STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Division of Forestry and Wildlife
Honolulu, Hawaii

January 13, 2011

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

Land Board Members:

SUBJECT: Acceptance of Hearing Officer's Report on a Public Hearing for One Proposed Withdrawal from the Forest Reserve System on the Island of Maui.

Approval and Recommendation to the Governor issuance of an Executive Order to Withdraw Approximately 0.60 Acres from Koolau Forest Reserve, Governor's Proclamations Dated August 24, 1906, May 20, 1925 and/or May 2, 1938, Honomanu and Keopuka, Koolau, Maui, Tax Map Key (2) 1-1-001: portions of 023 and/or 044.

Possible Executive Session with Board's Attorney Regarding Bradbury vs. State, Civil No. 09-1-0763(1).

Background: At its meeting of July 8, 2010, item D-6, the Board approved in concept the removal of approximately 0.25 acres from Koolau Forest Reserve, Governor's Proclamations Dated August 24, 1906, May 20, 1925 and/or May 2, 1938, at Honomanu and Keopuka, Koolau, Maui, Tax Map Key (2) 1-1-001: portions of 023 and/or 044. The original staff estimate of 0.25 acres was not based on actual survey work. Preliminary field survey data has subsequently indicated that the true area of the proposed removal is closer to 0.60 acres. The boundaries of the proposed Forest Reserve removal have not changed.

Approval to hold a public hearing on the proposed forest reserve withdrawal was obtained from the Board of Land and Natural Resources on July 8, 2010 (Exhibit A). Approval to hold the public hearing and to appoint Glenn Shishido, the Division's Maui Forestry Manager, as the Hearing Officer was obtained from the Chairperson on October 9, 2010.

In accordance with a Notice of Public Hearing published in the Maui News, Honolulu Star Advertiser, Garden Island, West Hawaii Today, and Hawaii Tribune-Herald newspapers, a public hearing was held on November 17, 2010 to receive public input on the subject item.

Two members of the public attended this meeting, the proceedings of which are summarized in the Hearing Officer's report (Exhibit B). Verbal testimony was received from one person

regarding this item – apparently in support. No written testimony was received by mail after the meeting. Based on these results, staff recommends final processing of the proposed transfer.

RECOMMENDATIONS:

That the Board of Land and Natural Resources:

1. Accept and approve the Hearing Officer's report and minutes for the public hearing held on November 17, 2010 relating to a proposed Forest Reserve System withdrawal on the island of Maui as described above.

2. Based on the results of the public hearing held on November 17, 2010 on the island of Maui, the Board approves and recommends to the Governor issuance of an Executive Order to withdraw approximately 0.60 acres, subject to final survey results, from Koolau Forest Reserve at Honomanu and Keopuka, Koolau, Maui, Tax Map Key (2) 1-1-001: portions of 023 and/or 044, and subject further to the following:

   A. The standard terms and conditions of the most current executive order form, as may be amended from time to time;

   B. Disapproval by the Legislature by two-thirds vote of either the House of Representatives or the Senate or by a majority vote by both in any regular or special session next following the date of the setting aside;

   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,

Randy Kennedy

for PAUL J. CONRY
Administrator

Attachments

APPROVED FOR SUBMITTAL:

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

Exhibit A

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

July 8, 2010

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

PSF No.:07MD-028

MAUI

1) Sale of Remnant to Alan Bradbury, Loiloa and Keopuka, Koolau, Maui, Tax Map Key: between (2) 1-1-1:44 and 1-1-1:23.
2) Approval in Concept for Removal of Approximately 0.25 Acres, More or Less, from Koolau Forest Reserve, Governor's Proclamations Dated August 24, 1906, May 20, 1925 and/or May 2, 1938, Honomanu and Keopuka, Koolau, Maui, Tax Map Key (2) 1-1-001: portions of 023 and/or 044.
3) Set Aside to the Department of Transportation, Highways Division for Drainage Purposes, Loiloa and Keopuka, Koolau, Maui, Tax Map Key: (2) 1-1-001: portions of 023 and/or 044.

APPLICANT:

1) Mr. Alan Bradbury
2) Department of Land and Natural Resources, Division of Forestry and Wildlife
3) Department of Transportation, Highways Division (?)

