

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

DATE: FRIDAY, SEPTEMBER 14, 2012
TIME: 9:00 A.M.
PLACE: KALANIMOKU BUILDING
LAND BOARD CONFERENCE ROOM 132
1151 PUNCHBOWL STREET
HONOLULU, HAWAII 96813

Chairperson William Aila called the meeting of the Board of Land and Natural Resources to order at 9:09 a.m. The following were in attendance:

MEMBERS

William Aila, Jr.
David Goode
John Morgan

Jerry Edlao
Rob Pacheco

STAFF

Russell Tsuji/LAND
Curt Cottrell/SP
Sam Lemmo/OCCL
Carty Chang/ENG

Ed Underwood/DOBOR
Stephen Soares/SP
Alton Miyasaka/DAR

OTHER

Linda Chow, Deputy Attorney General (AG)
Cindy Young, Deputy AG
David Frankel: D-1, K-5
Keith Kiuchi, J-
Ross Smith, M-2
Artie Rehnquist, E-1
Randy Vitousek: K-1, K-4
John Sakaguchi, K-3
Yvonne Izu, K-5
Lisa Bail, K-5
Mary Donovan: F-1, F-2

Bill Wynhoff, Deputy AG
Max Graham, D-1
Sheryl Nicholson, D-7
Burt Lau, J-1
Bob Frame, E-1
Greg Kugle, K-1
Mike Muekiyo, K-3
Michael Kumukauoha Lee, K-5
Henry Chang Wo, K-5
Eric Enos, D-16
Todd Apo, F-3

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

Item A-1 August 24, 2012 Minutes

Approved as submitted [~~Gen, Edlao~~] (Morgan, Pacheco)

Item A-2 September 14 , 2012 Minutes

Item A-2 was not available.

Item D-1 RESUBMITTAL: Denial of Request for Contested Case Hearing Regarding BLNR Agenda Item D-3, January 13, 2012, regarding Grant of Perpetual, Non-Exclusive Easement to Eric A. Knudsen Trust for Access and Utility Purposes, Poipu, Koloa, Kauai, TMK: (4) 2-8-014:from Parcel 19 (Hapa Road).

(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).

Russell Tsuji representing Land Division conveyed item D-1 and that counsel raised some issues that the Attorney General's (AG) office needs to look at.

Max Graham representing the Knudsen Trust testified that they requested an easement across Hapa Road. David Frankel and Ted Blake asked for a contested case hearing analysis, but it doesn't change the case or the basis of the case. It is required of constitutional law where he cited the Iao Valley water case and the analysis is correct. He also cited Sandy Beach and to deny the request is appropriate

David Frankel representing Ted Blake testified that they will appeal the denial. It is customary practices and ownership is not distinguishable as cited by the Supreme Court and is not the same right. It is not only for private property owners. Native Hawaiians have a right to a contested case hearing where he cited PASH, etc.

Chair Aila made a motion for the Board to go into Executive Session pursuant to Section 92-5(a)(4), HRS to consult with our attorney on questions and issues pertaining to the Board's powers, duties, privileges, immunities and liabilities. Member Goode seconded it. All voted in favor.

9:17 AM EXECUTIVE SESSION

9:42 AM RECONVENED

Member Morgan said after talking to their counsel the issues are difficult and moved to deny the contested case hearing. Member Edlao seconded that. All voted in favor.

Unanimously approved as submitted (Morgan, Edlao)

Item D-7 Denial of Request for Grant of After-the-Fact Term, Non-Exclusive Easement to LBUBS 2007 – C2 Alii Drive, LLC, for Drainage and Utility Purposes; Denial of Request for Issuance of Right-of-Entry for Survey, Mapping and Maintenance Purposes, Auhaukeae, North Kona, Hawaii, Tax Map Key: (3) 7-5-09:43 pors.

Written testimony from John Marshall was distributed to the Board.

Member Pacheco recused from item D-7.

Mr. Tsuji noted that item D-7 was drafted as a denial of the applicant's request for a contested case because the Attorney General's office didn't think the Board had the discretion to grant an easement to a third party over the objections of the Lessee and the Lessee is objecting. Since then, there was a letter from the applicant asking that the letter be withdrawn and they further explained to file with Circuit Court and have the courts find it as a complied easement and if they are successful they will be back. The counsel for the shopping center and counsel for D.G. Anderson are here. Staff's recommendation is to allow the application to be withdrawn.

Member Goode asked whether the circuit court could hand it back. Mr. Tsuji said we wouldn't want the court to say it's the discretion of the Board – deny. The argument from the shopping center is a matter of law they are entitled to because of the facts of this case. He thinks what Bill Wynhoff is saying is that the legal question is beyond this Board, but if the court says yes then the Board could formalize the easement.

Sheryl Nicholson representing the applicant testified apologizing for taking awhile to get back to the Board. The analysis they did after looking at the issue from all sides it is as staff had characterized giving rise to 2 part inquiry as first of all whether there is an easement to begin with and if that issue is in favor of the landlord they will come back to the Board for action that is appropriate. It's not the first issue where an easement has been granted and they are coming to the Board asking for the consent, but there was a dispute on whether or not there was an easement created to begin with back in 2002. After looking at the legal and jurisdictional issues by the Deputy Attorney General we came to the conclusion that first issue as whether or not the easement was created is one that is between two private parties because we have a Lessee that disagrees. Therefore that issue needs to be resolved in the first instance outside this Board by the courts. That was the reason for withdrawing the application. The parties are motivated to try to resolve their differences without having the Board resolve it. But, if they have to they will file a suit in any event to keep this moving along. They don't intend this to languish. If the parties are not successful in reaching an agreement they will probably bring the suit in circuit court for a voluntary ruling of the easement, but hope to work this out in the meantime.

Member Goode made a motion to accept the withdrawal and was seconded by Member Edlao. All voted in favor.

WITHDRAWN (Goode, Edlao)

The Applicant requested to withdraw its Application for an Easement and informed the Board it intends to a file suit for, among other things declaratory relief in Circuit Court that an implied easement already exists and if successful, would likely be back later before the Board seeking to formalize such an easement.

Item J-1 Status Report on Proposed Waikiki Landing Project at Ala Wai Small Boat Harbor (AWSBH); Kalia, Honolulu, Oahu, Hawaii. Tax Map Key Nos: (1) 2-6-010:003 (por), 005, 15 & 016; 2-3-37:020

Written testimony from Burt Lau was distributed to the Board.

Ed Underwood, Administrator for the Division of Boating and Ocean Recreation (DOBOR) briefed the Board on item J-1 which is a status update and briefing on the Ala Wai Small Boat Harbor (AWSBH) and gave some background where they entered into an RFP. Staff is looking to develop the boat yard and haul out sites. Honey Bee was selected and entered into a development agreement. If they get all their entitlements staff would enter into a 65 year lease with them. A \$150,000 development fee was paid for the first year, subsequent to that was \$15,000 a month and that development agreement expires December of this year. In total they've paid \$450,000 in development fees. To date Honey Bee has done their due diligence – Chapter 343, EA (environmental assessment), done a FONSI, and performed various community outreach, met with user groups. Based on that Honey Bee did amend their project and there have been changes to the statutes that may affect this project. In 2011 the Legislature passed 2 bills – Act 153 gives the Board the power to exempt all boating related projects from SMA requirements and Act 197 authorizes the Board and expressly directs the Board to both lease fast and submerged lands at the AWSBH and specifies the uses under those leases determined are appropriate and permissible under any such leases...Honey Bee's proposed retail uses, banquet room facilities and wedding facilities aren't permitted under the County zoning code, but under Acts 153 and 197 and under the request of the Board exempt this project from SMA requirements and preempt the zoning code.

Keith Kiuchi, attorney for the developer testified relating some history of submitting their EA in 2010 and a final EA after receiving comments. Concerns were the size of the boat yard, the challenges of it and they designed a 1600 sq. ft. deck 16 feet above the water using technology. The reason for 16 feet is to give DOT room to fix the Ala Moana Bridge. He cited the Portland Oregon boat yard which is 20 feet above the water and described the cantilever system that mainland contractors were interested in installing it. Mr. Kiuchi displayed some artist renderings of the project and described it. There are 2 first floors – pier level, street level. A 4 story building accessed from Ala Moana Blvd. by a pedestrian bridge, from the pier or from the Prince Hotel side. There is room for 11 boats to be repaired, a machine room and storage lockers all on the second floor. There is a 2 story building along the Ala Wai channel and walkway along the water. Computer generated drawing to show the height of the buildings surrounding this project. They didn't want a concrete canyon at the entrance of Waikiki and wanted something low rise and pedestrian friendly with the walkway by the dock. The canoe house is where the wedding chapel will be. The design of the buildings on the boat yard is Hawaiian maritime borrowing the building designs in Lahaina. For the 2 story fuel dock facility it was designed like a boat angling

out and about 10,000 sq. ft. Also, they have a lease with Hawaii Kayak and Canoe Team to train there for \$1.00 a year. He showed some architectural drawings of the canoe building, the parking, the wharf building and boat yard building. The site plan of the second floor of the boat yard building and wharf building. The new boat yard is almost as wide as the old Ala Wai Marine boat yard. There will be an area for commercial boat operators, an area for 17 to 18 kiosks along the pathway. On the second floor will be a convenience store, the third and fourth floors will be for restaurants and offices for the boat repair. On the site plan for the fuel dock will have 6 vessels moored on both sides, kayak facilities, showers, weight training, storage facilities, fuel dispensers and propane tank. They have been out to the neighborhood board twice and addressed their issues.

Member Morgan asked what were the main concerns that they addressed after the first meeting and Mr. Kiuchi said it was the size of the boat repair facility. Also, there were concerns of pollution at both sites which they tested twice on one site and three times on the other. The Department gave them a letter of no further action on the boat yard site and there is a plan of action for the fuel dock site that the contamination is limited to 200 sq. ft. On the second go around there were concerns with noise and they are working to put some sound absorbing type of board. When they met with Rep. Chang there were concerns with putting a shower out at the fuel dock facility which they've added in, also, addressed dedicating the elevator for the fuel dock facility. It is a work in progress and is open to suggestions.

Member Goode inquired about the Hawaii Prince Hotel's requirement regarding the bathroom. Mr. Kiuchi said whatever it takes to comply with SMA requirement the Prince Hotel had – 1) Having bathrooms which they have. 2) Having signage to the bathrooms which they agreed to. 3) Put a shower in which they are willing to do. 4) And keeping it open at night which they are willing to do. They have no problem meeting those requirements. They will have 24 hour security.

Mr. Kiuchi described the location of where the Prince Hotel's bathroom is which is on State land and explained where their bathrooms will be and what they will be.

Burt Lau representing the Hawaii Prince Hotels testified that it was gratifying to hear Honey Bee's public statement and commitment to ensure their existing permits and requirements will be shifted over to Honey Bee and will be duplicated. In order for the County to allow our permit to be affected in that way they have to be ensured that there is no gap between what was encroached on them, but Honey Bee is going to be... It will have to be in a written document. The City imposed that on us that they have a covenant in their lease and permit. Chair Aila asked if he would feel comfortable if it was a condition for the Land Board to approve and Mr. Lau said yes.

Chair Aila said that was just a presentation and there is no action on this item.

Item M-2 Issuance of an On-Demand Airport-Based Shuttle Bus Concession at Kahului Airport, TMK: (2) 3-8-01: Portion of 19

Ross Smith representing Department of Transportation (DOT)/Airport asked to go out to bid for a new operator.

Unanimously approved as submitted (Pacheco, Edlao)

Item E-1 Termination of Revocable Permit No. SP0064 to Hawaii Pack and Paddle, LLC, Kealakekua Bay State Historical Park, South Kona, Hawaii, Tax Map Key: (3) 8-1-011: 001, 006, 010, 011, por.

Written testimonies from Robert Frame, Betsy Morrigan, Bari Mims, Christopher Kirby, Forest Hoff, Jennifer Stephan, Shayne and Jolene Armstrong, Karen Anderson and Digger Tamura were distributed to the Board members.

