

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

April 25, 2008

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

PSF No: 08KD-017
KAUAI

Grant of Term, Non-Exclusive Easement to Spence Aguiar for Building and Landscaping Purposes; Rescind Prior Board Action of March 8, 1996, under Agenda Item D-5, Withdrawal from General Lease No. S-3827/Revocable Permit No. S-6959, Spence Aguiar Request for Purchase of Portion of Ditch Right-of-Way, Realignment of Said Right-of-Way, and Grant of Non-exclusive Ditch Easement to of the State of Hawaii, Kapaa Homesteads, Kawaihau, Kauai, TMK: (4) 4-6-26:portion 1

APPLICANT:

Spence Aguiar, whose mailing address is 5858 Kawaihau Road, Kapaa, Hawaii 96746.

LEGAL REFERENCE:

Section 171-13, Hawaii Revised Statutes, as amended.

LOCATION:

Portion of Government lands of Kapaa Homesteads situated at Kapaa, Kauai, identified by Tax Map Key: (4) 4-6-26:portion 1, as shown on the attached map labeled Exhibit A.

AREA:

1,670 square feet, more or less.

ZONING:

State Land Use District: Urban
County of Kauai CZO: R-6

TRUST LAND STATUS:

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

CURRENT USE STATUS:

Vacant and unencumbered.

CHARACTER OF USE:

Right, privilege and authority to construct, use, maintain and repair a building and landscaping over and across State-owned land.

COMMENCEMENT DATE:

To be determined by the Chairperson.

EASEMENT TERM:

Fifty-five (55) years.

ANNUAL RENT:

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

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

In accordance with the "Division of Land Management's Environmental Impact Statement Exemption List", approved by the Environmental Council and dated April 28, 1986, the subject request is exempt from the preparation of an environmental assessment pursuant to Exemption Class No.1, Item No.2 that states "use of State lands that previously existed with no interruption of use change."

DCCA VERIFICATION:

The Applicant as a landowner is not required to register with DCCA.

APPLICANT REQUIREMENTS:

Applicant shall be required to:

1. Pay for an appraisal to determine the one time payment of fair market value for the easement; and
2. Provide survey maps and descriptions according to State DAGS Standards and at the Applicant's own cost.

BACKGROUND:

The subject ditch right-of-way was not part of the active ditch system utilized and maintained by Lihue Plantation. It was filled

in and considered abandoned for over 20 years. Mr. Spence Aguiar owns Parcel 22 which is only 3,121 square feet and irregularly shaped. Mr. Aguiar wanted to construct a single family residence for his family but due to the small size, irregular shape and County building setback requirements, the only development option was to: 1) purchase the State ditch remnant located between Parcels 17 (owned by Kyle Aguiar) and Parcel 22 (owned by Spence Aguiar) and 2) provide at no cost to the State, a realigned ditch right-of-way easement along the northern property line of Parcel 22 (owned by Spence Aguiar). The Land Board on March 8, 1996, under agenda Item D-5 approved to sell a section of the ditch right-of-way to Mr. Spence Aguiar.

Recently, Mr. Spence Aguiar was trying to mortgage his property. Title Guaranty Escrow Services discovered during a routine title search, there was no record of Mr. Aguiar owning a section of the ditch right-of-way.

Staff researched Mr. Aguiar claims and discovered the land disposition had never been completed.

ANALYSIS:

From all indications, Mr. Aguiar went ahead and built a second house with blessing from the County of Kauai over the State ditch right-of-way. Nothing else was done by Mr. Aguiar to effectuate a land disposition document.

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

Staff is recommending prior Board action of March 8, 1996. To be in compliance with the recent Supreme Court's ruling in the Office of Hawaiian Affairs, et al., vs. Housing and Community Development Corporation of Hawaii (HCDCH), et al., S. Ct. No. 25570 (Civil No. 94-4207), we cannot process the sale of the ditch right-of-way to Mr. Aguiar. Staff is recommending a term easement be issued to Mr. Spence Aguiar instead.