LEGAL REFERENCE:

1) Section 171-52, Hawaii Revised Statutes, as amended.
2) Sections 183-11, et seq., Hawaii Revised Statutes, as amended.
3) Section 171-11, Hawaii Revised Statutes, as amended.

LOCATION:

Portion of Government lands of Loiloa and Keopuka, Koolau, Maui, identified by Tax Map Key: between (2) 1-1-1:44 and 1-1-1:23, as shown on the attached map labeled Exhibit A.

AREA:

4.42 acres, more or less.

ZONING:

State Land Use District: Conservation/Agriculture
County of Maui CZO: General Conservation/Agriculture

TRUST LAND STATUS:

Portion non-ceded, acquired pursuant to a stipulated judgment in 1986 and portion Section 5(b) lands of the Hawaii Admission Act.

DHHL 30% entitlement lands pursuant to the Hawaii State Constitution: NO _X__

CURRENT USE STATUS:

Vacant and unencumbered.

CONSIDERATION:

One-time lump sum payment of fair market value to be determined by independent or staff appraiser, subject to review and approval by the Chairperson.

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

While the proposed transfer of the remnant parcel and removal of the 0.25 acre portion of the remnant parcels from the forest reserve involve the use of State land, the effect of the proposed actions are exempt from the preparation of an environmental assessment pursuant to HAR §11-200-8(a)(1) as the same are, "Operations . . . of existing . . . topographical features involving negligible or no expansion or change of use beyond that previously existing."

DCCA VERIFICATION:

Not applicable. The Applicant is an individual landowner and 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 remnant;
2) If applicable, consolidate the remnant with the Applicant's abutting property through

the County subdivision process;

3) Provide survey maps and descriptions according to State DAGS standards and at Applicant's own cost; and
4) Upon completion of the sale, dismiss with prejudice the Complaint filed in 2nd Cir. Civil No. 09-1-0763(1).

REMARKS:

1) In 1863, Royal Patent 2916 for 79.07 acres was issued to Kekuahani, et al. The grant was based on a survey conducted in 1853 that described the eastern boundary of the property as going to the "ravine." "Ravine" was not defined in the survey, and thus it was not clear if the surveyor meant to the top of the ravine, i.e., the ridge, or to the bottom of the ravine, i.e., the middle of Puohakamoa Stream that runs through the ravine. Apparently, by acreage, the top of the ravine more closely conforms to the size of the property referenced in the patent, 79.07 acres. In 1895, the Boundary Commission determined that the western boundary of government-owned land to the east of the property conveyed by Royal Patent 2916 purportedly gave both properties a common boundary at the east bank of the stream. It is not clear, however, whether this 1895 determination conclusively defined the eastern boundary to Royal Patent 2916. Confusing matters further is that Territorial C.S.F. Map 7325 (rev. December 1934) for the adjacent Ko`olau Forest Reserve listed as the boundary between the forest reserve and the south corner of Grant 2916 at course 50 as, "Thence up along the middle of said Puohakamoa Stream, along the Easterly boundary of Grant 2916 to Kehuahani, et al, to the South corner of said grant, the direct azimuth and distance being: 65° 11' 511.25 feet".°

The property conveyed by Royal Patent 2916 has subsequently been conveyed and subdivided. In 1979, Bradbury's predecessors-in-interest filed an action to quiet title to a portion of 2916, 2nd Cir. Civil No. 4321(3). In 1986, the parties to the quiet title action, including the State of Hawaii, stipulated that the eastern boundary of the 2916 property was the top of the ridge, and thus the property from the top of the Ridge to the stream definitively became the property of the State of Hawaii. This stipulated judgment is final and unappealable. Bradbury purchased his property (the same portion of 2916) in 1991. At the time he purchased his property, he knew or should have known that the eastern boundary of his property was at the top of the ravine.

According to the Complaint, not all personnel in DLNR were aware of the stipulated judgment in the quiet title action, and believed that the boundary was to the stream and that the portion between the top of the ravine and the stream (the "Disputed Portion") belonged to Mr. Bradbury. Representatives of the DLNR allegedly advised Mr. Bradbury of this belief. In reliance on these representations, Mr. Bradbury claims to have made improvements to the Disputed Portion.

