

**MINUTES FOR THE
EMERGENCY MEETING OF THE
BOARD OF LAND OF NATURAL RESOURCES**

DATE: FRIDAY, APRIL 20, 2012
TIME: 1:30 P.M.
PLACE: KALANIMOKU BUILDING
LAND BOARD CONFERENCE ROOM 132
1151 PUNCHBOWL STREET
HONOLULU, HAWAII 96813

DEPARTMENT OF HEALTH
EMERGENCY PREPAREDNESS
2210 IMI KALA STREET, SUITE 204
WAILUKU, MAUI, HAWAII 96793

DEPARTMENT OF TRANSPORTATION
KONA INTERNATIONAL AIRPORT AT KEAHOLE
ADMINISTRATIVE OFFICES
73-200 KUPIPI STREET
KAILUA-KONA, HAWAII 96740

Chairperson William Aila called the emergency meeting of the Board of Land and Natural Resources to order at 1:57 p.m. The following were in attendance:

MEMBERS

William Aila, Jr.
John Morgan
Rob Pacheco

Ron Agor
Jerry Edlao

STAFF

Carty Chang/ENG

OTHER

Bill Wynhoff, Deputy Attorney General
Lance D. Collins

Arlene Kahawai

{NOTE: Language for deletion is [bracketed], new/added is underlined.}

Item L-1 Authorization to Enter Into an Agreement with William Jacinto, Shirley Jacinto & the Church of Christ of The Redeemed of The Lord for the Construction and Declare Project Exempt from Requirements of Hawaii Revised Statutes (HRS), Chapter 343, and Hawaii Administrative Rules (HAR) Title 11, Chapter 200 for Job No. J45CO41G, Kula Kolea Place Rockfall Mitigation, Honolulu, Oahu, Hawaii

Carty Chang, Chief Engineer representing Engineering Division conveyed some background on Item L-1 where on April 12, 2012 multiple boulders damaged private properties along Kula Kolea Place in Kalihi Valley. On April 13th, DLNR with the help of a consultant AECOM made a site investigation and determined the boulders' location citing the TMK and who the landowners are. Their consultant also determined there were other boulders that remained up on the hill side – one at the origin and another below that posing a hazard and was recommended these boulders be removed. Based on the factual findings and pursuant to Hawaii Revised Statutes (HRS) 92-8, the Board finds these boulders pose imminent peril therefore justifying the need for this Emergency Meeting. Our consultant's findings are summarized in Exhibit A. This project also had a 343 analysis. It was deemed to remove these boulders and would be exempt referring to the analysis presented in Exhibit B with an exemption class 1 under Operation, Repairs...and Topographic Features. The Draft Agreement is attached as Exhibit C and staff will be entering in with the private property owners for this project. The scope of work would be to demolish and remove the boulders and miscellaneous related work. Mr. Chang asked to make a correction to the citation to the Act, although, it is still a draft subject to approval by the Attorney General's office. Staff wanted to reflect the correct source of funds and revise Act 164 to Act 180 Session Laws of Hawaii 2010, item A-10. Staff recommends the Board authorize the Chairperson to sign the agreement for the Kula Kolea Place Rockfall Mitigation Project and other necessary documents pertaining to the project. Also, to declare the potential affects of the proposed project under Chapter 343, HRS, this project will probably have minimal or no significant affect on the environment and therefore is exempt from the preparation of an environmental assessment. The landowners are here for any questions.

Chair Aila introduced our Big Island Board member Rob Pacheco and our Maui Board member Jerry Edlao from Maui noting that this is the first time we're using our video conference system. He also acknowledged Senator Kim in the audience who is playing an important role in this process.

Deputy Attorney General Bill Wynhoff suggested that they start by the Board making a determination that it accepts the findings that is the basis for this Emergency Meeting and that an emergency exists then we can move on to the substance of this meeting. We need 2/3 of the entire Board where all 5 of you would have to agree just as to the emergency to come in as a motion. Member Morgan moved to declare this is an emergency under the appropriate section to the rule. Member Agor seconded it. Both Members Pacheco and Edlao acknowledged in favor. Chair Aila concluded all 5 Board members support the findings of the emergency.