Curt Cottrell, State Parks Assistant Administrator conveyed that the Division of State Parks recognizes they have monumental management issues at Kealakekua Bay State Historical Park and have for some time. He went over previous submittals that dealt exclusively with the issue of how to reconcile commercial interests in the form of kayak tours and protecting sensitive cultural resources. It comes down to trying to regulate multiple kayak requests with multiple jurisdictions with high public visitations in a challenging infrastructure and a lot of unauthorized activity all around it. The results are 4 authorized kayak companies allowed to operate at Kealakekua Bay since 2006. However, today he is only discussing the revocation of one specific permit and the Division of State Parks is asking the Board to terminate a month-to-month revocable permit (RP) for Hawaii Pack and Paddle (HPP) to use Kealakekua Bay's State Historic Park for landing and launching a Ka'awaloa Flats. As set forth in paragraph B(2) of the RP – the Board may revoke and thereby terminate this permit for any reason whatsoever, upon written notice to the permittee at least 30 calendar days prior to the revocation. As mentioned these RP's were established by the Board in 2006 and the conditions of these RPs were established in consultation with 4 authorized operators. These permits have very specific conditions in order to:

1. Provide for public safety.
2. Minimize human impacts to the marine environment and the significant cultural resources on site – in addition to the natural resources.
3. Provide management equity among the 4 authorized kayak tours for the privilege of using a valuable public resource for income and in doing so
4. Enhance the quality of the guided tour and the visitor's experience at our park.

The Division of State Parks does this in 4 ways by regulating the duration of stay, the location of the tour, the number of patrons and the payment of fees. Staff has discovered that Hawaii Pack and Paddle violated 3 of the specific terms of the RP occurred on July 4, 2012. Keep in mind that they have 4 authorized operators and its incumbent on these folks to exercise an honor system on how they conduct their tours because of our limited staffing ability to monitor. We rely upon the accurate recording of our commercial operators to ensure faithful adherence to our permit conditions. The first provision is a complicated permit issue. The Board submittal says there were 13 patrons while the permit condition per tour authorizes only 12. The face value doesn't seem like an egregious offense for revocation, but looking at Exhibit D the reporting mechanism that the Division assesses compliance the initial report says there were only 4 patrons

on July 4th. Subsequent discussions with the permittee then brought it up to 13 which is still under the threshold if you break it into 2 groups. But, further discussion we are at about 18 patrons and the method they were deployed was on 3 trips. They've already violated one of the conditions of the permit where each vendor is allowed 2 trips per day. That's the first violation of the permit in going over the limit.

Mr. Cottrell said the second violation and again it is incumbent for the operator to honor their 2-1/2 hour length of stay to honor the conditions and kokua the other operators. Based on discussions with the permittee it looks like 1-1/2 over the limit. Instead of 2-1/2 hours they were there about 3 hours and 20 minutes which is well over the allotted time. We have 3 other companies that rely upon these vendors to honor these permit conditions in order to avoid conflict at the landing, to provide for safety and to avoid the resource impacts.

The third violation Mr. Cottrell related is the most substantial based on the safety issue is they conducted a tour which deviated from the areas authorized under the RP violating paragraphs A.3 and B.41. In Board submittals of the past there was lots of discussion saying that in order for protection of the resources and to enhance public safety the kayak tours were allowed to land at Ali'i Point, traverse a small trail (displayed a map of the Bay) and this is all sensitive archaeology to the Captain Cook Monument. Stay, snorkel, swim, picnic and then leave. There is limited land capacity here for all 4 companies at one time. Also, the place is visited by hoards of other visitors, but based on discussions with the permittee on that day they went approximately a ¼ mile off the map over to another location which is the third violation of the permit condition where we ostensibly say for you commercial folks – you must adhere to these conditions to avoid impacts to this area, for public safety purposes, follow the game plan, return and go. On that day they chose not to do so and went out of bounds where the severe incident occurred.

Mr. Cottrell said we have approximately 16 RPs out throughout the State and about 41 authorized tour providers with assorted other permits throughout our Division of State Parks. Due to our limited staffing, the remote location and the variety of tours monitoring for compliance is really challenging. We rely on our operators to truthfully report their use for these tours. It is incumbent upon them for the privilege of using our State Parks knowing that we have limited monitoring capacity to simply play by the rules to ensure public safety, minimize damage and provide for a quality tour that doesn't have any impact on the natural and cultural resources. In the case of Kealakekua Bay, they need to honor all of the conditions set forth in these previous Board meetings that were established in collaboration with the other tour providers. The 3 violations taken at face value may seem insubstantial it's the cumulative impact and in this case staying on the authorized trail for the protection of public safety that in our opinion warrants the staff's recommendation to revoke this permit. He thinks it's incumbent on this Department when we issue commercial permits for the privilege of using public resources for income in particular public resources that have arguably the most sensitive cultural resources in the State that the permittees abide by the conditions that they set forth.

Member Edlao asked whether it's first come first serve since there are 4 groups out there. How do they decide? Mr. Cottrell pointed out the color schedule in the submittal that was established that the 4 companies self-sorted themselves where they will come in at 2-1/2 hour increments.

Member Pacheco said this was agreed to by 2 of the permittees and Mr. Cottrell confirmed that. With our property manager in consultation with the permittee the original payment shown as Exhibit D of those 4 is now spiked up to 18. That's been reconciled financially and they think the permittee is caught up with the payment requirements, but it doesn't resolve the issue that on that day there was more people than allowed. Even if you broke it into 3 groups that individual permittee exceeded his time limit and exceeded his group limit by one even though this was a youth group he thinks the third group was 5. Nonetheless, it's incumbent upon them to play by the rules and in addition the reporting since initially there was only 4 people which is an issue with recording and was reconciled post discussion. Exhibit D also shows there were tours booked for July 5th, 6th, 7th and 8th which subsequently cancelled. I believe financially we're good, but it doesn't solve the 3 other violations of time, place and number.

Member Morgan asked whether there were cumulative amount of the 4 days on July 5th, 6th, 7th and 8th came out doing the math and Mr. Cottrell said they worked that part out that the checks have been reconciled. Their property manager is here who was dealing the financial reporting. But, it's the broader picture of going out of bonds and public safety was jeopardized in addition to over the group limit, you stayed longer and those are more resource impacts and quality impacts to the users. It's the going out of bounds, the public safety issue that recreated the most compelling reasons for the revocation.

Member Morgan asked whether he has reason to suspect this is one of or a repeated thing. Mr. Cottrell said he had no idea that we don't know how to monitor well and in this case it was discovered. He can't really say. We've had issues in the past where staff questioned the reporting, but then again this event on that day clarified that the report was off.

Member Morgan said when you hire people to go out there this makes the company circumstance that you want to hire the right people to do the right job and if an employee does something that they are not supposed to do that is unfortunate, but the under reporting to me is a huge thing because it is a relationship built on trust. Once you violate that trust it's in conflict.

Member Edlao asked all these violations occurred on that day and Mr. Cottrell said correct. Member Edlao asked do you suspect there were previous incidents out there, but you don't have any proof? Mr. Cottrell said instinctively given the patronage that we know happens down there when looking at the reporting documents it seems lower than what could be happening given how immensely popular Kealakekua Bay is for kayaking. Again, he can't even speculate because we don't have staff on the ground to count. Member Edlao said that is unfortunate and Mr. Cottrell agreed.

Member Pacheco reported that he had discussions with the different permit operators and he brought up the question seeing small numbers on the permits being used and one of the things they respond to is since the increase on the non-permitted activities it's impacted their businesses. For him, the issue of them going out of bounds is obvious. Their guys brought the news crew down there and showed them exactly where they went to. They have good evidence of that. He had some questions and he agreed with Mr. Cottrell that it is most grievous of the permit breach.

Member Pacheco asked help me understand condition 16 of the permit on page 8. They are basically allowed 2 trips of 12 guests with no more than 8 kayaks each day with one guide for a maximum of 12. What they (HPP) are saying is they had 2 groups of 7 and 7 even though it was one party. It was found there was a third group on that trip so regardless even if we wanted to say...the permit is not real clear here and he asked are those 2 trips have to be completely separated. Mr. Cottrell asked their property manager aren't they have to be split by a half hour right? Stephen Soares said they are staggered per the schedule. Member Pacheco asked but that is their own implied schedule and it's not in the permit. Mr. Soares said the schedule is attached to the permit. Member Pacheco said they have to be a half hour apart and we have a third trip that is acknowledged by them (HPP) and in the corrected count that was sent to the Department. Mr. Cottrell acknowledged that and they are up from 4 to 18. Member Pacheco said which is under the allotted number allowed for 2 trips and Mr. Cottrell said correct. Had they done the 2 trips of the allotted amount with the half hour stagger that issue wouldn't even be before you now.

Chair Aila asked the reason for the staggering and maximum is to limit the amount of impacts to this highly culturally sensitive area which is the whole reason for coming up with the schedule and for coming up the limits and splitting people out so not to have too many people in a culturally sensitive area. Mr. Cottrell said not only the people, but the storage of the kayaks. We don't have any storage or infrastructure and we can't have all the kayaks stacking up at one time. He pointed out that this schedule was agreed upon at previous Board meetings and they all (the operators) participated in the self-sorting. Way back the Board recognized there were 4 authorized companies that deserved having a revocable permit to do this and they agreed to this schedule.

Member Morgan asked whether there was any communication or concerns with this company prior to this at all. Mr. Cottrell said there were no concerns. The company recently changed hands in January 2012. The previous permittee sold the company under the terms of the RP and the company stayed the same and just changed ownership because you can't transfer the rights, but HPP went from one entity to another and have been operating under this company for 6 months. But, they had worked for the previous owner and they knew the game plan prior. Member Pacheco confirmed that Mr. Mims worked for the previous owner. Mr. Cottrell said other than that there were some accounting errors which were very common with our RPs and our property manager spends a lot of time chasing down checks or late payments, but nothing too significant for us to come to talk to the Board about except for the 3 he had mentioned. Cumulatively, it propels a compelling reason that our RP holders need to know even if we cannot monitor if we do get knowledge we have to take action. It's really important that people who use our public resources...as seen with other tenants with the same kind of emotion that once they are in they are in and they tend to get sloppy in the commitments made originally and it's very difficult for staff to get them back out. I think that is something that has partially devastated this Division and its ability to manage resources properly and we're correcting it.

Bob Frame representing Hawaii Pack and Paddle (HPP), LLC testified that he had written and asked for a continuance to sort out all of the factors surrounding this and he was advised that you would go forward. We have a number of people they could talk to sort out all of the issues surrounding the actual circumstances. There has been a tremendous amount of media coverage

over this incident. Even there has been some contention that things were not exactly as the charges here indicate that there was some undue influence exerted over HPP guides by an out of control member of another group. First you have to understand this was a group of young people that were on a camping type of excursion and this particular trip was one portion of that. The kids were all together with their own guides throughout the course of their time here. This is where he can't speak to it because he has not yet talked to the witnesses, but they believe there was this particular issue of diverting that was highly contentious and out of the ordinary. This particular company is now owned by Mr. Mims, but he worked for the previous owner. There were a number of people who wanted to buy this company, but she (the previous owner) hand selected Mr. Mims because he was the most safety conscious person and attuned with the cultural heritage of the site there. Because we have not yet had the opportunity to prepare defense and this is the first day that this matter has on the agenda for adjudication. He is duty bound to request for a contested case hearing on the matter and doing that now and following up with a written petition after today. He would answers if he can, but he was only brought in recently.

Member Pacheco asked whether Mr. Mims was here today and Mr. Frame said he is not here today. Member Pacheco asked whether he had any knowledge of the number of participants on the 3 separate trips out that day. Mr. Frame said he does know there were 2 guides and less than 24 people. Member Pacheco asked for the party that went out of bounds and also Mr. Mims was on-site. Mr. Frame said he was not aware of that. Member Pacheco said he told him that himself. Member Morgan asked he was on-site. Member Pacheco said yes, he had a conversation with him (Mr. Mims) and he told Member Pacheco he was also out there because he helped them load up and he had paying participants also. Member Morgan stated what you are saying is the owner was there on that day. Member Pacheco said he was, but left before the group had gone out because he had his own separate party.