RECOMMENDATION: That the Board:

1. Rescind the prior Board action of March 8, 1996, under agenda item D-5.
2. Declare that, after considering the potential effects of the proposed disposition as provided by Chapter 343, HRS, and Chapter 11-200, HAR, this project will probably have minimal or no significant effect on the environment and is therefore exempt from the preparation of an environmental assessment.

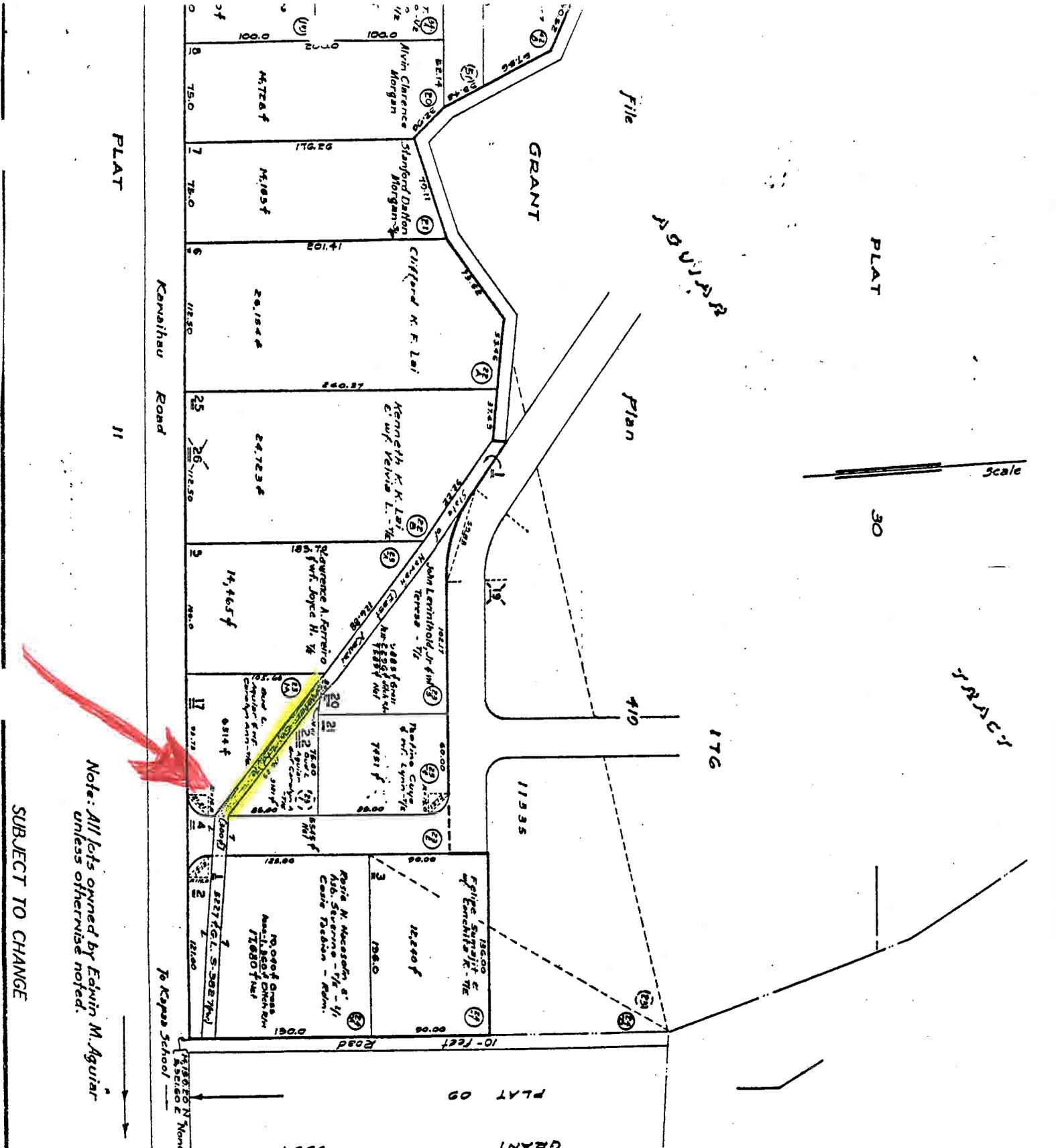
- 3. Authorize the subject requests to be applicable in the event of a change in the ownership of the abutting parcel described as Tax Map Key: (4) 4-6-26:22, provided the succeeding owner has not had a lease, permit, easement or other disposition of State lands terminated within the last five (5) years due to non-compliance with such terms and conditions.
- 4. Subject to the Applicant fulfilling all of the Applicant requirements listed above, authorize the issuance of a term non-exclusive easement to Spence Aguiar covering the subject area for access purposes under the terms and conditions cited above, which are by this reference incorporated herein and further subject to the following:
 - A. The standard terms and conditions of the most current term easement document form, as may be amended from time to time;
 - B. The easement shall run with the land and shall inure to the benefit of the real property described as Tax Map Key: (4) 4-6-26:22, provided however: (1) it is specifically understood and agreed that the easement shall immediately cease to run with the land upon the termination or abandonment of the easement; and (2) if and when the easement is sold, assigned, conveyed, or otherwise transferred, the Grantee shall notify the Grantee's successors or assigns of the insurance requirement in writing, separate and apart from this easement document;
 - C. Review and approval by the Department of the Attorney General; and
 - D. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

