court has specifically considered and rejected such claims. As to federal

² The shoreline and ownership lines are the same where the shoreline is not affected by structures. No Hawai'i case or statute addresses the question of where the ownership line is when the shoreline is affected by a seawall or other man-made structure. We have not found it necessary to address that question in providing this advice.

³ The term "mauka" means "inland." *Leslie v. Bd. of Appeals of County of Hawai'i*, 109 Haw. 384, 386, 126 P.3d 1071, 1073, note 3 (2006). A "mauka" movement of the ownership line means toward the mountain or (equivalently) away from the sea.

taking law, the State's inchoate rights in the property existed prior to private ownership. The interest lost was not part of private title to begin with and cannot be the basis of a taking claim.

5. Is the Attorney General required to give prior approval to State ownership of land by reason of erosion or sea level rise? Is the Attorney General required to approve as to legality and form documents relating to land owned by the State by reason of erosion or sea level rise?

Short answer: No. Ownership of land by erosion or sea level rise is not an acquisition of land and the State is not acquiring land within the meaning of those statutes. Therefore the statutes requiring that the Attorney General review and approve land acquisitions do not apply.

6. Can the Board require the former landowner to pay fair market value in order to obtain an easement or other interest in land now owned by the State?

Short answer: Yes, applicable statutes specifically provide for the payment of fair market value in most cases.

DISCUSSION

1. What is the dividing line between public and private property with respect to oceanfront property?

It is the uniform law of every coastal state that land below (seaward or "makai" of) the shoreline is owned by the State and held in public trust⁴ for the people of the State.⁵

⁴ The public trust doctrine is a common law doctrine, inherited from England and dating back to Roman law, dictating that all submerged lands are the property of the state and held in trust for the people. *Shively v. Bowlby*, 152 U.S. 1 (1894). The seminal United States case for the public trust doctrine is *Illinois Cent. R.R. Co. v. State of Illinois*, 146 U.S. 387 (1892). The seminal case in Hawai'i is *King v. Oahu Ry. & Land Co.*, 11 Haw. 717 (1899). In Hawai'i the public trust is also recognized in the Constitution, article XI, section 1.

⁵ The same issue can arise as to rivers, lakes, or other bodies of water. Indeed *Illinois Cent. R.R. Co.*, see *supra* note 4,

Most states define the shoreline/ownership boundary as the mean high tide mark. *Purdie v. Attorney Gen.*, 143 N.H. 661, 666, 732 A.2d 442, 446-47 (1999):

The few States that reject the mean high tide mark as the public-private shoreland boundary do so on distinct histories not applicable to our State. See, e.g., *Application of Ashford*, 50 Haw. 314, 440 P.2d 76, 77 (1968) (Hawaii boundary based on Hawaiian King's issuance of royal patents in 1866); *Bell v. Town of Wells*, 557 A.2d 168, 171-72 (Me.1989) (Massachusetts and Maine adopted mean low water as boundary line based on 1647 Massachusetts ordinance); cf. *Opinion of the Justices (Public Use of Coastal Beaches)*, 139 N.H. at 88-89, 649 A.2d at 608 (refusing to adopt Massachusetts rule for New Hampshire).

See also Margaret E. Peloso & Margaret R. Caldwell, *Dynamic Property Rights: The Public Trust Doctrine and Takings in a Changing Climate*, 30 Stan. Envtl. L.J. 52, 57 (2011) ("In nearly all cases, the lines for defining the limits of private title and public access are the mean high water and mean low water marks.")

Purdie rightly identifies Hawai'i as a state with a unique approach to defining the shoreline. This approach was initiated and explained in three landmark cases, all authored by then Chief Justice William S. Richardson.

In *Application of Ashford*, 50 Haw. 314, 440 P.2d 76 (1968), the Court considered the ownership line in the context of a request to register land title in the land court:

Clinton R. Ashford and Joan B. S. Ashford, the appellees, petitioned the land court to register title to certain land situate on the Island of Molokai. The lands are the makai (seaward) portions of Royal Patent 3004 to Kamakaheki and Royal Patent 3005 to Kahiko, both issued on February 22, 1866.

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

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The question before this court is the location of the makai boundaries of both parcels of land, which are described in the royal patents as running 'ma ke kai' (along the sea). The appellees contend that the phrase describes the boundaries at mean high water which is represented by the contour traced by the intersection of the shore and the horizontal plane of mean high water based on publications of the U. S. Coast and Geodetic Survey.