Mr. Frame said he would like to add that a contested case hearing is important in this matter because then they would be able to flush out through cross examination what exactly went on, review the documents collected by the State's 60 day investigation and then we would have an opportunity to provide findings of fact and law because we are all aware that this doesn't end here. Chair Aila pointed out that we accept the request for a contested case hearing, but whether or not one is required because of the revocable permit status. Mr. Frame said he understands that.

Member Goode asked you requested in your letter to defer to our next Board meeting of October 12th. Member Pacheco said September 28th is the next Board meeting. Member Goode asked do you need a few weeks or a couple weeks. Mr. Frame said depending on the date he would certainly appreciate more time. If it is later this month he'll be on the mainland from Sept. 26th to Oct. 8th.

Member Pacheco asked what will that time buy you. What kind of information are you going to give us that you don't already have now? Is your client going to deny they weren't out at that location? Mr. Frame said no. It was subject to a lot of media coverage and everyone knows what happened. One young man is missing, never been found. Another suffered serious injury and unresponsive. One of the guides from HPP revived him in the water undoubtedly saved his

life and that we know that they were there. As far as what transpired during the trip especially in regard with this important issue about the deviation is something that has to be flushed out. I just don't know how long it's going to take. But, the witnesses are not here and are on the mainland as well.

Member Pacheco said the applicant's argument is they had no choice, but to go out there because of actions of their clients. Mr. Frame said at some point you can protest to do it a certain way, but where do you draw the line. They aren't going to engage in physical altercations if it comes to that. Yes, if there was something there that prompted this deviation that was outside the norm for this company and something that they argued against.

Member Pacheco asked how did the participants know the place to go to. They are being guided. Mr. Frame said he cannot answer that question.

Member Goode asked it seems the client's position is don't revoke the permit and delay this to gather more facts and basically allows them to continue to operate until something is decided, correct. Mr. Frame said yes. Member Goode said something they could discuss especially a suspension of the permit until such time they are able to have a hearing. He asked did he discuss this with his client if it was something they might...Mr. Frame said one of the purposes for making this request for the contested case hearing is because he knows it gives them time to talk with the people, the enforcement people and hopefully reach some sort of agreement so we don't have to air everything in the hearing. And, yes, I have discussed with them the possibility of some sort of suspension rather than revocation. Which of course, it would be devastating for the people who are employed there and work with them. It would probably end with the company not being able to continue to operate.

Member Edlao asked are you talking about the suspension. Mr. Frame said no. The revocation is the recommendation to revoke. Member Goode asked but as far as suspension goes. Mr. Frame said that would be something he would love to be able to negotiate.

Member Edlao said from his perspective if they do decide to give him some time, I would say you would not operate until that time they come to a decision. It's not I'll go talk to my client. I think you guys got bigger problems, but that is not what is before us. I'd be interested in seeing what else you come up with, what rationale. But, even if I do go along with some sort of deferral on this thing I do not want you guys operating until we come to a decision. Mr. Frame asked if I understand what you are saying if the recommendation is taken as of today the 30 days notice the company cannot operate. Member Edlao said right. Mr. Frame asked even though they made a request for the contested case hearing. Member Pacheco said he doesn't know what a contested case hearing will do for your client because it is quite a process. These are annually renewed revocable permits. Because of the on-going issues out there the Department has actually gave notice to the other permit operators and are very likely they are not going to renew the permits come January 1st in order for the Department to take some comprehensive action out there. I don't know if that is going to do your client any good. If they take action today to terminate the permit, go for the contested case hearing and the Department is not required. It is a revocable permit. It is the Department's decision to not issue new permits is not even a Board action, but the Department can make that choice themselves. These revocable permits aren't something the

Board gets to decide. Do you understand what I'm saying? Mr. Frame said he understands. It is always debatable about whether there is a property interest in a permit that's comes up and it's certainly something we contend we're entitled to due process and protection.

Chair Aila said so that everybody understands it - it is the intent of the Department not to renew any of the permits and if you want to operate understand that is the intent of the Department. Mr. Frame said he understands.

Member Pacheco said he could support the deferral for the next meeting, going for another month after the Department...he couldn't accept a deferral for another month. He could accept a deferral to the next meeting in September.

Member Morgan asked if Mr. Frame's client be able to be here if he wouldn't be here. Mr. Frame said he would have to check.

Member Edlao said that he could support a motion that if you do that I don't want them to operate at all. Member Pacheco pointed out the permit requires the 30 day notice. The Chair said if they decide today they would still have the opportunity for 30 more days that's the procedure. Mr. Frame said HPP had a sterling safety record prior to this incident and one-off the phrased used it's certainly what this is. Member Pacheco said it's a one-off, but it was also a one-off within the permit requirements in that area is one thing, but the fact it happened outside of a permitted area that commercial operators are not allowed to go into and puts us into a different place. Mr. Frame said its unusual circumstances resulting from that deviation.

Member Goode said that the applicant could help us by voluntarily ceasing operations. You agree to have this on the 28th of September. It might go a long ways with the process.

Member Pacheco asked whether we could find them in fault of the permit and terminate them today and allow for re-consideration at the October meeting.

Artie Rehnquist testified asking whether they are a Board of 5 and the Board members said it's normally 7, but they have one vacancy. After hearing all the testimonies it compelled him to come forward. This will have an impact to tourism and activities near the shoreline. There are at least 2 Board members that are asking the company to suspend all operations at least for 1 month or until January when they have to come for revoking the permit on their business. He recommended following Member Goode's recommendation to instill goodwill to visitors, be respectful not only to local culture, but custom, safety and health. When going to executive session recommend approval for the continuance and as a condition the company unilaterally voluntarily suspend all operations. Health and safety is paramount. To prejudice the company's jurisdiction over others - civil, criminal - losing a business is manini compared to going bankrupt or going to jail and he recommends for due process sake in executive session pass a resolution 3 to 2.

Board member Edlao made a motion for the Board to go into Executive Session pursuant to Section 92-5(a)(4), HRS to consult with our attorney on questions and issues pertaining to the

Board's powers, duties, privileges, immunities and liabilities. Member Morgan seconded it. All voted in favor.

9:37 AM EXECUTIVE SESSION

9:58 AM RECONVENED

Member Pacheco recommended a motion to accept staff's recommendation to revoke the permit and offered the permittee the opportunity to ask to bring it back for reconsideration no later than October 8th (he means Oct. 12, 2012) BLNR meeting. Member Edlao seconded that motion.

Member Goode said it's important in light of the volunteers in and out, the importance of the activity, when staff says they don't have the resources to enforce, that DOCARE doesn't either, we got to trust to do the right thing and it's clear that trust has been broken. It's a month-to-month revocable permit that one of the operative words is "revocable" and I think that is the action we need to do at this time.

Member Pacheco said just for process to allow the operator to come back to give more information, but like I said I was uncomfortable doing that for a month, but I can swallow this. The Chair said they will advise staff to put a place holder for 30 days on the October agenda and you (HPP) also have to follow up with your request for a contested case hearing in writing. All voted in favor.

The Board:

Approved staff's recommendations to revoke the permit and allowed to bring this back to the Board on October 12, 2012 for reconsideration. Otherwise, staff's submittal was approved as submitted.

Unanimously approved as submitted and amended for reconsideration on October 12, 2012. (Pacheco, Edlao)

Item K-1 Conservation District Use Violation File OA-13-07 Regarding an Alleged Unauthorized Erosion Protection Structure, by 4615 Kahala Avenue Corporation, at Kahala, Island of Oahu, Tax Map Key: (1) 3-5-005:015

Written testimony from Gregory Kugle was distributed to the Board.

Sam Lemmo representing Office of Conservation and Coastal Lands (OCCL) conveyed that item K-1 is an enforcement case and the purpose of this proceeding is to seek removal of an erosion control structure installed by 4615 Kahala Avenue. This was an outgrowth of the implementation of Act 160 which was passed at the beginning of 2010 and the Legislature allowing DLNR to fine people and compel them to remove encroaching vegetation on sandy beaches. Staff went through Kahala because they received a number of complaints and tagged a number of properties that clearly had vegetation like naupaka growing out on the beach. Many of them complied. Some didn't. Staff went back and did it again. This is one of the landowners involved in the complaint. The Corporation agreed to remove the naupaka to comply with Act

160 as long as we allowed them to install a temporary control structure to stabilize the bank for a short period until a longer term solution. Staff issued them a site plan approval in December 2009 which is a minor permit.

Mr. Lemmo noted that the permit was for a temporary structure to stabilize the bank for removal of vegetation. The structure today has been continually maintained thus extending its life beyond what staff feels is allowed or expected. Staff received complaints from people in the area and they investigated the matter by doing a number of site visits. Staff wrote to the land owner and said look it's been a few years this was not intended for a long term solution to the erosion problem. It's causing erosion to the beach in front of it, it's causing flanking to the side of it and it's causing a public safety problem because people have nowhere to walk any long except over the structure or on the base of the structure. A very dangerous situation from his perspective and it is inhibiting public accessing along this section of the beach. There is a recreational beach here that people go to swim and sun bath. The Corporation responded and staff replied back to their responses. They have 3 primary arguments that if they remove the structure their property will be damaged by erosion. When they say that, they are correct, if they remove the structure there will be some erosion of the sand bank and might lose some landscaping features, but the house will not be threatened. Staff only allows emergency shore protection when your house is under threat from the ocean and this is not the case. What will happen is some sand will be released during the active beach phase; it will improve lateral public access along the beach which will make the situation much nicer for the public. The property owner would likely suffer some loss of land because the land around is eroding and there will be some initial erosion response to removing the structure. But, everybody else in the State is suffering the same problem, erosion, as you know they don't have a right to armor the shoreline at the expense of the public beach. Mr. Lemmo agrees there will be some loss of property.

Mr. Lemmo said there is a big storm drain that runs nearly perpendicular to the shoreline out to the outer edge of the reef. They are claiming sand is going into the storm drain and getting flushed out beyond the reef. They cite a study done by sand engineering and could be related to the client's erosion problem. Staff read the report and it does not suggest this is the case. They drilled some holes in the pipe and they found some sand in it. They never said this was related to beach loss or erosion of the beach at Kahala. Staff investigated the matter themselves with their coastal geologist and walked the whole length of the pipe and this is just not the case. The most compelling evidence is if you look at the shoreline recession maps prepared by Fletcher and U.H. you'd think you'd see some kind of erosion signature in the vicinity of the pipe break/breach and it's not there. Everybody has gotten it wrong on that issue.

Mr. Lemmo said they are seeking long term solutions to the issue and need more time. They said they were going to employ this engineer and that engineer and talk to the neighborhood board, but he has no evidence or indication that they've done any of that at this point. Staff asked them time to remove it and they said no. Mr. Lemmo told them that they will put this before you to give them their due process to address you and this is what we are doing. The recommendation is to remove structure, remove all materials within 30 days and failure to comply with that will result in fines of \$15,000 per day. There are a lot of miss-quotes, miss-used data, miss-interpretations and this is the first time he realized that this property is owned by another country as he saw in Mr. Kugle's recent filing – San Marino is a tiny country in Italy.

Member Pacheco pointed out in their letter they referenced an identical situation next door. Mr. Lemmo said he went out there and couldn't find it. He dug down 2 feet and pulled up some burlap. To him the structure is largely disintegrated and even if it's there it's buried by the beach and isn't a problem whereas their structure is a major problem. Member Pacheco asked then the structure was put in and left in place...Mr. Lemmo said they have been actively maintaining it even though there were conditions in the original authorization that suggest they speak to us before doing that.