Respectfully Submitted,

for Thomas O'i
 Kauai District Land Agent

APPROVED FOR SUBMITTAL:

Laura H. Thielen, Chairperson

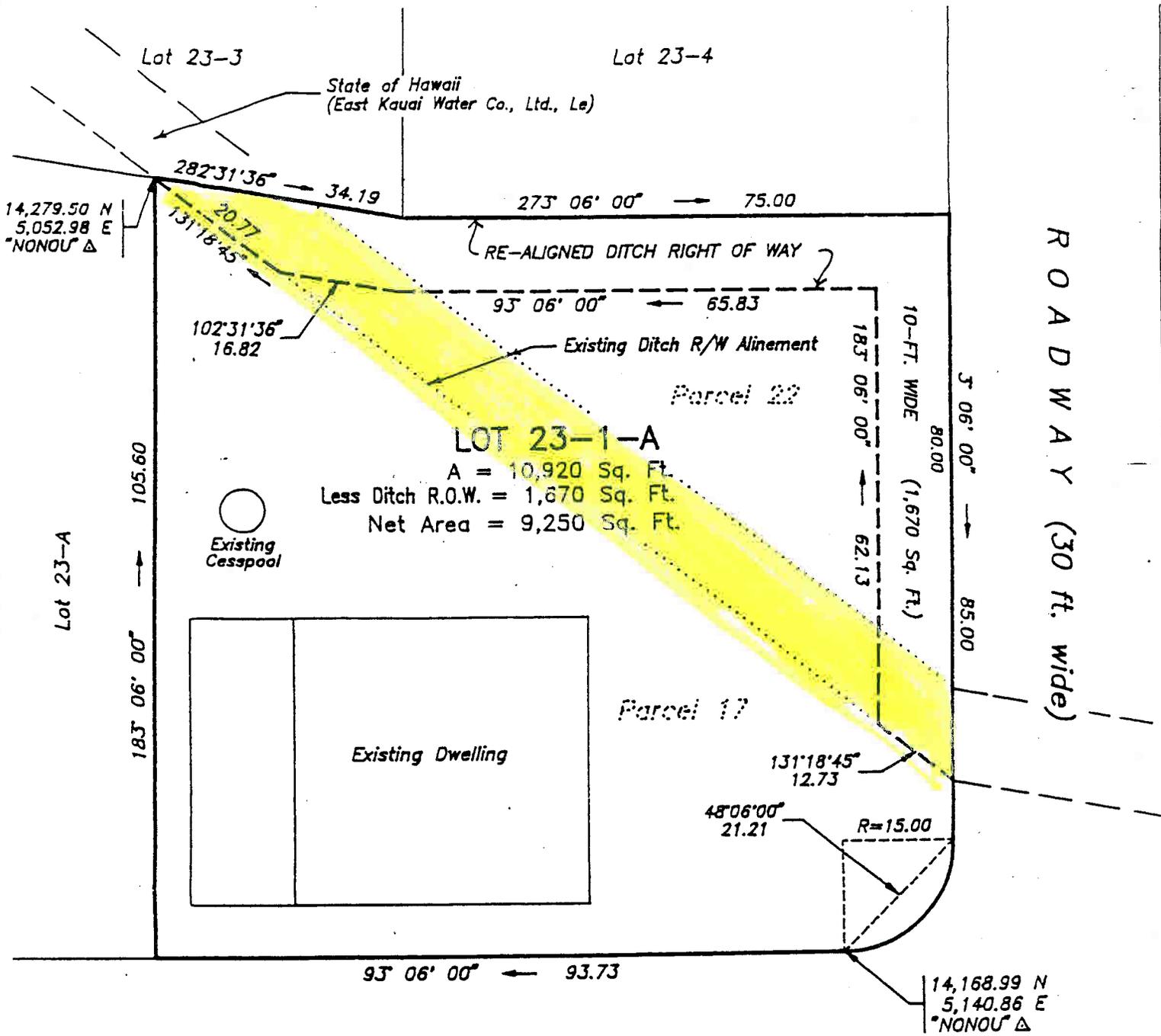


Note: All lots owned by Edwin M. Aguilar unless otherwise noted.

SUBJECT TO CHANGE

TAXATION MAPS BUREAU			
TERRITORY OF HAWAII			
TAX MAP			
FOURTH DIVISION	PLAT	11	
ZONE	SEC.	6	26
CONTAINING PARCELS			
SCALE	1" = 50 FT		