50 Haw. at 314-15, 440 P.2d at 76-77.

The Court held that the boundary (ownership line) was not the mean high water mark. Rather the boundary -- pursuant to Hawaiian custom as established by kama'aina⁶ testimony -- is further mauka, specifically: '

along the upper reaches of the wash of waves, usually evidenced by the edge of vegetation or by the line of debris left by the wash of waves, and that the trial court erred in finding that it is the intersection of the shore with the horizontal plane of mean high water.

50 Haw. at 14, 440 P.2d at 77 (1968). That landmark ruling was confirmed and elaborated on in *Hawaii County v. Sotomura*, 55 Haw. 176, 517 P.2d 57 (1973), and *Application of Sanborn*, 57 Haw. 585, 562 P.2d 771 (1977). See *Sotomura*, 55 Haw. at 182, 517 P.2d at 62:

We hold as a matter of law that where the wash of the waves is marked by both a debris line and a vegetation line lying further mauka; the presumption is that the upper reaches of the wash of the waves

⁶ "Kama'aina" is defined as "Native-born, one born in a place, host." Other relevant senses include "acquainted [with], familiar." M. Pukui & S. Elbert, *Hawaiian Dictionary* 9 (rev. ed. 1986).

Leslie v. Bd. of Appeals of County of Hawai'i, 109 Haw. 384, 386, 126 P.3d 1071, 1073 (2006), as amended (Feb. 28, 2006).

over the course of a year lies along the line marking the edge of vegetation growth. The upper reaches of the wash of the waves at high tide during one season of the year may be further mauka than the upper reaches of the wash of the waves at high tide during the other seasons. Thus while the debris line may change from day to day or from season to season, the vegetation line is a more permanent monument, its growth limited by the year's highest wash of the waves.

See *Sanborn*, 57 Haw. at 182, 562 P.2d at 773 (1977):

The law of general application in Hawaii is that beachfront title lines run along the upper annual reaches of the waves, excluding storm and tidal waves.

2. How is the ownership line affected when the shoreline moves landward or mauka because of erosion or sea level rise?

These same cases address and resolve the issue of whether and how ownership changes when the shoreline moves landward or mauka due to erosion or rising sea levels.

Sotomura is particularly relevant. In that case, the private owner indisputably owned the land in the past. In fact, the private owner had registered the property in the land court. The land court had determined the seaward boundary of the property and described it by distances and azimuths. The shoreline moved mauka due to erosion. The Court framed the question as "whether title to land lost by erosion passes to the state." The Court noted that this was an issue of first impression in Hawai'i.

The Court held that the answer was "yes," making clear that the ownership was fluid and specifically that it changed with erosion:

We hold that registered ocean front property is subject to the same burdens and incidents as unregistered land, including erosion. HRS § 501-81. Thus the determination of the land court that the seaward boundary of Lot 3 is to be located along high water mark remains conclusive; however, the precise

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location of the high water mark on the ground is subject to change and may always be altered by erosion.

55 Haw. at 180, 517 P.2d at 61.

Even the previous determination of boundaries in land court was not binding where the actual shoreline was altered by erosion:

This court recently rejected the position that the state cannot subsequently challenge title to registered land where the state later discovered that the seaward boundary was located further mauka than shown on the maps, and a portion of the property had become submerged by erosion.

55 Haw. at 181, 517 P.2d at 61 (citing *In re Application of Castle*, 54 Haw. 276, 277, 506 P.2d 1, 3 (1973)).⁷

⁷ *Sotomura* has a complex and murky path after the Hawai'i Supreme Court decision. The United States Supreme Court rejected the owners' petition for certiorari. 419 U.S. 872 (1974). Landowners then sued the County and State officials in federal court. The federal district court judge was the Honorable Dick Yin Wong. Judge Wong was previously the state land court judge. It was his decision that the Hawai'i Supreme Court reversed in *Application of Sanborn*, 57 Haw. 585, 562 P.2d 771 (1977).

Judge Wong ruled in federal court that the Hawai'i Supreme Court deprived landowners of due process by deciding the case on a basis not presented by the parties or actually litigated. Judge Wong also held that the Hawai'i Supreme Court's decision "ignore[ed] vested property rights" and "was so radical a departure from prior state law as to constitute a taking of the Owners' property by the State of Hawaii without just compensation in violation of rights secured to them by the Fourteenth Amendment to the United States Constitution." *Sotomura v. Hawaii County*, 460 F. Supp. 473, 482-83 (D. Haw. 1978).