Greg Kugle representing 4615 Kahala Avenue Corporation testified that the property isn't owned by the country of San Marino it is the consulate for the country of San Marino. He agreed with Mr. Lemmo's presentation that they did try to resolve things. Mr. Kugle pointed out that there are fully mature, naturally grown hau trees and naupaka along his client's property while in 2007-2008 was holding the sand bank on an actively eroding beach. His client received in the 2008 letter to cut the vegetation in exchange to protect the beach and the dune referring to Dr. Fletcher's report regarding a neighboring structure which is on the Koko Head side of this property. His client agreed to remove the vegetation to protect their property and entered an SPA (site plan approval) for this work. A year later the same people who are complaining are complaining about this that the coconut sand bags are all bio-degradable and securing the property. Mr. Kugle described the coconut trees, the hollow tile wall and fence that would be down on the beach if this structure were removed. The Kawamoto property next door is littered with hollow tile wall which is to the west.

Mr. Kugle said he did file a request for a contested case hearing if the alternative he proposes doesn't work out. The erosion map rates in the submittal identified that there would be no increase in erosion from this pipe, but looking at Exhibit 4-A and 4-B which shows the pipe going across their property and 2 others you have to discount those erosion rates to the west because of existing sea walls describing the accretion rates. He doesn't disagree with Mr. Lemmo that there will be erosion and hasn't jeopardized the house, but will. He does disagree with the effect of this pipe. The sea engineer report was prepared for the City 30 years ago for the drainage pipes and this pipe still works abandoning the other 2 pipes. Sea engineering describes how there are gaps in the 6 to 8 foot lengths of the pipe that sand enters at the bottom of the pipe and flushes out beyond the reef with every storm event and this is removing sand from the beach. Mr. Lemmo doesn't agree that is occurring, but the e-mails he submitted between the City, the State and our contractor in 2010 indicated no one thought so. The City employee, Taylor Sugihara said that he thought sand was entering the pipe closer to the beach and not further out in the tile flats.

Mr. Kugle distributed some photos of James Correa standing on the pipe about 5-10 feet from shore with a 4 foot measuring stick inserted into the crack of the pipe which goes down 3 feet. They walked the pipe and measured from 1 foot of sand closer to shore to 2 feet of sand at the other end which the pipe is half filled at that end. Calculations show several hundred cubic yards of sand in that pipe at any given time. It's unusual a private owner has to call the City and State out to find a resolution that this pipe continues to move sand off shore in an unnatural manner and they want to get this pipe repaired. The City never got any permits from the State to run this pipe across State land. He wasn't sure how they could do that relating how people built seawalls on the State property. They as a private property wasn't successful in forcing the City or the

State into a lawsuit to address the effect if this pipe and repair it. In the long run, the solution would be a beach nourishment project, but it doesn't make sense to put sand on the beach if it is being pumped out of this pipe. His client is willing to contribute financially to a sand nourishment project, but there is no way only one individual could do it referring to the Waikiki Beach nourishment project. Their neighbor Mr. Kawamoto is not willing to participate in anything. The other neighbor's structure is working on his beach and their structure is bearing the brunt of the erosion for that property. That owner wasn't willing to contribute. They continue looking at solutions and short of armoring their property like every other one down Kahala Avenue putting sand on for the long term is an expensive proposition. Mr. Fletcher's report might serve a few houses for a few months or a few years. They are in this catch 22 that whether it's the effect of the neighbors armor their shoreline and as the staff's report suggest is the cause of this or it's the pipe or a combination. They have one property owner bearing the brunt of this erosion and the beach and access is a public benefit. They are willing to put sand out there and contribute to it and part of the SPA was to put these coconut husk bags down and covering with sand which didn't remain referring to the pictures. Many were taken on July 3, 2012. Mr. Kugle is a surfer and the best day on the South shore was July 4, 2012 with a huge south swell. There are pictures showing no sand on either side of the property – that's unusual.

Mr. Kugle said on minor repairs to the structure – they experience incidents of vandalism where someone cut the blanket, snapped off pieces of the fence, cut hedges and vegetation above the private property. Obviously, someone is not happy about the situation, but it has been a challenge to deal with those issues so there have been acts of vandalism. He doesn't understand why the Land Board doesn't have the power to determine whether the City has this pipe in place and whether it should be maintained and what it's effect on the erosion is that he has seen the Department when dealing with private individuals. As demonstrated by these pictures and the sea engineer report this pipe does remove sand from the beach depositing it in the ocean. They have been unable to bring the City and the State to the table encouraging a solution. Everybody says it's not my problem, but it's our problem. They don't have the power for the City to explain why they aren't maintaining their pipe. Mr. Kugle suggested deferring this directing the Department to bring the City to the table saying you bring this pipe on State land and have no permits for it, you haven't maintained it with a 30 year history, but chose to operate it. We need to fix the pipe first before dumping sand on that beach. If the Board is unwilling to defer this and wants to do the action we do need a contested case hearing. Not the least of which we have some complex engineering and coastal geology issues for expert testimonies and they have to figure out what role this pipe plays if any and then it's a matter of due process before it would affect our real property interests and financial interests. As to the fines, the staff recommends \$15,000 as though they built a permanent concrete structure or seawall, that's not the case. The guidelines attached to the staff report suggest for a SPA type case or violation the appropriate fine would be \$1,000 or \$2,000 range. Not that he is suggesting fining them. He doesn't believe you can and doesn't want you to, but if and when they go to a contested case hearing the hearings officer will determine that.

Member Morgan asked whether all the seawalls were to the west and Mr. Kugle confirmed that, but not the immediate Kawamoto property and nothing on the east. They are at the apex. Member Morgan asked whether the lateral movement of the sand was east to west. Mr. Kugle

said they haven't done a sea engineering study, but the one in 1981 found the occurrence in front of this drain is east to west.

Member Pacheco asked when his client received the permit to do the temporary shoring up what were their expectations that constituted temporary. The Fletcher report says a year. The photos show different age of bags put down, some much younger and have been maintaining this. Mr. Kugle said their understanding of temporary was until they could find a longer term solution to the erosion that was occurring at that part of the beach in particular. The SPA itself does not have a time limit. His definition of temporary is defined by its opposite which is permanent. Looking at this beach and others he could find what a permanent protective structure looks like. It's made of rock and concrete and it's big and it doesn't move. All the stake holders were looking for a longer term solution. They have retained experts and studying the effect of this pipe and we attempted to make repairs to the pipe itself. Mr. Correa placed coverings over some of the holes which are documented in a series of e-mails between the City and the State and his client. Member Pacheco asked who Mr. Correa was. Mr. Kugle said he was the contractor responsible for installing the blankets.

Member Pacheco asked about the photo showing the Kawamoto property which Mr. Kugle confirmed it is to the west that the hollow tile wall is the boundary between the two properties. After Member Pacheco's questions Mr. Kugle said he believes it's their wall, but wasn't sure. The pipes were from the Kawamoto home which was bulldozed.

Member Morgan asked whether he thinks OCCL with their proposal expecting once it is gone it will stabilize. Maybe some of the coconut trees fall into the ocean. Mr. Kugle said he doesn't believe it will stabilize over the long term it will continue. It was ironic that his client didn't build their home close to the ocean and there are 2 other homes to the east built closer to the ocean and he suspects that if the Board orders our property to be exposed...right now there is a nice beach there with their structure protecting, but that will go and that house and the next will have a steady march of seawalls going down there. They would love to find an alternative solution reiterating his beach nourishment suggestion. They were approved to put 50 yards of sand, but that's gone and they could put more, but it is a public beach. Maybe the public may participate or other private owners. This pipe benefits much of the community of Kahala and they should contribute.

Randy Vitousek testified that his grandparents purchased 4623 Kahala Avenue in 1927 and sold it in 1999 and spent most of his life there. The currents run west to east over the pipe and the water depth is significantly lower on the west side of the pipe than the east side. There is a big channel where the pipe reaches the reef. The water flow is always west to east and against the tradewinds coming from the other direction. It was always his impression that the sand piles up against the pipe, goes over the pipe east, but doesn't come back. Also, as he saw Kahala Beach disappear from Black Point toward the Hawaii Kai direction that has always been an influence. He walked out on that pipe in big waves all the time, but he never saw sand going out the end of the pipe. He thinks it (the pipe) is an impact, but not that impact.

Member Pacheco asked whether he doesn't think sand is migrating sand through the pipe. Mr. Vitousek said he does not and thinks the pipe is blocking the movement of sand in a lateral

movement. It was his understanding there are rocky headlands on either side that there is a circulation of sand that is involved there and he believes the circulation is interfered with in part by the pipe and in part by the hardening at the Black Point side.

Member Goode asked whether he knew when the pipe was installed. Mr. Vitousek said it was there from when he was born maybe 1955 or 1956, definitely before 1964. Also, there is a staggering amount of erosion in that area and it's accelerating.

Member Morgan asked he understands staff has a difficult time protecting shoreline, protecting access and everything and it doesn't look pretty, but if it's removed you talked about how there will be some erosion. Just out of curiosity whose responsibility if trees fall in the water? And how far back is the house? Mr. Lemmo said it's their responsibility to clean it up and about 70 feet. Member Morgan asked that what he is proposing is to get rid of everything, there will be erosion, and your hypothesis is it will stabilize. Mr. Lemmo said it will equal out. There will be an immediate erosion response because that portion of the beach is starved of sand. Normally when a shoreline erodes it feeds on the upland sand, but because of the structure it's not starved of sand, it needs sand. There will be an adjustment and then it will equilibrate and even out with the other shorelines. Member Morgan asked how that relates to the constant erosion that Mr. Vitousek described. Mr. Lemmo said you can't escape the fact that shoreline is undergoing long term chronic erosion and there are a lot of reasons for that. He'd rather have a coastal geologist explain the process behind that and for the most part due to the extensive armoring along Kahala Beach which is starving the beach of sand. Member Morgan asked if the hypothesis is incorrect and the erosion keeps going, then what. Mr. Lemmo said if it threatens the house they could come in and request an emergency authorization under our rules to protect the house. Member Morgan asked there seems to be some measure of stability and all these actions created instability, but the hau trees and naupaka has been there for years and years and this action and all this created a dynamic situation when it was somewhat static before. My concern would be if we do this with impacts to this property will there be impacts to other properties? Mr. Lemmo said that removal of this structure will benefit adjacent properties. We wished we had never issued this permit to these guys. Everybody else cut their vegetation back and didn't ask for anything else. The neighbor came in for a permit to install all that material, but has deteriorated. It was only intended to give some protection and was never about this becoming a permanent fixture. It is an active storm drain with water and you can see the fresh water coming out of the joints. Staff dove on it and there are big railroad cars out there. There is sand in it with an accumulation of sand over a long period of time. It is not as characterized with sand going in there with a flushing action. That is not the case. He understands Mr. Vitousek's comment with the sand being blocked, but you would see the signature in the aerials and you don't see that. It appears from the science that the storm drain is not a significant element in the erosion of the beach.

Member Pacheco asked is that what we have to look forward to if we take that out or what...Mr. Lemmo said that the reason it looks like that is because of this structure. In coastal engineering there is a thing called flanking, it's a science, there's a formula for it. If you harden the shoreline there is a formula that dictates that you will have flanking of the erosion on the immediate down drift side (on the lee side). This is like a study that supports that theory. This Kawamoto property is experiencing severe flanking because of the structure and he is surprised that they

wouldn't say anything to you, they are neighbors. There are civil cases regarding this issue. If you took the bags out the situation would be alleviated to a certain extent.

Member Morgan asked after the Kawamoto property that area is not going to erode and there will be a certain stabilization to that point. Mr. Lemmo explained there is a public access right after Kawamoto, then the next property is hardened and despite the armoring down 3 or 4 properties there is still a nice recreational beach and a lot of people like to go there. The structure is creating an impediment to people walking laterally along the shoreline. But, the erosion signature you see on the aerial is basically consistent with the seawall problem. Seawalls are built on the west side and you see flanking in the high erosion data referring to 4-B. High erosion rates just to the east of the seawall. Mr. Vitousek is correct that the current is to the east. The tradewinds are blowing and the currents are cranking to the east. There's just no more sand out there.