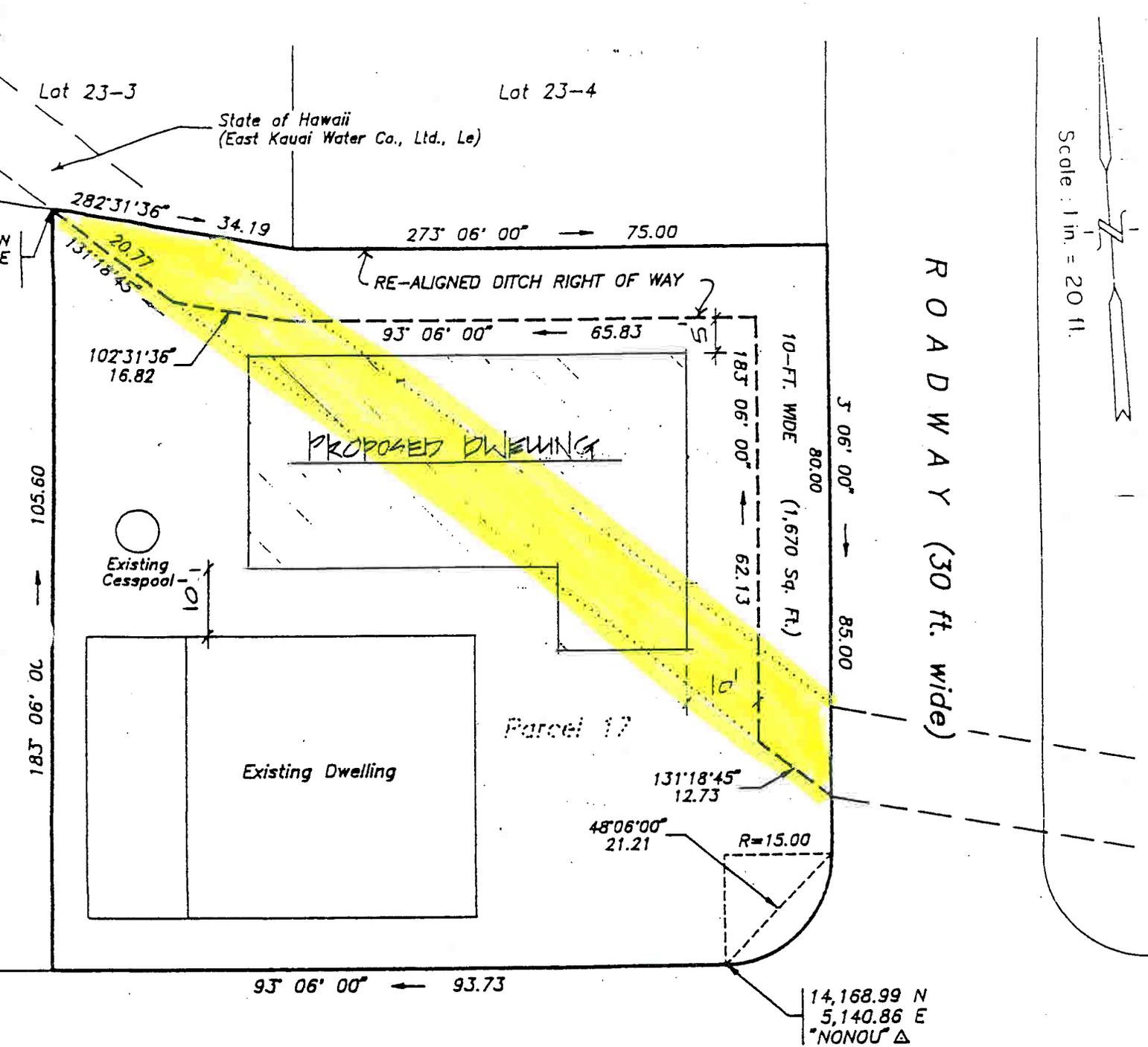
EXHIBIT A



KAWAIIHAU ROAD

EXHIBIT B





KAWAIHAU ROAD

PLOT PLAN



EXHIBIT C

- Present Ditch Around Property
- No State or County Permit.

Return MUA TOYAH
SP- Present PROPOSED OF
DITCH EASEMENTS ON
KAPAA HOW WE SIT DOWN
HAWAII.

State of Hawaii
 DEPARTMENT OF LAND AND NATURAL RESOURCES
 Division of Land Management
 Honolulu, Hawaii 96813

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March 8, 1996

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Board of Land and Natural Resources
 State of Hawaii
 Honolulu, Hawaii 96813

KAUAI

Subject: Withdrawal from General Lease No. S-3827/Revocable Permit No. S-6959, Spence Aguiar Request for Purchase of Portion of Ditch Right-of-Way, Realignment of Said Right-of-Way, and Grant of Non-Exclusive Ditch Easement to the State of Hawaii, Situate at Kapaa Homesteads, Kapaa, Kauai, Tax Map Key 4-6-26: por. 1

STATUTE:

Chapter 171-52, Hawaii Revised Statutes, as amended.

APPLICANT:

SPENCE AGUIAR

FOR:

Withdrawal of approximately 1,225 sq.ft. from an existing ditch right-of-way from General Lease No. S-3827 (expired)/Revocable Permit No. S-6959 (replacement, documents not yet executed) for purchase by Spence Aguiar for consolidation with his abutting property, realignment of ditch right-of-way and granting of non-exclusive ditch easement to the State, situate at Kapaa Homesteads, Kapaa, Kauai, being a portion of Tax Map Key 4-6-26: 1, as shown outlined in red on map attached as Exhibit A.

LAND TITLE STATUS:

Subsection 5(b) land of the Hawaii Admission Act

STATUS:

Encumbered by expired General Lease No. S-3827/replacement Revocable Permit No. 6959.

ZONING:

State LUC: Urban
 County of Kauai CZO: Residential District R-6

EXHIBIT "D"

LAND AREA:

Approximately .03 acre; however, exact land area and configuration to be determined by the applicant, subject to review and confirmation by Survey Division, Department of Accounting and General Services.

CHARACTER OF USE:

Ditch right-of-way, 10 ft. wide

CONSIDERATION:

To be determined by an independent appraisal, same subject to the review and approval of the Chairperson.