Although Judge Wong wrote the decision, it appears that Judge Samuel King entered the judgment. Defendants appealed but the

Importantly, the Court based its ruling on the common law principle that loss of land by erosion is an inherent aspect of littoral property:

The loss of lands by the permanent encroachment of the waters is one of the hazards incident to littoral or riparian ownership. . . . [W]hen the sea, lake or navigable stream gradually and imperceptibly encroaches upon the land, the loss falls upon the owner, and the land thus lost by erosion returns to the ownership of the state. *In re City of Buffalo*, 206 N.Y. 319, 325, 99 N.E. 850, 852 (1912).

55 Haw. at 183, 517 P.2d at 62.

One reason for that common law rule (now abrogated in part by statute, section 171-2, HRS) is the tradeoff between accretion and erosion: "since the riparian owner may lose soil by the action of the water, he should have the benefit of any land gained by the same action." *Id.* (citing 65 C.J.S. *Navigable Waters* § 82(1), at 256 (1966) (footnotes omitted)). See *Application of Banning*, 73 Haw. 297, 303-04, 832 P.2d 724, 728 (1992), where the Court explained that accretion belongs to the littoral landowner.

Sotomura also relied on the public trust doctrine, citing to *King v. Oahu Ry. & Land Co.*, 11 Haw. at 723-24, for the proposition that:

The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.

55 Haw. at 184, 517 P.2d at 63. Public policy therefore "favors extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible." 55 Haw. at 182, 517 P.2d 61-62.

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

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This public policy remains in effect as the Court has repeatedly ruled. *Application of Banning*, 73 Haw. 297, 309-10, 832 P.2d 724, 731 (1992); *Diamond v. Dobbin*, 132 Haw. 9, 26, 319 P.3d 1017, 1034 (2014); *Gold Coast Neighborhood Ass'n v. State*, 140 Haw. 437, 458, 403 P.3d 214, 235 (2017).

The Court reached the same result in *Application of Sanborn*, 57 Haw. 585, 562 P.2d 771 (1977). *Sanborn* also concerned property registered in the land court where the shoreline moved mauka from the land court boundary. The Court framed the issue as:

In addressing the issue of the Sanborns' beachfront title line, the primary question is whether the line is to be determined according to Hawaii's general law of ocean boundaries, or whether certain distances and azimuths contained in the Sanborns' 1951 land court decree of registration are to prevail.

57 Haw. at 588, 562 P.2d at 773.

The Court specifically held that the land court boundary was subject to change in the event of erosion:

We hold that, regardless of whether or not there has been permanent erosion, the Sanborns' beachfront title boundary is the upper reaches of the wash of waves. Although we find that the State is bound by the 1951 decree to the extent that the decree fixes the Sanborns' title line as being 'along the high water mark at seashore', we also find that the specific distances and azimuths given for high water mark in 1951 are not conclusive, but are merely prima facie descriptions of high water mark, presumed accurate until proved otherwise.

57 Haw. at 590, 562 P.2d at 774.

The Ninth Circuit Court of Appeals made the same ruling in *Napeahi v. Paty*, 921 F.2d 897 (9th Cir. 1990). The court there considered ownership of land that was mauka of the shoreline when ceded land was granted to the Territory in 1898. The land later became makai of the shoreline because of erosion. The court specifically held that the property moved from private to public ownership.

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[T]he holdings in *Sotomura* and *Zimring*⁸ require us to conclude that if the 1.75 acres became submerged land because of natural erosion after 1898 and before being altered by the actions of the property owner, then that property would be ceded lands subject to the terms of the trust.

Napeahi v. Paty, 921 F.2d 897, 903 (9th Cir. 1990).

For these reasons and based on the cases cited above, we advise that the law in Hawai'i is that when the shoreline boundary migrates landward or mauka because of erosion or sea level rise, the State owns the additional submerged land that results from the migration.

3. What, if anything, is the effect of statutes that require the Board of Land and Natural Resources (Board) or the Attorney General to approve "acquisition" of real property?

A concern has been raised as to a trio of statutes that require Board and Attorney General approval of acquisitions of real property or interests in real property. The statutes are sections 26-7, 107-10, and 171-30, HRS.⁹

⁸ *State by Kobayashi v. Zimring*, 58 Haw. 106, 566 P.2d 725 (1977). This case is discussed in more detail below.