Member Goode asked it seems to him that Mr. Kugle's concerns were of the land owner that if they remove all of those, erosion, there is no guarantee that the house over time would be at risk and the Board would have to adopt a permit to have permanent armoring further in land would that be a Board action. Mr. Lemmo said if it were locating it within our conservation area it would be a Board permit. Alternative they could seek an SMA permit from the City. The house would not be threatened. Member Goode asked whether they moved forward in submitting anything since this has been put in place. Mr. Lemmo said no, nothing. Member Goode asked has it been 3 years and Mr. Lemmo acknowledge they are coming up to 3 years.

Member Morgan said he is unconvinced that the pipe has anything to do with this situation. It's an eyesore and something that affects lateral access. He is usually sympathetic to the property owner and he still is because they didn't invite this and things changed, but it doesn't look like something that we can tolerate continuing as is. Besides the hypothesis that fixing the storm drain will somehow solve the situation and something has to be done and he is not comfortable assessing \$15,000 per day. Mr. Lemmo said the \$15,000 is only if they don't remove it. They are not proposing to fine them. They are asking them to take it away.

Member Goode asked if they fine happens after 30 days and Mr. Lemmo confirmed that. Member Goode said he tends to agree with Member Morgan that this is coastal property and as all owners on the coast should know there is a tendency for erosion. He could support staff's recommendation, but would like to give more than 30 days so the operation is done as well as can be done because the property looks terrible. He offered 60 days.

Member Edlao said they haven't done anything in 3 years. What is another 30 days going to do?

Member Morgan said it seems to him that the property owner is trying to comply with everything and that he doesn't think there is anything bad to this point that they came into this situation that they didn't anticipate or want, but they didn't invite any of this. The status quo is unacceptable because we have resources to protect and he is suggesting in 60 days.

Member Pacheco said that we are not going to solve this retractable problem of this whole area and to keep temporary structures will cause other problems and he could support removal in 45 days. Member Goode said the reason for 60 is because of the permitting on the City side.

Member Pacheco asked these other cases next door are generally meant to dissolve or get covered over, is that right. They are generally not removed right? Mr. Lemmo said staff discovered these things in India, Sri Lanka and they called to them and these things are supposed to degrade after a year or two, but in this case they are repairing it as though it is a permanent fixture. All the cases they have issued permits for emergency shore protection staff is reassessing at this time to see if they are in compliance.

Member Edlao said he can't go along with the 60 days. To get a special permit and somebody else to remove these things and they do know this was supposed to be a temporary thing that has been going on for 3 years and repairing it knowing that they shouldn't have been doing that. He made a motion to accept staff's recommendation as is. Member Goode seconded it.

Member Morgan asked whether removal can be done in 30 days. Mr. Kugle said he didn't know about permitting with DOH or Army Corp of Engineers for any work to be done that touches the water that he couldn't say. They could proceed with Mr. Lemmo's order that it be removed and let the State assume liability for...they will be stuck in a catch 22 not knowing what the permitting requirements are. Physically, there are sandbags at the top and bottom and it's this blanket and...it could be done. Member Pacheco asked all these that are partially buried would have to be dug up.

There was some discussion between Board member Pacheco and Mr. Lemmo whether this was non-native sand and its native sand and discussed how to remove the old revetment. Member Morgan asked about the hollow tile wall and Mr. Lemmo said they will have to cut it back that people have been removing things for years as the erosion line recedes.

Chair Aila took the vote and only Member Edlao voted in favor.

Member Pacheco made a motion to approve staff's recommendation and remove within 60 days. Member Morgan seconded it. All voted in favor.

Chair Aila reminded counsel to follow-up in writing for the contested case hearing.

Unanimously approved as submitted [~~(Con, Pacheco)~~ (Pacheco, Morgan)

Item K-3 Conservation District Use Application (CDUA) MA-3624 Regarding the Proposed Waiakeakua Communications Facility, by the Maui Police Department, located at Mt. Lanaihale, Pu'u Kole, Island of Lana'i, Tax Map Key: (2) 4-9-002:001 (por.)

Mr. Lemmo reported that Maui Police has some facilities at the one Lanaihale telecom site. Maui Police wants to expand their voice and data services and propose to build a new tower about 350 feet from the existing site. He described the physical attributes of this new tower that it will be 150 high with an equipment building. The Fish and Wildlife Service (USFWS)

commented that they would like the applicant do a night time radar survey for birds, the Hawaiian petrel and that this tower could be in their flight path. After talking to DOFAW (Division of Forestry & Wildlife), Mr. Lemmo suggested adding a condition “that the permittee shall do a night time radar survey conducted by a qualified biologist to determine impacts to the Hawaiian petrel. Upon completion of the survey the permittee shall consult with Fish and Wildlife Service and DOFAW to ensure compliance with Chapter 195D, HRS” and he would like to add that condition. DHHL (Department of Hawaiian Home Lands) had concerns which were adequately addressed in the final environmental assessment (EA). Staff processed an EA which was published on August 8, 2012. There were some mitigation efforts which facilitate supporting this project like co-location – building this tower where there are other towers, surveying for endangered plants, animals, archaeological and cultural assessment and there were no issues. It meets the Coastal Zone Management Act. The 90 foot Cook pines will be preserved and act to screen the tower. The orientation is such that it will not be visible from Manele Harbor or from Lanai City. Mr. Lemmo noted that when they did their report they could have added more regarding Hawaiian rights and could have looked at the Kapa’akai situation. Staff had summarized the EA on cultural impacts which he thinks satisfactorily addresses Native Hawaiian rights and asked the Board to append it to the report as part of the record to show that if the Board chooses to take affirmative action that you are also making some findings with respect to Native Hawaiian rights.

Michael Muekiyo introduced himself and Captain Jeff Amaral from Maui Police Department and testified that the Department has started the avian survey and the first phase was completed this past summer. He explained that they met with the USFWS and agreed on a methodology of the avian survey and they have another count coming up in October and once the two phases of night time surveys are completed the modeling will be done on the petrels and any mitigation which they will coordinate with the USFWS.

Mr. Lemmo said that he wanted to add the new condition regarding the radar monitoring, the findings and noted that conditions #6 and #10 are the same and #12 and #18 are the same. Remove the duplications and renumber the list of conditions.

Member Edlao made a motion to move as amended by staff. Member Morgan seconded that. All voted in favor.

The Board:

Amended staff’s submittal by adding the following: “That the permittee shall do a night time radar survey conducted by a qualified biologist to determine impacts to the Hawaiian petrel. Upon completion of the survey the permittee shall consult with Fish and Wildlife Service and DOFAW to ensure compliance with Chapter 195D, HRS.” Also add “The Board made findings with regards to Native Hawaiian rights.” And remove conditions #10 and #18 and renumber the list of conditions.

Unanimously approved as amended (Edlao, Morgan)

12:27 PM RECESSED – Lunch and Oral Arguments separate from the BLNR meeting.

2:17 PM RECONVENED

Item K-5 Action to Deny Henry Chang Wo's and Michael Kumukauoha Lee's Requests for a Contested Case and Reconsider the Board's Decision to Grant a Conservation District Use Permit (OA-3604), or Grant a Discretionary Hearing and Authorize the Chairperson to Select and Appoint a Hearing Officer for the Kalo'i Gulch Drainage Improvements, by Haseko (Ewa) Inc., Located at Oneula Beach Park, Honouliuli, Ewa, Oahu, Makai of Tax Map Keys: (1) 9-1-011:007 & (1) 9-1-134:006

Mr. Lemmo reminded the Board that item K-5 involves the Kalo'i Gulch drainage improvements proposed by Haseko that the Land Board approved the permit in March 2012 and staff received two petitions for contested case hearing since then. The petitioners are Michael Kumukauoha Lee and Henry Chang Wo who is represented by Native Hawaiian Legal Corp. You have staff's recommendation on how to proceed on this matter, but he wants to amend the staff report and recommendations distributing his list of amendments. This is whether or not the Board is going to grant a contested case on the Kalo'i Gulch drainage improvements CDUP.

Mr. Lemmo said the first option A is to reconsider the decision to grant the CDUP. The purpose is to further review and analysis of the valued cultural, historical or natural resources in the petition area, the extent those resources are impacted by this project, and any feasible action, if any, to be taken to reasonably protect those rights. While this is pending, the Board should defer making a decision on both petitions.

1. OCCL staff will gather the necessary information to investigate Native Hawaiian rights to the extent this project incorporates protection for those rights or
2. They would hold a discretionary hearing to facilitate the gathering of this information. The hearings officer would produce a report and staff would ask the Board to reconsider the CDUP in light of the new information.

Option B is to not to reconsider the CDUP. The Board's decision stands and the Board would have to decide on one of the following:

3. Grant the contested case petitions of either Chang Wo or Lee or both.
4. Deny the contested case petitions of either Chang Wo or Lee or both.

Staff is recommending that you follow option A. Defer making a decision on the contested case hearing requests. Hold a discretionary hearing gather more information on Hawaiian rights and (a) find that Mr. Chang Wo and Mr. Lee may be parties to the discretionary hearing; (b) limit the discretionary hearing to identifying valued cultural, historical, or natural resources, including traditional and customary rights in the area covered by the CDUP, and the extent to which such rights may be affected by the CDUP and what feasible action will be taken to protect such rights; (c) authorize the appointment of a hearing officer to conduct the discretionary hearing limited to the issues described above and report back to the Board for a final decision; and (d) delegate authority for selection of the hearing officer to the Chairperson. Mr. Lemmo said if the Board decides to hold a discretionary hearing, you don't need Mr. Lee's filing fee because it doesn't fall under the same provision as contested cases which are required. However, if the Board decides to give Mr. Lee a contested case he needs to pay the filing fee and as such he submitted a letter asking for a waiver from the filing fee.

It was asked by Member Goode with this discretionary hearing process what is the status for a contested case. Mr. Lemmo said it's stayed or deferred until a later date.

Member Pacheco asked then only Mr. Chang Wo and Mr. Lee would be the only parties in discretionary hearings. Mr. Lemmo said he believes so.

Michael Kumukauoha Lee testified that he is a Native Hawaiian cultural practitioner and recognized by SHPD as a cultural descendent to the iwi (bones) discovered in Honouliuli found on State land by the Ewa Marina entrance channel in April 14, 2010. The City & County recognized Mr. Lee for his cultural practice with a certificate at Kalo'i Gulch using seaweed. He was recognized by Judge Kifu, First Circuit Court in 2006 with the Papipi Road case. Where the Judge asked what are the cumulative impacts of heavy metals to his cultural practice which is 700 feet from this project. She ruled for this specific area that unless a long term study of cumulative heavy metal runoff from the roads and from non-source point pollution if you are not going to do a long term study to show what these effects are and show Mr. Lee's cultural practice as a lapa'au of the sea then you must have a retention dam. If you lower the berm they don't have to have a retention dam and they could use that property for more building projects. He was originally given standing for that contested case. Dr. Maiki was the hearings officer and he should have standing here.

Chair Aila asked what his position is regarding the discretionary hearing and Mr. Lee said it's brilliant and is all for that. If they can come up with an amicable arrangement, that is wonderful. It could save the State a lot of money and is all for it.

David Frankel representing Henry Chang Wo testified that he is perplexed by this discretionary hearing proposal which is a citation to the rule. There are standard lists, it is a proceeding not knowing whether you are familiar with, but he has never encountered it. He has heard great things about it per the AG's perspective. There is no need for appeal; it's a standardless process so it's unreviewable. The thing is the Hawaii Supreme Court came out with a decision a few months ago in the Alaka'i decision in which said agencies cannot prevent their decisions from being reviewed. The effect of the discretionary hearing process is really what we call is a denoble hearing – we will litigate in court before a judge and put our case there. The question is do you want our case cited by you or want to punt to the court. If you bring in this discretionary hearing process and have a contested case hearing you'll just have a regular dinner with them which costs more money and more time for everyone and completely remove decision making authority from you and any deference the court would give you will no longer exist because of a denoble hearing. It seems like an easy solution, but it doesn't work. He wanted to address the AG that it sets back 30 years referring to the denial of Ted Blake's case earlier today and assumed it has to do with the SHARMA case dealing with land as the manager. They disagree with the AG's interpretation of that case and of the tour operators, but SHARMA doesn't apply here when dealing with a CDUA. What the AG is telling you is when traditional customary practices are involved or environmental interests are involved there are no rights to a contested case hearing. The only logical consequence of the AG's analysis provided to you is the only entities that have a right to a contested case hearing are land owners when we are talking about CDUPs. That is so wrong and is inconsistent with what you have done in the past.