On October 2, 2009, Mr. Bradbury filed an action for declaratory relief in the Second Circuit against Defendants State of Hawaii and Morris Atta, in his capacity as Administrator of the

Land Division, Department of Land and Natural Resources (Land Division) entitled Civil No. 09-1-0763(1). In that action, Mr. Bradbury claims that declaratory relief is proper as there is a dispute over ownership and responsibility for the Disputed Portion.

Subsequent to the filing of the lawsuit, counsel for the Plaintiff and Defendants have discussed the objectives of the parties and potential settlement of the action. Mr. Bradbury expressed a continuing desire to own the property and keep the area in its current unimproved state as part of his existing ecotourism venture, the Garden of Eden. Mr. Bradbury's only proposed actions deal with the repair and replacement of existing fencing to keep trespassers from entering the area from the adjacent Hana Highway.

In the course of those discussions, it was questioned as to whether the State wished to continue ownership and responsibility for the Disputed Portion. An inspection of the site and maps of the Disputed Portion revealed that the boundaries of the Disputed Portion are the top of the ravine at the 1,050 foot elevation and the east bank of the stream at the 825 foot elevation. The majority of the Disputed Portion is a steep slope with the remainder of the Disputed Portion being the stream, pools and waterfalls along course 50 of C.S.F. 7325. Upon inquiry to other divisions within the Department and to other State agencies, no preference was expressed for retaining ownership of the property. It was noted that the Hana area is well known for at least 21 rapid water rescues since 2007. There was a 2003 near drowning incident at this site. Based thereon, it is recommended that the property be transferred.

Pursuant to section 171-52, HRS, a remnant is defined as "a parcel of land economically or physically unsuitable or undesirable for development or utilization as a separate unit by reason of location, size, shape, or other characteristics." As noted above, it is believed that the subject parcel should be determined to be a remnant under this definition.

Mr. Bradbury is the owner of parcel (2) 1-1-1:23 as staff has confirmed by checking the County of Maui, Real Property Tax Assessment Website. There are no there are no other abutting private properties to the subject remnant parcel.

Mr. Bradbury 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 therefore concludes it is in the best interest of the State to sell the remnant to Mr. Bradbury.

2) As noted previously, the State's Koolau Forest Reserve boundary presently extends to the midpoint of Puohakamoa Stream. If the Board authorizes the sale of the Disputed Portion, the segment of the Disputed Portion extending from the midpoint of the stream to the east bank will no longer be "government land" and, pursuant to HRS §183-11, should be removed from the Forest Reserve. The area for prospective removal from

Koolau Forest Reserve is approximately 0.25 acres, more or less, to be determined by legal survey methods.

The Division of Forestry and Wildlife concurs with the removal of the portion of the Disputed Parcel from the Ko`olau Forest Reserve should the Board authorize the sale of the Disputed Parcel.

Staff is seeking Board authorization to start the process to remove the approximately 0.25 acres, more or less from the Forest Reserve System. When staff has completed the process, the results will be scheduled for a Board meeting.

Comments were solicited from:

DHHL	No response
Maui County Planning	No response
Maui County Public Works	No response
OHA	No response
DOT-Highways	Comments addressed below.

3) During our preparation of this submittal, we were informed by Department of Transportation, Highways Division (DOT) staff that their drainage improvements completed in 2002 are located on the subject property along the bend of Hana Highway (near a tree) before a bridge crossing Opana Gulch. DOT would want to maintain control of the area upstream for drainage maintenance purposes. While there are no plans to improve the highway downstream beyond the bridge structure, Hana Highway is classified as a major rural collector, which by subdivision code requires at least a 50' wide road right-of-way. Thus, the drainage area will also need to encompass the portion of the subject property needed to accommodate any potential roadway expansion. DOT staff will have the subject drainage area surveyed.

Staff is requesting this drainage area be set aside to DOT.

RECOMMENDATION: That the Board:

1. Find that the subject lands are economically or physically unsuitable or undesirable for development or utilization as a separate unit by reason of location, size, shape, or other characteristics and, therefore, by definition is a remnant pursuant to Chapter 171, HRS.