⁹ Section 26-7, HRS provides in relevant part:

The department [of the attorney general] shall . . . approve as to legality and form all documents relating to the acquisition of any land or interest in lands by the State

Section 107-10, HRS, provides in relevant part:

No real property or any right, title, or interest therein shall be acquired by agreement, purchase, gift, devise, eminent domain, or otherwise, for any purpose, by the State or any department, agency, board, commission, or officer thereof, without the

We advise that those statutes are not applicable to change in the ownership line caused by landward or mauka migration of the shoreline due to erosion or sea level rise. As we now show, the possibility of boundary changes due landward or mauka migration of the shoreline due to erosion and accretion is already part of the State's ownership of public trust land. That possibility already encumbers private littoral land. *Sotomura*, 55 Haw. at 183, 517 P.2d at 62. When the State comes into possession of land because of erosion or sea level rise, the State is not "acquiring" property within the meaning of the statutes.

State by Kobayashi v. Zimring, 58 Haw. 106, 566 P.2d. 725 (1977), is a key case supporting this proposition. *Zimring*

prior approval of the attorney general as to form, exceptions, and reservations.

Section 171-30, HRS, provides in relevant part:

(a) The board of land and natural resources shall have the exclusive responsibility, except as provided herein, of acquiring, including by way of dedications:

- (1) All real property or any interest therein and the improvements thereon, if any, required by the State for public purposes, including real property together with improvements, if any, in excess of that needed for such public use in cases where small remnants would otherwise be left or where other justifiable cause necessitates the acquisition to protect and preserve the contemplated improvements, or public policy demands the acquisition in connection with such improvements.
- (2) Encumbrances, in the form of leases, licenses, or otherwise on public lands, needed by any state department or agency for public purposes or for the disposition for houselots or for economic development.

The board shall upon the request of and with the funds from the state department or agency effectuate all acquisitions as provided under this section.

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addressed ownership of lands newly created by a 1955 lava flow that extended the shoreline and added 7.9 acres of land in the Puna area. One of the issues in that case was whether the lava extension was ceded land acquired by the State from the federal government. The State argued that the federal government transferred the lands to the State under section 5(b) of the Admission Act. The opponents countered that the only lands that passed to the State under section 5(b) were those lands ceded to the United States by the Republic of Hawaii in 1898. They argued that the lava extension did not exist in 1898, and could not have been ceded to the United States. The Hawaii Supreme Court disagreed with the opponents and sided with the State. The Court held that the term "property," as used in the Joint Resolution of Annexation, is "extremely broad," and includes "property which is real, personal and mixed, choate and inchoate, corporal or incorporeal." *Id.* at 122-23, 566 P. 2d at 736.

The lava land was an inchoate property right in 1898. When the lava land was later created, that circumstance resulted in the ripening of State ownership of ceded land even though the land did not exist in 1898.

Napeahi v. Paty, 921 F.2d 897 (9th Cir. 1990), is on point for the proposition that an inchoate property interest in the possibility of erosion was also "public property" under the Joint Resolution of Annexation. In that case, a native Hawaiian sued the State, alleging that the State had a trust duty under the Admission Act to claim ownership of 1.75 acres shorefront property Kona. It was undisputed that "at the time the public land was ceded by the Republic of Hawaii to the United States in 1898, it did not include the 1.75 acres in contention." 921 F.2d at 902. However, that did not "end the inquiry." Relying on *Zimring* and *Sotomura*, the Ninth Circuit ruled that the land passed from private to public ownership because of erosion -- automatically and as a matter of law:

There is no reason to distinguish the inchoate property interest in submerged land that could be acquired by the State as the result of erosion from that which could be acquired by a lava extension. Both were inchoate property interests which *Zimring* held to be property that was ceded to the United States and then returned to the State in 1959. Thus, the holdings in *Sotomura* and *Zimring* require us to

conclude that if the 1.75 acres became submerged land because of natural erosion after 1898 and before being altered by the actions of the property owner, then that property would be ceded lands subject to the terms of the trust.

921 F.2d at 903.

We therefore conclude that under Hawai'i law, the State holds an inchoate right to land that may pass to it by erosion or sea level rise. This is an inherent aspect of the State's ownership of land, already owned by the State (and by the Territory before it). Ripening of that inchoate right is not "acquiring" or "acquisition" of real property under any of the statutes cited above.

This conclusion is bolstered by the Hawai'i Supreme Court's recent ruling in *Gold Coast Neighborhood Ass'n v. State*, 140 Haw. 437, 403 P.3d 214 (2017). The issue in that case was whether the State owned seawalls and land under the seawalls because the general public used the seawalls as a walkway. The State argued that under section 264-1, HRS, property could only be dedicated to the State by "deed of conveyance" accepted by the State. The State also cited to and relied on the other statutes cited above. The Court rejected this argument, holding that an "implied dedication" is not a "dedication" covered by section 264-1, HRS.