Member Edlao asked to repeat what the findings were. Mr. Chang related that these are CIP funds appropriated in Fiscal Year 2011 under Act 180 Session Laws of Hawaii, item A-10 which is for rockfall and flood mitigation statewide. Member Pacheco pointed out that is referenced in

Exhibit D. Mr. Chang said it is referenced in both Exhibits C and D citation to the Act. Exhibit D has the correct citation. Exhibit C was the one he just corrected.

Member Pacheco asked about Section 3 of the agreement that talks about the State's responsibility and what our exposure and liability is on this. Mr. Wynhoff said I think we already suggested that language comes out. Member Pacheco queried we are maintaining all the work done on private property and will we be liable after we do the work if something comes down that it maybe linked to the work that was done later on. Mr. Wynhoff said it's possible. It's difficult to predict all of the circumstances that might arise, but that's possible. One could imagine scenarios, but he imagines are unlikely. We know the contractors, assuming they will do a competent job which is a good bet. It is unlikely that doing the work will decrease or change the danger. It is however possible that the State would be liable for future injuries or possible scenarios.

Member Morgan asked wouldn't it be appropriate to put in an indemnification clause in there from the landowner since it's their land to begin with and they would be liable if the State hadn't stepped in if something happened. Mr. Wynhoff said that's a matter of negotiation. I can't say it's appropriate or not appropriate.

Member Pacheco said he was trouble by this aspect. He understands the urgency and safety and he definitely want to take this opportunity to help mitigate this, but he is also uncomfortable at this point that the State has no liability and now by us coming in as a good neighbor we are assuming all liability and we open ourselves up for future risk if more rocks fall from that cliff because of our involvement. He asked is there anything we could do to mitigate that. Member Morgan said he does know with other agreements because we are participants of agreements similar to this (referring to Makawa Stream) and as a landowner we have to sign an indemnity agreement. Mr. Chang acknowledged he is correct that in past agreements signed when we made improvements on private property essentially what we build on private property becomes the liability or ownership and maintenance responsibility would fall on the landowner. What he thinks Bill is saying that's negotiable and this particular one could be included or not.

Arlene Kahawai representing the Church and is the landowner testified that they have no insurance. The Chair asked about going forward into the future. Ms. Kahawai said they may have to, but the Church has no funds to come up with insurance which is why they had the property for 41 years and she was thinking of gifting it to the State.

Chair Aila asked whether the property always looked like this (in its natural condition). Ms. Kahawai said yes that there was no development because it's on conservation land and you can't do anything on it. The Chair asked whether she wanted to make a statement. She said to get going that the residents are ready to proceed with this work. Chair Aila said we understand the apprehension on the part of the residents and the desire to see closure. We have some legal steps that we have to take care of this first before we authorize any work to proceed. This is part of that legal process for the State to come in and assist.

Member Pacheco asked whether that property is all on conservation and the Church has no structures on it. Ms. Kahawai confirmed that saying yes and that the Church has had it for 41 years.

Member Pacheco asked how the Church acquired it and for what reason. Ms. Kahawai explained that they acquired it because the original owners needed money for their church where her parents bought the property from them and ever since that time they never touched it or did anything to the land. Member Pacheco assumed that you yourself and husband and the Church are both on the title. Ms. Kahawai said she was not married that her parents' name is on the title. Her mother is still living, but her dad passed away. She and her brother's signatures are on the title. It was asked by Chair Aila whether her dad's name was William and it wasn't. The Chair asked her to explain how the other owners came to be part of the ownership. Ms. Kahawai gave an explanation of how the Kanekuas with whom they bought it from came in saying they promised it to the Jacintos a portion of the land because they were originally going to buy the full 10 acres. Her parents agreed and let them have whatever portion. It was that portion the 3.5 acres and from that time on that is how the Jacintos become part owners of the property.

Member Agor asked whether she would be opposed to having a clause in this agreement to exempt the State from any future liability. Ms. Kahawai said she wouldn't mind if they had the funds. Member Morgan said the way he sees it is if the State doesn't step in the State is without liability. We obviously have a public safety issue, but presumably there is a certain responsibility of the landowner and so the State is stepping in. What Member Agor is asking is as part of the agreement to indemnify the State for any future liability it's not that you have to go out to buy insurance because you are not in any worst situation than you are today. You are in a lot better situation because the State is going to step in and done something and appears they are not going to charge anything for it.