Mr. Frankel cited the Honoli'i case at Hilo that under the AG's analysis today surfers would not be allowed to have a contested case hearing. He cited Wa'ahila Ridge regarding power lines at Manoa and a contested case would be denied, too. Ever since the Lingle administration this Board has carried on denying contested case hearings when the law clearly requires it. He also cited Kaleikini case and removal of bones where the AG wrongly advised the Board to deny a contested case hearing. You got bad advice in the Haena case denying Randy Vitousek a contested case hearing and you lost. Now in the Na Wai Eha case you argued there wasn't supposed to be a contested case hearing and you are wrong. In this case, we have multiple practitioners clearly engaging in traditional customary practices. This Board has conducted 2 contested case hearings already regarding polluted storm water discharges in this very area. One went to the Circuit Court that overturned your decision and did not allow polluted storm water to be discharged in Papipi. After the second contested case hearing your hearings officer was reprimanded against granting the permit. One of the reasons you want a contested case hearing is to hear evidence from experts citing a peer review article on harmful algae involving the study of limu (seaweed) in this specific area and the study found that the further away you moved from the storm water outlet the more native species there were, more diversity, greater abundance and less nitrogen in limu showing that when you have polluted storm water coming out it fuels the growth of invasive limu that choke out the native species. Your staff has not read it and you need this kind of information before making a decision. Our client exercise traditional customary practices, he lives at Ewa Beach. Under the Pele Defense Fund versus Puna Geothermal case because the applicant would be able to obtain rights and because traditional customary practices and constitutional protected interest of our client is implicated you have to give a contested case hearing.

Member Pacheco said his perception of the discretionary hearing is like a contested case hearing and the decision would come back to us giving us better information. Do you have information that says differently? Mr. Frankel said this is what your rules say "the Board shall follow procedures that in its opinion best serves the purposes of the proceedings." What is the process? Is it whatever you determine? And the recommendation doesn't say it will be conducted like a contested case hearing, it doesn't say cross-examination of witnesses, it doesn't say a bar of exparte communication, it doesn't say there will be findings of fact, that testimonies will be taken under oath and there are rules which aren't very thick that govern contested case proceedings are conducted. Those rules don't apply here unless you specifically order them in a contested case.

Member Morgan pointed out your interpretation was that it goes before a judge and there was no alternative process. Mr. Frankel said if you don't give us a contested case hearing then we will do directly to the judge. Member Morgan said he thought those comments were applied to the discretionary hearing process. Mr. Frankel said he is not interrupting the discretionary hearing process as being a contested case hearing and because there is no right for them to appeal then they will go directly to the court to get some action.

Member Goode said that is why he was asking what happens in a contested case hearing. Mr. Lemmo said it's held in advance so you go through the discretionary and the contested case hearing is still out there and is a possibility. It's a pre-hearing that confines the issue on something we want more information on. Mr. Frankel said that is fair and then you have the

contested case hearing, but the only issue you face is we would have to do the same thing twice. Because you have issues of traditional customary practices and that's easy. We've already submitted our declaration and it won't take much time. What are the impacts of those practices? The evidence for that is largely the same. What are the impacts of the CDUP? We have the discretionary hearing first and then we have a contested case hearing and we'll be doing the same thing twice which you could do, but it's your waste of time and money. That is the practical result.

Yvonne Izu representing Haseko testified that she thinks at the end they more clarification of what was happening that if they go through this discretionary hearing on just the Kapa'akai issues and after that the petitioners will have an opportunity to either ask for or renew their request for a contested case. She clarified that there are 4 other applicants – Haseko, City & County of Honolulu, DHHL and University of Hawaii (UH). The UH attorneys are here, but she is not speaking for them, but she can say she is speaking for the other applicants. We as applicants are prepared to go forward either way. She understands that the Board might want more information and clarification on the Kapa'akai issue, but she tends to agree with Mr. Frankel that they might be duplicating some effort here and Mr. Frankel is going to ask for a contested case anyway that they will have to cover that in the contested case.

Member Pacheco asked what would be the best case scenario. How would it be potentially better off? Ms. Izu said she thinks for Mr. Frankel to go through the Kapa'akai analysis and have you reverse your decision. Maybe you should ask Mr. Lemmo.

Lisa Bail representing UH testified that the University takes no position on staff's recommendation to the extent they understand it. However, like the other party they would like some additional clarification on the discretionary hearing procedures and what those would be involved and they foresee there could be duplication of efforts essentially holding 2 hearings. She wanted to ask for clarification and understood the hearing today was whether to grant a contested case and when Mr. Lemmo spoke he referenced a standing decision being made today. If that is to be done she would like to submit briefs on that issue although it would be premature to decide standing before actually deciding there is a contested case in the first place.

Member Morgan asked granting that a contested case standing is relevant to that...Mr. Lemmo said he didn't know why you would grant a contested case if you didn't have any parties. That is what was on the table. Member Morgan said learning about the whole discretionary process it sounds like a time delay and duplication process. Member Edlao agreed with Member Goode about the duplication and at the end we will have a contested case anyway, but personally he is confused. Mr. Lemmo said to think about the position our attorneys of our Department take on that and what we are trying to do is say these people are Native Hawaiian practitioners and they have Native Hawaiian rights. Let's talk about Kapa'akai in the context of how this project affects them and fix any grievances that they have. That is why they are limiting this discretionary hearing to those issues and hopefully their concerns have been addressed and satisfied and then staff could come back to the Board with the sustained original permit. He supposed if you believe that they have a right to a contested case hearing then this would all be unnecessary. Staff is trying to work within the limits of our experience on this matter.

Member Morgan asked what the time period he anticipates for a discretionary hearing process. Mr. Lemmo said a minimum of 6 months.

Member Pacheco said he assumed a discretionary hearing would be similar to a contested case hearing, but rather a full blown examination of the whole CDUP it would be to the topics mentioned here. Was that your understanding of a discretionary hearing? Chair Aila said it's to flush out under the context of the Kapa'akai analysis and that is the reason for revisiting our decision. Mr. Lemmo said if you think the courts are going to laugh at you and say do a contested case hearing then fine. We're just doing our job. We are trying to stay within the confines of what were hired to do. We're not going to necessarily agree there is a right and we're giving you an alternate path. It may ultimately be fruitless and a waste of time, but that is why we laid it out in this manner as options because it is confusing. As long as you know what you are doing when you do it, we're ok with it.

Chair Aila asked that Member Goode's concern was without adequate direction to the Board in terms of rules for discretionary hearing would you have any adverse reaction to stay within the rules that govern how we do a contested case hearing to control this discretionary hearing. This is more narrowly focused on trying to do a Kapa'akai analysis, but at the same time have some rules that everybody feels comfortable with would be important. Mr. Lemmo said they talked about doing that at OCCL, but he didn't like the idea. He assumed that they would follow the guidelines or practices for running contested cases and he doesn't have any problem with that.

Member Morgan asked whether standing would be part of the discretionary hearing. Mr. Lemmo said no.

Member Pacheco said we could deny standing and no contested case then see you in court. It's either we see you back in a contested case or not. Or we could try to do this discretionary hearing and come to some reasonable accommodations and get information on it and move forward from there. If not we're back to contested case hearing anyway. Why not try this process instead of punting it to court. Mr. Lemmo said you guys have to ask yourselves at this time if you think you are going to grant them a contested case hearing then we should think about that.

Mr. Lee said he said everyone has been talking about it and he is being left out. His concern is this that they need land to make their wishes come true with space and this is what this is all about. Have them go deep if you don't want them to go wide, but in terms of the engineering a wide retention dam takes a lot of their land space. They want to build more buildings and classrooms and building wide dams is eating up all that building space. He is not against that; he is all for protecting his cultural practice. If you allow their engineers to dig deep then we won't have to take down the sand berm, they get the lands and we are protected. It is giving them what they want and protecting it at the same time. Have the engineers do it in a smaller footprint. The Chair said that is not before them today, but they would work something out outside of this venue. The question before us is staff's recommendation is whether to do a discretionary hearing to focus on or do the analysis on Kapa'akai in hopes that we may revisit the decision that we made at the last Land Board meeting. We can always address the question of whether or not to

grant or deny a contested case hearing so everything is clear on that at a later date because this would stay that process.

Member Goode said that Member Pacheco was asking the timing one way or the other whether we are ready to go against the recommendation, pardon the AG, because at this point he is in favor of a discretionary hearing. It doesn't bar discussions about mitigation would be better. Mr. Lemmo said you never know what will happen.

Member Edlao said it is different. Human nature is afraid of the unknown, but he can live with this discretionary hearing. If it is something that works well it's all good, but he could support that motion.

Member Pacheco asked say we decide to defer making a decision on standing, hold the discretionary hearing, does that preclude Mr. Frankel from taking this contested case matter to court or is it still in limbo and it's a matter of court. Mr. Frankel said when you approved the permit back in March, they filed 2 cases against you, and entered into a stipulation which had stayed those 2 proceedings until you either reach a decision at the end of the contested case hearing or deny Uncle Henry standing. Even though from a positive perspective it is not a good idea for you guys to hold a discretionary hearing. We would not go directly to court, can't do it. We are not going to do that. It will take longer and it's a duplication of effort. We'll go to court when it's done.

Member Pacheco asked we are here making a decision on the discretionary hearing and basically giving them standing in the discretionary hearing while not ready to give them standing in a contested case hearing what is the difference there. Member Goode said to get more information. Chair Aila said it's to reconsider our decision based upon new evidence based on the analysis of Kapa'akai. After the analysis we can determine whether we made the right or wrong decision then everything will flow from there. Member Pacheco said it would be better to have the staff do the analysis if that is recommended instead of doing the discretionary hearing. If we are using the discretionary hearing to solve the issue of standing then...Ms. Chow clarified the discretionary hearing is not suggested to clarify standing, but is a fact finding tool and is to gather information for the Board. Member Pacheco said to make a distinction about standing. Ms. Chow said no, to make findings regarding the Kapa'akai matter. The standing issue is a whole separate issue. Chair Aila said the decision on standing would be put aside before this first. Ms. Chow agreed.

Member Morgan said he doesn't think a discretionary hearing is a good idea then because it isn't addressing the right issues. Chair Aila said it is to decide whether or not to affirm our original decision and then decide whether or not to grant a contested case.

Member Morgan said it sounds like the quickest way to get to the decision making process is to approve staff's recommendation "A" then they would go to court immediately, originally.

Member Pacheco said he wasn't going to go with the original CDUP. If there wasn't a problem with that they wouldn't be here right now having this discussion or we would be having a

discussion on standing and we are not having that. Obviously, there is a problem with that decision. We need to work through the process to reconsider that decision.

Board member Pacheco made a motion for the Board to go into Executive Session pursuant to Section 92-5(a)(4), HRS to consult with our attorney on questions and issues pertaining to the Board's powers, duties, privileges, immunities and liabilities. Member Morgan seconded it. All voted in favor.

3:02 PM EXECUTIVE SESSION

3:15 PM RECONVENED

Member Morgan said this is a very complicated matter and considering the circumstances of this case he moved to accept the request(s) of contested case hearing by both Mr. Wo and Mr. Lee and delegate to the Office of the Attorney General. Member Pacheco seconded that.