Instead implied dedication is a common law doctrine, not addressed or abrogated by section 264-1, HRS, or by the other statutes discussed above. The Court articulated a strict standard for statutory abrogation of common law rights:

The Hawaii Revised Statutes, and in particular, HRS §§ 264-1(c)(1), 171-30, 26-7, 107-10, and 520-7, do not "imperatively require" abrogation of common law implied dedication, nor do they evince an express legislative intent to do so. Minneapolis Fire & Marine Ins. v. Matson Nav. Co., 44 Haw. 59, 67-68, 352 P.2d 335, 340 (1960); Burns Int'l Sec. Servs., Inc. v. Dep't of Transp., 66 Haw. 607, 611, 671 P.2d 446, 449 (1983).

140 Haw. at 452, 403 P.3d at 229.

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We believe the Court would view the statutes in the same way with respect to land gained by erosion or sea level rise -- there is no express intention to abrogate common law principles to the effect that the State owns the land without the need for affirmative action by either the Land Board or the Attorney General.

This conclusion is consistent with case law from other jurisdictions which have generally viewed a state's interest in land that may come to the public trust in the future as either a vested or contingent future interest. For example in *Severance v. Patterson*, 370 S.W.3d 705, 718 (Tex. 2012), the Texas Supreme Court said:

A person purchasing beachfront property along the Texas coast does so with the risk that her property may eventually, or suddenly, recede into the ocean. When beachfront property recedes seaward and becomes part of the wet beach or submerged under the ocean, a private property owner loses that property to the public trust.

Similarly in *Nies v. Town of Emerald Isle*, 780 S.E.2d 187 (N.C. Ct. App. 2015), cert. denied, 2017 WL 1550808 (U.S. Oct. 2, 2017) the court ruled against a taking claim. Under North Carolina common law the dry sand portion of plaintiffs' property had always been encumbered by the public trust. Thus enforcement of that public trust did not interfere with or "take" any pre-existing right. See generally Margaret E. Peloso & Margaret R. Caldwell, *Dynamic Property Rights: The Public Trust Doctrine and Takings in A Changing Climate*, 30 Stan. Env'tl. L.J. 51, 87 (2011).

4. Does this result violate private owners' due process rights or constitute a "taking" of private property?

In *Application of Sanborn*, 57 Haw. 585, 596, 562 P.2d 771, 777-78 (1977), the Sanborns argued that the Court's ruling raised constitutional issues, including a takings claim.

The Sanborns contend that both the Hawaii and federal constitutions would be violated if this court fixes the Sanborns' title line along the upper reaches of the wash of waves. It is contended that such an adjudication would be a taking of private property for

public use without just compensation and also, by allegedly denying *res judicata* to the 1951 decree, would be a violation of due process *per se*.

The Court rejected these arguments, because its ruling was simply an application of existing Hawai'i law:

Under our interpretation of the 1951 decree, we see no constitutional infirmity. The 1951 decree recognized that the Sanbors' [sic] title extends to a line 'along high water mark'. We affirm the holding in *McCandless, supra*, that distances and azimuths in a land court decree are not conclusive in fixing a title line on a body of water, where the line is also described in general terms as running along the body of water.

Id. This ruling resolves the issue in state courts.

Nor are there viable federal claims, notwithstanding the suggestion to the contrary in *Sotomura v. Hawaii County*, 460 F. Supp. 473 (D. Haw. 1978). As explained in the previous section of this opinion, the possibility that private littoral land may pass into public ownership is an inherent part of the State's ownership of land. And conversely, the possibility that the seaward boundary may migrate inherently burdens private shoreline property.

This is important to the putative taking claim because the threshold question in any taking case is whether "private property" is being taken at all. As the Supreme Court put it in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992), compensation need not be paid "if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."

Similarly, in *Esplanade Properties, LLC v. City of Seattle*, 307 F.3d 978, 985 (9th Cir. 2002), the Ninth Circuit denied a taking claim after determining as a threshold issue that "plaintiff's claimed property right never existed" in the first place. See also *Maritrans Inc. v. U.S.*, 342 F.3d 1344, 1351 (Fed. Cir. 2003) (In deciding whether governmental action constitutes a taking of private property without just compensation, "[f]irst, a court must evaluate whether the

claimant has established a 'property interest' for purposes of the Fifth Amendment."); *Conti v. U.S.*, 291 F.3d 1334, 1339 (Fed. Cir. 2002) ("However, if a claimant fails to demonstrate that the interest allegedly taken constituted a property interest under the Fifth Amendment, a court need not even consider whether the government regulation was a taking."); *Raceway Park, Inc. v. Ohio*, 356 F.3d 677, 683 (6th Cir. 2004) ("[T]here is no taking if there is no private property in the first place.").