Chair Aila asked whether Ms. Kahawai is representing the Church and she said she is the pastor. The Chair asked to make the agreement would she need the approval of her church members that she may have to go back to check with her board or the people she answers to at the Church. Ms. Kahawai said that they have given her the authority to go ahead to do whatever needs to be done.

Member Agor clarified that the exemption is a result of anything happening from our work giving an example of not working in an area up here and boulders roll down. The State wouldn't be exempt from that. It would just be the areas the State worked on.

Member Edlao asked he didn't understand what Member Agor is getting at with indemnification because technically we don't have any liability at this point and you're asking her to do that and he is a bit confused what action you are asking her to do. As it is right now we are just stepping in because of the emergency to the public and other owners out there and that is not our responsibility, that's the landowner. To have her do some kind of indemnity in the future doesn't make sense to him because if anything happens again we'll probably step in again if it concerns public health. Member Morgan said he hears what Member Edlao is saying that his position might be different from Member Agor's position that Member Morgan thinks the indemnity should be for everything – during work as well as after the work because he agrees that the State

doesn't have any current liability and is going in there as a good neighbor. As Member Pacheco said what if something happens, we shouldn't be liable for trying to be a Good Samaritan and a good neighbor and that it is very worthwhile to go in there to do that, but he would like to see a note of liability attached to it because that seemed to be the right thing to do with our fiduciary duty of the State resources.

Member Agor said that what he is concerned about, having gone through this with the Kilauea River is that as a result of our people being on the site and working there the exemption would be to free the State from any future liabilities from the areas we actually worked on. We're working on your property at our expense helping you and that is how he believes the exemptions work drawn on other projects.

Mr. Wynhoff said it is the Attorney General's position, based on what you said so far, is this property in its natural undisturbed condition so it's the Attorney General's position that landowners of property in its natural undisturbed condition of which in fact the State is the largest in the State of course that they are not liable for this rock fall so he thinks its for the Board to consider. They are not liable now and they are not doing anything. To try to enter into an agreement that makes you liable for future problems when they are not liable now and she (Ms. Kahawai) is not doing anything to increase that liability is something that the Board should consider whether that's appropriate. Member Agor said he appreciates that clarification. Member Morgan said he appreciates that too and appreciates understanding the State's position and agree with it.

Member Pacheco said in light of that his only concern would be then the amount of work that is done and since we are stepping in there is really no way for us to pad that liability and taking on that responsibility so we have the contractor and our Engineering Division to do the best that we can do. Even if we had this indemnification if there was something that happened that resulted from the work he didn't think the State is going to get out of it in light of the fact there is no insurance on the property and no place for anybody else to go for compensation. He was ok with this.

Member Edlao thanked Mr. Wynhoff for his comment and that is exactly what he meant, but didn't have the words for it and agreed with what he said.

Lance D. Collins, a resident of the Kula Kolea Tract submitted a petition with a 115 names of residents asking the State to use Act 76 powers to step in because Ms. Kahawai said that the Church didn't have money to fix the hazard. The residents are not sleeping because of the hazard and none of the rocks that fell has hurt anybody destroying parts of houses and that's just the luck so far. Our message is the sooner that you (the State) can get the rocks stabilized or removed people can start sleeping at night. About 90 of the signatures are from the Kula Kolea residents and the rest are from the faculty and staff at Kalihi Elementary at the bottom of the hill. The Chair thanked him for the petition.

Member Morgan made a motion to approve staff's recommendation(s). Member Agor seconded it. All voted in favor.

Chair Aila said community members we are still finalizing the plans. Once they are ready with the plans they will have a meeting and will set up the dates and times asking for their cooperation on this operation to proceed.

Unanimously approved as submitted (Morgan, Agor)

Adjourned

There being no further business, Chairperson Aila adjourned the meeting at 2:24 p.m. Recording(s) of the meeting and all written testimonies submitted at the meeting are filed in the Chairperson's Office and are available for review. Certain items on the agenda were taken out of sequence to accommodate applicants or interested parties present.

Respectfully submitted,



Adaline Cummings
Land Board Secretary

Approved for submittal:



William J. Aila, Jr.
Chairperson
Department of Land and Natural Resources