Member Goode questioned the waiver of the fee of \$100.00. Member Morgan said it's hard to waive the fee. He moved not to approve the request to waive the fee. Member Pacheco asked whether to amend the waiver of the fee. Ms. Chow said that it was whether or not they would grant the petition for a contested case hearing. Member Pacheco seconded that. All voted in favor.

The Board:

Approved Mr. Wo's and Mr. Lee's request(s) for a contested case hearing and delegate to the Office of the Attorney General.

Unanimously approved to grant the contested case hearing(s). (Morgan, Pacheco)

Item K-2 Conservation District Use Violation File KA-13-08 for an Alleged Violation of the Permit Conditions of Conservation District Use Permit (CDUP) KA-1706, by Gary D. Stice, at Haena, Island of Kauai, Tax Map Key: (4) 5-2-002:022

Written testimony from Gary and Apolonia Stice were distributed to the Board.

Mr. Lemmo asked to do items K-2 and K-4 together since they are similar. He related that this is an enforcement case requesting to fine Gary Stice regarding an illegal vacation rental and he related some background history on item K-2. Our rules have a stated prohibition on transient rentals. There was a request for a deviation by the landowners which was rejected. A request for a contested case hearing was denied, appealed, the Board afforded the landowners a contested case, but the landowners withdrew their request before the contested case hearing was held. Staff believes the landowner continue to use the property as a vacation rental referring to a website and asked to fine them \$15,000 because he is willingly renting the property for a vacation rental after he was told he shouldn't be doing that. If he continues to he will be subject to additional fines, he needs to submit a cessation of this activity within 60 days and he needs to

pay us the \$15,000 within 60 days. Their counsel is here and he asked for a contested case hearing if you decide to enforce the recommendation.

Member Edlao asked it's a \$15,000 fine and if during that period they do not cease what kind of fines are we talking about. Mr. Lemmo said he is not an attorney, but generally when you fine somebody and he asks for a contested case Mr. Lemmo was told they have to stay the daily fine until the cessation of the contested case hearing or a decision is made.

Member Pacheco said there is a letter here asking for postponement and their counsel is here.

Item K-4 Conservation District Use Violation File KA-13-10 for an Alleged Violation of the Permit Conditions of Conservation District Use Permit (CDUP) KA-3379, by David Kuraoka, at Haena, Island of Kauai, Tax Map Key: (4) 5-2-002:052

Mr. Lemmo reported that item K-4 is slightly different since this particular landowner wasn't part of that group in 2007. Mr. Kuraoka received a CDUP in 2006 to build his SFR (single family residence) with the expressed condition that he doesn't use it as a rental or commercial purposes which was vetted by us and mentioned by the Hanalei/Haena Community Association (HHCA) and was discussed in the staff report. His attorney at the time said his client would comply with all the conditions proposed and highlighted the willfulness of the activity finding Mr. Kuraoka using his residence as a vacation rental. Evidence is trip advisor, reviews and staff recommends the same penalty as they are for Mr. Stice.

Randy Vitousek confirmed that he is representing both permittees that they did put in for a request for contested case hearing because Mr. Lemmo uses the word "evidence" a bit loosely that all he has given you is a couple printouts from the internet and for you to consider that evidence you have to decide that everything printed from the internet is true. All he has given you shows that at best somebody advertised something and doesn't prove anybody did anything. You're purporting to fine somebody \$15,000 that you need some evidence that somebody violated it by renting something and you have absolutely none of that. Staff hasn't authenticated who downloaded this, where it came from, what it actually is. As someone told him if you believe something is on the internet is absolutely true then Elvis is alive and Obama was born in Kenya. You can't accept something that was printed from the internet as true without proof. If there is anything you do today on your request of a violation is to deny their request, but in the assumption this is going to go forward which he assumed it will we requested a contested case hearing and that is where you'll have the opportunity and the burden he might add to put on their proof. That is the request they have for you today. We are denying it is a violation and we're asking for a contested case hearing.

Member Pacheco asked that you are denying your client(s) are actually using the property for rental. Mr. Vitousek said he is denying it is a violation. He is not authorized to make admissions on behalf of his clients. If you ask me what my clients have or have not told me that is attorney/client privilege. Based on what the Department is investigating they are entitled to pursue an enforcement action, but they need to prove their case before they can get \$15,000 from them.

Mr. Lemmo said he understands where Mr. Vitousek is coming from. We have these 2 cases because it's not just the internet they researched, phone calls talking to people.

Deputy Attorney General Bill Wynhoff spoke saying he represented the partner in this matter when there was a contested case before and he would prefer to continue to act in that role. You do have your own Board here. He would say on behalf of staff the way that we do it is this is a Sunshine meeting, there is not a formal process for putting in sworn testimonies, and that is why we have a contested case. Our view is that staff has met what they put on to indicate the violation. He personally believes that they often have discussions on whether somebody is entitled to a contested case or not, but the wheel house situation where there was a contested case had a fine. What they request on behalf of staff that both of these submittals be approved and the fine entered, a contested case asked for orally at the meeting and that is the first step. He assumed Mr. Vitousek will follow up with a written request. Mr. Wynhoff certainly assumed at some point the answer would be yes. You can ask your own attorney here whether the agenda is sufficient to support granting a contested case today or would have to come back again that in his view would be the later and won't advise you on that, but that is his position with staff's submittal(s).

Member Pacheco asked Mr. Lemmo in the conditions of the recommendations you set out to prove the vacation rental to cease what kind of proof would you have for that. Mr. Lemmo explained that some of the people who were formally doing vacation rentals that were brought to you in 2007-2008, some of them subsequently came to staff requesting to build an addition to their house or make some changes, something that needed discretionary approval from us. We told them we're not real comfortable because we think your using your house as an illegal vacation rental. They volunteered to submit declarations to us saying that they are not using their homes as vacation rentals. Staff felt that was a strong offer and to submit some sort of written document to us attesting to the cessation of the vacation use and is on record. Member Edlao noted it is on record that they said they are not going to do it. When he first got on the Board this was going to give us problems with a clause to not use as vacation rentals without expressed permission of the Board. He always wanted to see that part taken out and he was told they are working toward something like that not knowing when that is going to happen. Mr. Lemmo said it's out. Member Pacheco confirmed that it is out. Mr. Lemmo said transient rentals are prohibited out right.

Mr. Vitousek said we are talking about a fine where the contested case hearing is where the person you are trying to fine gets their due process. It doesn't make sense to me that you are fine them in violation based on no evidence and without due process and then give them their due process. He didn't understand how that would work and he understood Mr. Wynhoff's position that you take the action before the contested case, but when there's a fine and there is no evidence to support it and clearly there is some due process that Mr. Lemmo can't say "I talked to some people." You need to have evidence and do that before you fine him in violation. Chair Aila said there is evidence that Mr. Lemmo presented before us and the question is at some point... Mr. Vitousek said that is just a piece of paper that doesn't say where it came from and who wrote it and can't be considered an admission because they can't even prove who wrote it. I think there is a foundation before it becomes any kind of evidence.

Chair Aila asked Deputy AG Linda Chow that there are some evidence presented to us right now. Is it enough that the Board can act? Ms. Chow acknowledged with a yes. The Chair asked it will be judged by a hearing officer at some point in the future. Ms. Chow said after the petition for contested case is filed.

Member Morgan asked whether they could still hold a contested case and fine them if there is evidence of illegal vacation rentals. Ms. Chow said they could always fine them if they are illegal under this permit that he should hold off on the fine until either the contested case is done or if he fails to file his written petition. Member Morgan asked it seems that the outcome would be the same and he is inclined to go ahead and run a contested case because presumably it will all come out at the end anyway. Ms. Chow said yes, but he still needs to do one more step which is to file the written petition. Mr. Lemmo said you have to give them some incentive to file a petition I think is what she is saying.

Member Pacheco said he can understand Mr. Vitousek's stance for his clients, but our burden of proof here is we are not a court of law. I'm comfortable moving forward on this and can't believe there are hackers out there who are putting this up on the internet to get somebody in trouble or to go through this expense. He is fine moving forward.

Member Goode said I am too and would prefer taking action. It seems outrageous and grievous to me what they are doing. He has enough information and if we got to have a contested case and get more facts. Quite frankly, he would be up to the maximum fine and if they lose covering our costs for a contested case. This is not right.

Member Pacheco made a motion to approve staff's recommendation on both items K-2 and K-4 as a point of discussion and to discuss the fine and was seconded by Member Edlao.

Member Pacheco asked we have an opportunity to stay the fine pending the impact...Member Morgan said that's automatic. Member Pacheco said he isn't talking about the day-to-day fine. Member Morgan asked won't the outcome be determined by the contested case. Mr. Lemmo said his advice is if you want to change the fine amount or add additional fines to not even mess with that at this point if you adopt the recommendation and he doesn't file a petition then this action kicks in within 30 days and he is fined on a per day basis. If he does file a contested case hearing the issue whether or not the fines are stayed or accumulate would be orally addressed by the hearing officer perhaps. Member Morgan said it depends on the outcome of the case. The Board members and Ms. Chow agreed and to do it for both items.

Member Morgan commented since it will come out in the wash anyway, whether we go with staff's recommendation or go with counsel's suggestion.

All voted in favor for both items.

Chair Aila said to Mr. Vitousek to submit in writing and he said he will.

Unanimously approved as submitted (Pacheco, Edlao)

Item D-16 Approval in Principle for Issuance of Direct Lease to Ka'ala Farm, Inc. for Educational, Cultural, Agricultural, and Workforce Development Program and Activities Purposes, Waianae, Oahu, Tax Map Key: (1) 8-5-006:004.

Mr. Tsuji said he had no changes to item D-16.

Eric Enos representing Ka'ala Farm said they were happy with staff's report.

Member Morgan commented that it was wonderful what they are doing and Member Pacheco agreed.

Unanimously approved as submitted (Morgan, Goode)

Item F-1 Request for Approval of Special Activity Permit 2013-3 for Ms. Eva Schemmel, University of Hawaii at Manoa, Zoology Department to Take Undersized Bonefish or O'io for a Study on Their Life History and Reproduction

Item F-2 Request for Approval of Special Activity Permit 2013-5 for Ms. Eva Schemmel, University of Hawaii at Manoa, Zoology Department to Take Undersized Convict Tang or Manini for a Study on Their Life History and Reproduction

Alton Miyasaka representing Division of Aquatic Resources (DAR) introduced Mary Donovan for items F-1 and F-2 and said there were no changes. These are common species of fish.

Member Goode asked whether this will spread to other areas of the take. Mary Donovan representing the applicant described the neighbor islands and on Oahu hard to collect in their habitat. Chair Aila suggested contacting Carl Jones to obtain them more easily.

Unanimously approved as submitted (Morgan, Pacheco)

Item F-3 Request for Approval of Special Activity Permit 2013-14 for Ms. Marjorie Awai, Disney Vacation Club Hawaii Management Company to Use Small Mesh Nets to Collect Marine Life for Stocking into a Saltwater Swimming Pool

Written testimonies from Karyn Herrmann, Rene Umberger, Maritza Madrigal, Cathy Goeggel, Claudia Tarry and Andrea Baer were distributed to the Board.

Mr. Miyasaka related item F-3 reminding the Board that they came to us last year for a permit to take fish and it was suggested they get their swimming pool started first and see how things go for a year before asking for regulated species which they did. He went to visit it last month and was impressed with the status of the swimming pool. The filtration system is state of the art and he had no concerns with them being able to keep these fish alive. The regulated species request is they are looking for specific species for algae control in the pool and for the aholehole that are

more up in the water column that are more visible, very silver and travel in schools and entertainment value is very high. Aholehole is a fairly common species. There is a long list of species and only 5 are regulated. Mr. Miyasaka listed all of the ones they asked for the sake of transparency so people know what they are taking, but they only need the permit for 5 species or so and all are covered under a minimum size. The reason why they are trying to take smaller size animals is the transition from wild to captive is easier when they are small and survive better.