Property rights are protected by the federal and state constitutions. They are not, however, "created by the [federal] Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). *Cf. Stop the Beach Renourishment, Inc. v. Florida Dept. of Env'tl. Prot.*, 560 U.S. 702, 707 (2010) ("State law defines property interests.").

As noted above, the Hawai'i Supreme Court has definitively ruled:

The loss of lands by the permanent encroachment of the waters is one of the hazards incident to littoral or riparian ownership.

Sotomura, 55 Haw. at 183, 517 P.2d at 62.

It follows that "the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Lucas*, 505 U.S. at 1027. Thus there is no taking.

5. **Is the Attorney General required to give prior approval to State ownership of land by reason of erosion or sea level rise? Is the Attorney General required to approve as to legality and form documents relating to land owned by the State by reason of erosion or sea level rise?**

As shown by the discussion of question 3, ownership of land by erosion or sea level rise occurs pursuant to the common law and is a ripening of a pre-existing inchoate right in the land. This ripening is not an acquisition of land and the State is not acquiring land within the meaning of those statutes. It follows

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that the Attorney General does not have to review the ownership change and does not have to review or approve "documents relating to" the ownership.

We note that all of the cases discussed above (*Ashford*, *Sotomura*, *Sanborn*, and *Napeahi*) were decided after enactment of the three laws. None of the cases imposed the additional requirement that the Attorney General or the Board approve State ownership. In light of those cases, we do not believe the Supreme Court would require Attorney General approval. See *Gold Coast*, 140 Haw. at 455, 403 P.3d at 232: "These provisions express no intent to abrogate common law implied dedication, nor have they ever been mentioned by our courts as having any relevance to the doctrine."

Conversely, we do not believe the Court would uphold a hypothetical refusal by the Attorney General to approve ownership by reason of change in the shoreline.

6. Can the Board require the former landowner to pay fair market value in order to obtain an easement or other interest in land now owned by the State?

Not only can the Board require a former landowner to pay fair market value, but it must do so under current law. Applicable statutes specifically require fair market value in most cases. See, e.g., section 171-13, HRS (requiring that easements be sold for fair market value determined pursuant to section 171-17(b), HRS).

This requirement could be changed by the Legislature. We understand that the Department has introduced appropriate legislation but has not been successful.

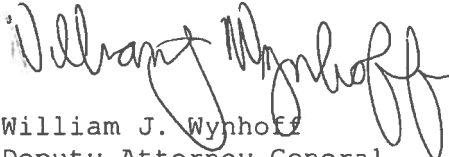
CONCLUSION

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

The Honorable Suzanne D. Case
December 11, 2017
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does not need to give prior approval in connection with such land, and that the Board can and should charge former owners fair market value in return for an easement interest in the land.

Very truly yours,



William J. Wynhoff
Deputy Attorney General

APPROVED:



Douglas S. Chin
Attorney General

WJW:w

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Google Maps 2017

WESTERN BOUNDARY FENCE

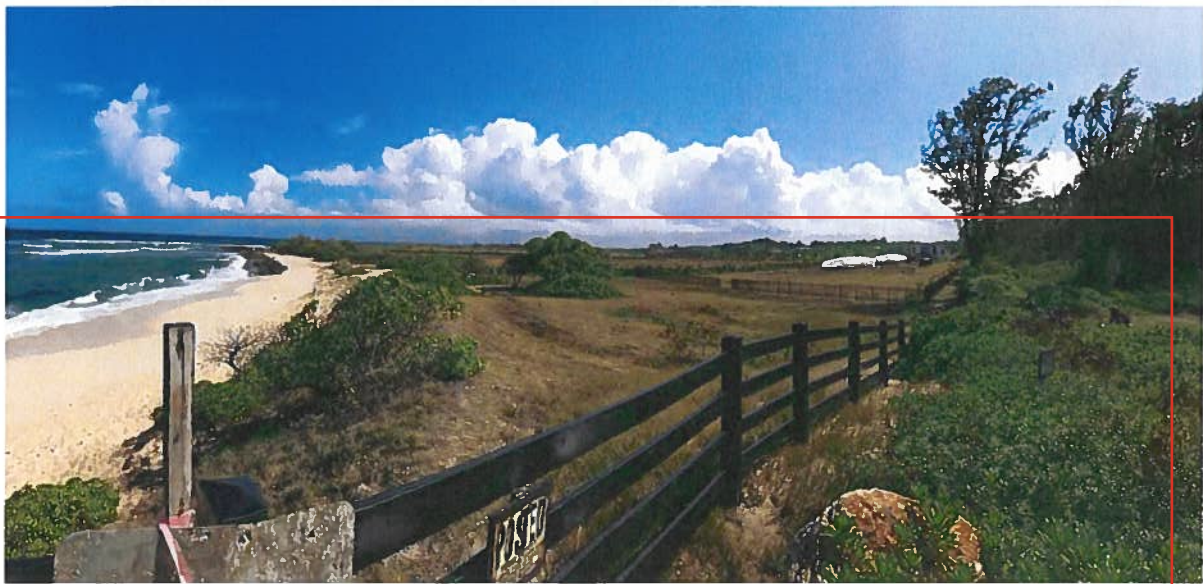


DLNR-OCCL January 31, 2024



October 17, 2023

Fence line #1 in the Conservation District



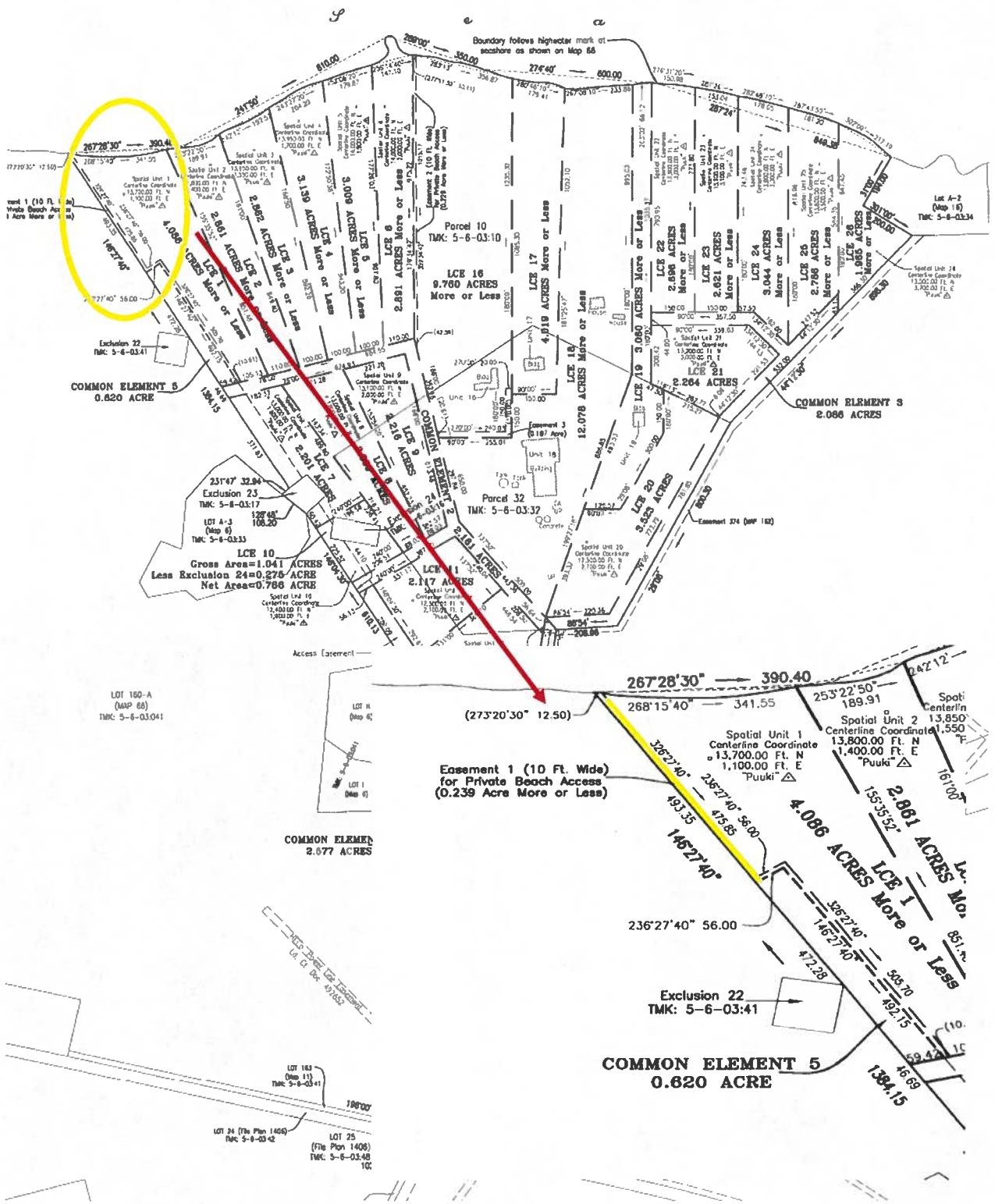
November 18, 2022

EXHIBIT A



12/22/2023 Drone footage of wave run up

Sea Grant Agent: There appear to be two wash lines. The regular high tide line is along the top crest of the remaining dune. The upper reach of the high wash of the waves is indicated by the second wash line marked by mulch and other organic material left in a wave created pattern mauka of the remaining dune. There is evidence of raking which left mechanical or man-made patterns leading into mulch piles. The raking into the mulch piles disrupts the mauka wash line indicating the upper reach of the high wash of the waves.



Western Boundary Fence Area provides beach access to CPR.



DLNR-OCCL 12/22/2023
 Fence lines at TMK: (1) 5-6-003:053. To the left is what appears to be a shade cloth fence. Running across an area noted as Unit 1 is what appears to be an iron wrought fence running parallel with the shoreline. To the right is the western boundary fence of the property.



DLNR-OCCL 1/31/2024 What appears to be a shade cloth fence east boundary of Unit 1.

Appendix: Text Summary of Attachment

This text summary has been prepared solely for accessibility purposes to facilitate general understanding of the referenced document. It does not constitute the official record, is not intended to be a complete or verbatim reproduction, and may omit, condense, or paraphrase content. This summary has no legal force or effect and shall not be relied upon for legal, regulatory, or evidentiary purposes. In the event of any inconsistency or conflict, the original document, as maintained by the issuing authority, shall control and be deemed the authoritative source.

Summary of Proposed Settlement – Marconi Point Condominium Fence Case

This document is a Board of Land and Natural Resources (BLNR) enforcement and settlement packet regarding unauthorized land uses within the Conservation District at the Marconi Point Condominium property in Kahuku, O‘ahu.

Background and Violations

The Department of Land and Natural Resources (DLNR), through the Office of Conservation and Coastal Lands (OCCL), investigated activities at the property and found multiple unauthorized actions within the Conservation District, including:

- Vegetation clearing and land disturbance across approximately two acres
- Removal of over 100 trees (including native and invasive species)
- Mulch spreading using cleared vegetation