METHOD OF PAYMENT:

One-time, lump sum payment, in advance.

ENVIRONMENTAL REVIEW:

Actions are exempt from the requirements of Chapter 343, Hawaii Revised Statutes by the Department's Exemption Class #3.

REMARKS:

Expired GL 3827/Replacement RP 6959. GL 3827 is a water license lease (with incumbent ditch system) to East Kauai Water Company/Lihue Plantation which expired on May 10, 1994. A 1-year holdover period expired May 10, 1995, whereupon Revocable Permit No. S-6959 was approved by the Board. However, the permit documents have yet to be executed by the permittee; negotiations continue regarding specific and technical elements of the lease/permit.

The subject ditch right-of-way in this vicinity is not a part of the active ditch system utilized and maintained by LP. It has been filled in and considered abandoned for over twenty years. LP has no objection to the proposal.

Spence Aguiar. The applicant is the owner of abutting property identified as TMK 4-6-26: 22, which is a small (3,121 sq.ft.), irregular shaped property. Applicant's brother is Kyle Aguiar, owner of TMK 4-6-26:17 located on the opposite side of the ditch. Mr. Aguiar would like to construct a single family residence for his family, but cannot due to the small size of the lot, irregular shape of the lot, and building setback requirements of the County. Mr. Aguiar has examined several development alternatives, but because of the above referenced limitations, must include the ditch right-of-way within any development scenario.

Mr. Aguiar proposes the following:

1. To purchase, in fee, that portion of the ditch right-of-way identified as TMK 4-6-26: por. 1, located between parcels 17 and 22, approximately 1,225 sq.ft. This would permit the construction of a "normal" sized and configured home, utilizing portions of his brothers lot. SEE Exhibit B and C.
2. To provide, at no cost to the State, a realigned ditch right-of-way easement along the northerly property line of parcel 22. This would keep the integrity of the entire ditch system whole until such time that the issue of unused/abandoned ditches as part of the lease/permit are resolved by the State and lessee/permittee at some point in the future. The land area involved in this realignment is approximately 1,670 sq.ft.

Ceded lands consideration. In early 1995, the administration established a policy that prevented the sale or exchange of any ceded lands within the State inventory. Exceptions are necessary, this being an example, since no other alternatives exist.

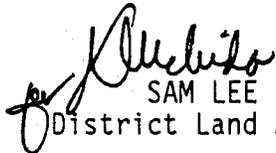
The proceeds from this sale can be placed within a ceded land sales fund, where interest from this fund could be used to further the goals of Hawaiian programs. With Mr. Aguiar providing the land area for a realigned ditch easement at no cost to the State, the integrity of the ditch system will remain whole until such time that the issue of unused ditches within the lease/permit can be satisfactorily addressed. And, a solution would be provided that would address the housing need for Mr. Aguiar.

RECOMMENDATION: That the Board:

- A. Find that the area in question to be unsuitable for development as a separate unit because of its size, shape, and non-use and is by definition, a remnant.
- B. Approve the direct sale of the remnant under the terms and conditions cited above which are by this reference incorporated herein in addition to the following:
 1. The purchaser agrees to purchase the remnant in its "as is" condition, being knowledgeable of all deficiencies related to the remnant.
 2. Standard liability clause in favor of the State.

3. a. Prior to issuance to patent or deed, the purchaser shall consolidate the remnant with his private property to the satisfaction of the County of Kauai Planning Department. The approved consolidation and resubdivision map shall reflect the realigned 10 ft. ditch right-of-way easement, in favor of the State of Hawaii, as reflected on Exhibit B, attached.
- b. The State shall not approve any building permit application until item 3a and 4 above has been completed.
4. The purchaser shall pay the full purchase price for the remnants in full by cash, certified or cashiers check.
5. The Grantee, its successor and/or its permitted assigns, shall submit construction plans for approval by the chairperson prior to the commencement of any construction work activity.
6. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State of Hawaii.

Respectfully submitted,


SAM LEE
District Land Agent

APPROVED FOR SUBMITTAL:


MICHAEL D. WILSON, Chairperson