Member Pacheco asked where they've done this before is the King's Pond at Hualalai and stocked it the same way. Mr. Miyasaka said usually the aquariums don't take regulated species. They will go and contract with a collector, but they will have staff go collect and collect non-regulated stuff. The regulated stuff things that the Waikiki Aquarium will take them because they need different species in their tanks for eco-system balance and they come in with a regulated take permit as well. The reason why you don't see those is the fact that in 2008 the Board delegated institutional permits to be approved by the Chair. These are on-going facilities that collect a few every year to maintain their exhibits. In this case, the Aulani just started up and are in the process of building the swimming pool and why there is a large number of animals and this year is the first which will be collected throughout the course of the year. A lot of the staff came from the Waikiki Aquarium and are very experienced collectors.

Member Pacheco referred to appendix 1 and asked are species that they don't need a permit to collect or are some of these. Mr. Miyasaka said about 5 of those are regulated and the rest are not.

Member Pacheco referred to written testimonies and someone mentioned the manta rays and asked if they are collecting that. Mr. Miyasaka said no, they won't be collecting that. After Ms. Chow pointed out and Mr. Miyasaka confirmed the spotted eagle ray for their education program.

Todd Apo, Public Affairs with Aulani introduced his staff and testified that the reason why they have these is to do the education and they have a strong animal care group that educates the guests about the fish before they get in the water and they have signage along the viewing windows about the fish as well and interaction with the rays as well. They have a strong education with their guests that when they do go into the ocean they can understand how delicate the reefs are and what that eco-system is. To be able to show them that in a controlled situation before they go out is helpful.

Member Pacheco asked whether ever person who goes into this pool gets an orientation or is guided and Mr. Apo confirmed that they go through an orientation before they get in the water.

Member Edlao asked whether there is a fee to do that. Mr. Apo said for the snorkel there is. Member Edlao said that is where he has a problem that you have to convince me what is in it for the State. We are giving you our resources and going to use it for education, fine, but you are going to be making money off of this. What's in it for the State? You are taking the resources away from the State and what do we get in return or can we get something in return? Mr. Apo said they are keeping it here in the State. Member Edlao said in your pond that they could go in

the ocean and see it for free. If I go to Disneyland's pond, I have to pay a fee to see them there. Mr. Apo said a portion of the revenues they make off of their Makai Preserve is dedicated back into our Disney conservation fund and those monies are dedicated to be used here in Hawaii and will not go into the global bucket those monies are coming back.

Member Edlao asked whether those monies they have to qualify for or what. Mr. Apo said they have had a number of partnerships with the University of Hawaii and grants have come out of the conservation fund, but he didn't have that information. One was specific to a turtle project and one to the facility at Sand Island that those efforts are being made to make sure there is a return to the community. Member Edlao asked so there is a process where the coral reef guys wanted some funds they would come to you guys. Mr. Apo confirmed that there is a global Disney application process for grants, but there is a specific set of money that is dedicated strictly to Hawaii to be used on the aquatic side as well as the cultural side and some of our art sales within our retail space.

Chair Aila asked whether he will have biological information on these fish and will he have cultural information on them at the same time. Mr. Apo said they have some for example they have the Hawaiian names on them, but there isn't any written depth storyline, but a lot of their cast especially the animal programs group tell some of those stories. Extending our reach a little bit is our Ama'ama Restaurant is themed around a Hawaiian fishing village and our cast are educated in telling those stories about the importance of fishing within the Hawaiian culture. Not to the point of talking about an individual fish in its cultural relevance and use, but with the overall story line. Chair Aila said he encouraged him to consider it making it part of the program because you are taking things that are culturally based specifically Hawaiian. Mr. Apo agreed that was one that they are staying to a Hawaiian storytelling and not a Polynesian one.

Member Pacheco said he thinks there is value for our visitors that the ignorance of the ocean, ocean behavior is one of our greatest resource management tasks and to think to have a facility that teaches people and makes them aware of its valuable resource. Mr. Apo said that a lot of their guests will not go out in the ocean and there is still this apprehension, but in a controlled location they could experience and be educated about this part of our marine life in a way that they would not otherwise feel.

Member Morgan said he totally supports this and that there all kinds of benefits to the State including the education.

Unanimously approved as submitted (Morgan, Edlao)

Item D-3 Approve the Withdrawal of Approximately 3 Acres from General Lease S-5320, Peter H. Jose and Richard A.J. Jose, Lessees; Authorize Amendment of General Lease No. S-5320, Peter H. Jose and Richard A.J. Jose, Lessees, to Reflect the Withdrawal, Decrease the Acreage of the Premises, Reduce the Rent, and Clarify that There is No Improved Legal Access to the Lease Premises from a Public Highway; Laupahoehoe, Hawaii, TMK: 3rd/ 3-6-6: portion of 46

Item D-4 Amend Prior Board Action of January 27, 2012, Item D-2, and Prior Board Action of April 25, 2008, Item D-9, Regarding Issuance of Direct Lease to United States of America, Department of Agriculture (USDA), for Research and Educational Purposes, Laupahoehoe, North Hilo, Hawaii, TMK: (3) 3-6-6: portion of 46. The Purpose of the Amendment is to Clarify that There is No Legal Access to the Proposed Lease Premises from a Public Highway, and to Include Requirements in the Proposed Lease that USDA Fence the West, North and East Sides of the Lease Premises and Reimburse Lessees under General Lease No. S-5320, Peter H. Jose and Richard A.J. Jose, \$1,560.00 for Their Costs Incurred in Clearing and Planting the Proposed Lease Premises in Grass.

Item D-5 Grant of Term, Non-Exclusive Easement to the United States of America, Department of Agriculture, for Access and Utility Purposes, Laupahoehoe, North Hilo, Hawaii, TMK: (3) 3-6-6: portion of 46.

Mr. Tsuji said to withdraw items D-3, D-4 and D-5.

WITHDRAWN

Item D-2 After-the-Fact Consent to License and Lease of Lands under Governor's Executive Order No. 1040 to Volcano School of Arts and Sciences, Olaa Summer Lots, Block B, Olaa, Puna, Hawaii, Tax Map Key: (3) 1-9-4:19.

Item D-6 Issuance of Right-of-Entry Permit to the State of Hawaii, Department of Transportation-Highways Division, Under Project Number 190C-01-12, to Conduct Topographical and Environmental Survey for Proposed Drainage Improvements at Puuwaawaa, North Kona, Hawaii, Tax Map Key: (3) 7-1-002:013 por. and 7-1-004:018 por.

Item D-8 Amend Prior Board Action of May 25, 2012, Item D-8, for the Consent to Assign Grant of Non-Exclusive Easement No. S-5798, Frederic W.C. and Mary F.C. Constant, Assignor, to Maui Happy Place, LLC., Assignee; Amendment of Grant of Non-Exclusive Easement No. S-5798 to Allow Easement to Run with the Land Identified as Tax Map Key No.: (2) 2-1-006:006 situate at Honuaula, Makawao, Maui, Further Identified as Tax Map Key: (2) 2-1-006:Por. 098, and Add the Requirement for Increased Liability Insurance Limits.

Item D-9 Issuance of Right-of-Entry Permit to Waikiki Beach Activities, Ltd. for Beach Activities Purposes on October 18, 2012, Waikiki, Honolulu, Oahu, Tax Map Key: (1) 2-3-037:021 (Portion).

- Item D-10** Issuance of Right-of-Entry Permit to Hawaii Explosives & Pyrotechnics, Inc. for Set up and Firing of Aerial Fireworks Display on October 6, 2012, Waikiki, Honolulu, Oahu, Tax Map Key: (1) 2-3-037:021 (Portion)
- Item D-11** Issuance of Right-of-Entry Permit to Hilton Hawaiian Village LLC for Beach Volleyball Event Purposes from October 18 to 22, 2012, Waikiki, Honolulu, Oahu, Tax Map Key: (1) 2-3-037:021 (Portion).
- Item D-12** Request Approval of Plans for Construction of New Residence, Mike Wunnicke, Owner, Diamond Head View Lots, Unit Two, Increment One, Lot 39, Honolulu, Oahu, Hawaii, Tax Map Key: (1) 3-1-048:046.
- Item D-13** Issuance of Right-of-Entry Permit to Steven Boyle dba Steven Boyle Design for Beach Activities Purposes to be held from September 14 -16, 2012, Waialae, Honolulu, Oahu, Tax Map Key: (1) 3-5-023:041.
- Item D-14** Amend Prior Board Action of January 27, 2012, D-11 by Revising the Remnant Area; Sale of Remnant to Harry Y N Mau Family Trust and Kenneth and Estrellita Leonhardt, and Withdrawal from Governor's Executive Order No. 1598; Waimanalo, Koolaupoko, Oahu; TMK (1) 4-1-024:portions of 066.
- Item D-15** Grant of Term, Non-Exclusive Easement to Bruce H.S. Kim for Seawall Purposes in Kaalaea, Koolaupoko, Oahu, Tax Map Key: (1) 4-7-024:seaward of 022

Mr. Tsuji had no changes to the rest of his items.

Unanimously approved as submitted (Pacheco, Goode)

- Item L-2** Application for a DLNR DAM Safety Construction/Alteration Permit No. 53 - Waimea 60 MG Reservoir (HA-0042) Dam Safety Improvement by Department of Agriculture (DOA), Waimea, Hawaii, TMK: (3) 6-4-002:125

Carty Chang representing Engineering Division conveyed that when staff comes to the Board to approve an application typically beyond just an issuance of the permit in this case they felt it important for the Board to understand that this specific dam is owned by Department of Ag (DOA). We are requesting the issuance of the permit however it doesn't correct all deficiencies in the dam. Staff wants to put some urgency on the Department because they noted there should be some other things that should be done that the granting of this permit doesn't alleviate them of their responsibilities. We want to make it part of the submittal that holds the applicant accountable for these other special conditions which are noted. There were cracks found in the dam bed and we are requiring them to do a stability analysis within a year. DOA was on notice since 2009. It can be done in one year whether they can or not we will see. He wants to see

some good faith effort on the applicant. Staff wants the Board to acknowledge and approve these special conditions which is in the submittal.

Unanimously approved as submitted (Pacheco, Edlao)

Item L-1 Appointment of JoLoyce Kaia as a Director of the Hana Soil and Water Conservation District

Item L-3 Application for a DLNR DAM Safety Construction/Alteration Permit No. 63 - Oahu Reservoir 545A (OA-0039) Dam Alteration/Removal by Kamehameha Schools, Waiawa, Hawaii, TMK: (1) 9-6-004:024

Item L-4 Application for a DLNR DAM Safety Construction/Alteration Permit No. 64 - Oahu Reservoir 530 (OA-0038) Dam Alteration/Removal by Kamehameha Schools, Waiawa, Hawaii, TMK: (1) 9-6-004:024

Item L-5 Application for a DLNR DAM Safety Construction/Alteration Permit No. 65 - Oahu Reservoir 510 (OA-0037) Dam Alteration/Removal by Kamehameha Schools, Waiawa, Hawaii, TMK: (1) 9-6-004:024

Mr. Chang had no changes to the rest of the items.

Member Pacheco asked whether Kamehemeha Schools plans to breach all of their dams. Mr. Chang said not all. Some don't fit in their long range plans. What is triggering this is they are empty, but technically could fill up and it is a regulated dam and required to still pay. Staff is pushing them if you are not going to use it or don't have any plans in the future then come in and remove it which is why they are seeing a number of these. The Dam Safety Rules is forcing the closure, but these have never been really used. He doesn't know whether their intent is to close all of their dams.

Unanimously approved as submitted (Edlao, Goode)

Item M-1 Issuance of a Revocable Permit to Hawaii Petroleum, Inc., at Kawaihae Harbor, Kawaihae 1st, South Kohala, Island of Hawaii, Tax Map Key No. 3rd/6-1-03:34 (portion)

Chair Aila asked whether anyone was here for item M-1 and no one was.

Unanimously approved as submitted (Pacheco, Morgan)

Adjourned (Morgan, Edlao)

There being no further business, Chairperson Aila adjourned the meeting at 3:55 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