- Installation of unauthorized fence lines, including a boundary fence extending toward the shoreline

Field inspections (described in the report and shown in exhibits) documented:

- Heavy equipment use and large-scale clearing (pages 3–4)
- Disturbance of shoreline ecosystems and habitats, including potential impacts to endangered species such as the Hawaiian yellow-faced bee and Laysan albatross (pages 3, 5, 10–11)
- Fence structures located within the Conservation District and near the shoreline (pages 5, 19; photo exhibits pages 47–51)

The area is within the Conservation District, including both General and Resource subzones, where land uses are highly regulated and require permits.

Legal Findings

OCCL concluded that multiple parties (including property managers and owners) conducted or allowed unauthorized land uses, including:

- Clearing vegetation and removing trees without permits

- Disturbing State land and shoreline areas
- Constructing fences within the Conservation District without approval
- Causing environmental harm to coastal ecosystems

The report emphasizes that:

- Shoreline vegetation plays a critical role in erosion control and habitat protection
 - Unauthorized activities caused significant ecological damage, including harm to native species and dune systems (pages 10–11, 18)
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Original Enforcement Recommendations

DLNR staff recommended substantial administrative fines and corrective actions, including:

- Fines totaling hundreds of thousands of dollars for tree removal, land clearing, mulch spreading, and unauthorized fencing
 - Additional penalties for impacts to State land and natural resources
 - Requirements to:
 - Remove unauthorized fences
 - Restore the Conservation District land
 - Provide plans for remediation and shoreline recovery
 - Daily penalties for noncompliance (pages 13–15)
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Settlement Agreement

Instead of proceeding with a contested case hearing, the Association of Unit Owners of Marconi Point Condominium and DLNR reached a proposed settlement.

Main terms:

- The Association must:
 - Remove the portion of the boundary fence located within the Conservation District
 - Work with DLNR to determine the correct boundary location
 - Cover all removal costs and provide documentation of the work
 - Coordinate removal to avoid impacts to protected wildlife
- In exchange:
 - DLNR agrees to waive all fines related to the boundary fence violation
 - The enforcement case against the Association (for the fence issue) will be closed upon compliance
- The Association:
 - Waives its right to a contested case hearing
 - Agrees not to challenge the enforcement action