2. Authorize the subject request to be applicable in the event of a change in the ownership of the abutting parcel described as Tax Map Key: (2) 1-1-1:23, 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.

3. If applicable, authorize the subdivision and consolidation of the subject remnant by the Applicant.

4. Subject to the Applicant fulfilling all of the Applicant Requirements listed above, authorize the sale of the subject remnant to Alan Bradbury covering the subject area 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 deed or grant (remnant) form, as may be amended from time to time;

   b. Review and approval by the Department of the Attorney General;

   c. Upon completion of the sale, Plaintiff shall dismiss with prejudice the Complaint filed in 2nd Cir. Civil No. 09-1-0763(1); and

   d. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

5. Approve in concept the removal of 0.25 acres, more or less, from the Koolau Forest Reserve, Governor's Proclamations dated August 24, 1906, May 20, 1925 and/or May 2, 1938, Honomanu and Keopuka, Koolau, Maui, Tax Map Key (2) 1-1-001: portions of 023 and/or 044.

6. Authorize the Division of Forestry and Wildlife to conduct a public hearing to remove the subject lands from the Koolau Forest Reserve, under provisions of Section 183-11, Hawaii Revised Statutes, as amended; and

7. Authorize the Chairperson to set a time, date and location for a public hearing pursuant to HRS §183-12 regarding the proposed forest reserve removal, and to appoint a hearing officer.

8. Approve of and recommend to the Governor the issuance of an executive order setting aside the subject drainage area to the Department of Transportation, Highways Division, under the terms and conditions cited above, which are by this reference incorporated herein and subject further to the following:

   a. The standard terms and conditions of the most current executive order form, as may be amended from time to time.

   b. Disapproval by the Legislature by two-thirds vote of either the House of Representatives or the Senate or by a majority vote by both in any regular or special session next following the date of the setting aside.

c. Review and approval by the Department of the Attorney General.

d. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

Respectfully Submitted,

Charlene Unoki
Assistant Administrator

APPROVED FOR SUBMITTAL:

Laura H. Thielen, Chairperson

Exhibit B

HEARING OFFICER'S REPORT AND MINUTES OF:

Public Hearing for One (1) Proposed Change Affecting the Area of Government Forest Reserve Lands on the Island of Maui

Lihikai School Auditorium
335 South Papa Avenue, Kahului, HI
6:00 pm

November 17, 2010

SUMMARY OF TESTIMONIES RECEIVED

Written testimonies are kept on file in the Division of Forestry and Wildlife for public review.

One oral testimony was provided:

Kenneth Schmitt

I don't really think I need to say anything because your presentation was clear. To my understanding, the boundary that we're looking at there was determined by the boundary commission in 1895 and it looks as if the forest reserve boundary has been set at the centre of the stream rather than the east bank and it should be on the east bank according to that boundary determination and so that makes me think that's the way you are proposing that it be. And so, I don't need to say anything further.

No written testimony was received.

I. SUMMARY OF PUBLIC HEARING PROCEEDINGS

A. The public hearing was called to order at 6:04 pm. In attendance were the following staff members from the Department of Land and Natural Resources:

Division of Forestry and Wildlife:

Glenn Shishido – Hearing Officer	Maui Forest Management Supervisor
John Cummings	Maui Branch Manager
Jacqueline Robson	Forestry & Watershed Planner

B. Two members of the public attended the meeting, one of whom provided oral testimony. The information that the Division of Forestry and Wildlife had prepared regarding these item was presented as planned.

C. The public hearing was adjourned at 6:24 pm.

II. APPROVALS AND NOTICES OF PUBLIC HEARING

A. Approval to hold a public hearing on the proposed forest reserve additions and withdrawals was obtained from the Board of Land and Natural Resources on July 8, 2010.

B. Approval to hold the public hearing and to appoint Glenn Shishido as the Hearing Officer was obtained from the Chairperson on October 9, 2010.

C. Notice of this public hearing was published in the Maui News, Honolulu Star Advertiser, Garden Island, West Hawaii Today, and Hawaii Tribune-Herald newspapers on Sunday, October 31, 2010.

Minutes prepared and respectfully submitted by Jacqueline Robson.