

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

September 14, 2012

PSF No.: 11HD-191

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

Hawaii

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, Auhaueae, North Kona, Hawaii, Tax Map Key: (3) 7-5-09:43 pors.

BACKGROUND:

At its meeting of April 27, 2012, Item D-7, the Board deferred action on the request of Applicant LBUBS 2007 – C2 Alii Drive, LLC (LBUBS), for the grant of an after-the-fact term, non-exclusive easement for drainage and utility purposes, and a related request for a right-of-entry over the subject land for survey, mapping and maintenance purposes. A redacted copy of the deferred Board submittal is attached as Exhibit 1.¹

LBUBS’ representatives provided testimony in favor of the requests at the meeting, and one of the State’s current lessees of the property, D.G. Anderson, and his counsel testified in opposition to the requests. The deputy attorney general assigned to the meeting suggested that the parties submit position statements to him regarding the Board’s jurisdiction to grant the requested easement. Once counsel had an opportunity to review the statements and advise the Board as to its authority, there was discussion that the matter would be brought back to the Board for action. No timeline was established for the submission of the statements, or the rescheduling of the matter with the Board.

REMARKS:

More than four months have passed since the deferral of LBUBS’ request and LBUBS has not submitted a position statement. Staff believes that four months is a reasonable amount of time for LBUBS to research and prepare a statement in support of its request.

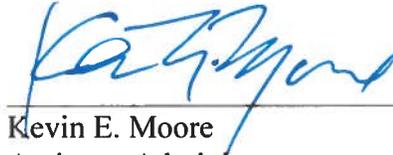
¹ The submittal was redacted to delete the voluminous Exhibits B through F that were part of the original submittal.

Based on LBUBS' lack of initiative in this matter, staff is now recommending that its request for an easement and right-of-entry be denied.

RECOMMENDATION: That the Board:

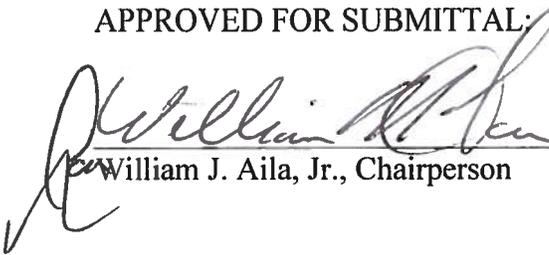
1. Deny the request of Applicant LBUBS 2007 – C2 Alii Drive, LLC for a grant of an after-the-fact term, non-exclusive easement for drainage and utility purposes, and deny its related request for a right-of-entry over the subject land for survey, mapping and maintenance purposes.

Respectfully Submitted,



Kevin E. Moore
Assistant Administrator

APPROVED FOR SUBMITTAL:



William J. Aila, Jr., Chairperson

DEFERRED

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

April 27, 2012

PSF No.: 11HD-191

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

Hawaii

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

APPLICANT:

LBUBS 2007 – C2 Alii Drive, LLC, a Hawaii limited liability company.

LEGAL REFERENCE:

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

LOCATION:

Portion of Government lands of Auhaukeae situated at North Kona, Hawaii, identified by
Tax Map Key: (3) 7-5-09:43, as shown on the attached map labeled Exhibit A.

AREA:

Parcel Area: .338 acres, more or less.

Easement Areas/Widths:

Drainage or detention basin area: 7,085 sq. ft.
Drainage line width: 10 feet
Utility line widths: 5 feet

Deferred
BY THE BOARD OF
LAND AND NATURAL RESOURCES
AT ITS MEETING HELD ON
April 27, 2012

EXHIBIT 1

D-7

ZONING:

State Land Use District: Urban
County of Hawaii CZO: V-.75 (resort-hotel)

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:

Encumbered by General Lease No. S-5188, Brad Radcliffe Anderson, Cord Dominis Anderson, and D.G. Anderson, Lessee, for commercial purposes as may be permitted under the zoning ordinances of the County of Hawaii. Lease to expire on May 18, 2039.

CHARACTER OF USE:

Right, privilege and authority to construct, use, maintain and repair a right-of-way over, under and across State-owned land for drainage and utility purposes.

COMMENCEMENT DATE:

To be determined by the Chairperson.

CONSIDERATION:

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

EASEMENT TERM:

Twenty-seven (27) years. The easement term will be coterminous with General Lease No. S-5188.

ANNUAL RENTAL:

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

RENTAL REOPENINGS:

Not applicable.

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

The Final Environmental Assessment (FEA) for the Coconut Grove Marketplace project was published in the OEQC Bulletin on November 23, 1988 with a finding of no significant impact (FONSI). The FEA covered both the private and State lands on which the project was to be developed. The use proposed for the subject State parcel was a passive park with a series of fishponds and botanical gardens. While no fishponds or botanical gardens were placed on the parcel, it has been used as a passive park. The present request for grant of easements relates to a drainage system and utilities that have been in place on the property for more than ten years. No new construction is required in conjunction with the grant of easement. Staff believes the present request is therefore exempt from HRS Chapter 343. See Exhibit B attached.

DCCA VERIFICATION:

Place of business registration confirmed:	YES <u>X</u>	NO <u> </u>
Registered business name confirmed:	YES <u>X</u>	NO <u> </u>
Applicant in good standing confirmed:	YES <u>X</u>	NO <u> </u>

APPLICANT REQUIREMENTS:

Applicant shall be required to:

- 1) Pay for an appraisal to determine one-time payment for the drainage and utility easements, and pay the appraised value in full;
- 2) Pay for an appraisal to determine whether the rent payable under General Lease No. S-5188 requires downward adjustment as a result of the placement of the drainage and utility easements on the land;
- 3) Provide survey maps and descriptions according to State DAGS standards and at Applicant's own cost; and
- 4) Obtain a title report to ascertain ownership, where necessary, at Applicant's own cost and subject to review and approval by the Department.

REMARKS:

LBUBS 2007 – C2 Alii Drive, LLC (Applicant) is the owner of the Coconut Grove Marketplace (Marketplace) retail complex situated in Kailua-Kona on Tax Map Keys: (3) 7-5-9:25, 27 & 28 (together, the Private Parcels). Applicant acquired the fee interest

in Parcels 25 and 28, and the leasehold interest in Parcel 27, through a foreclosure action against their prior owner, LRG Real Estate LP (LRG), a Hawaii limited partnership. The Private Parcels surround the subject State parcel, designated as TMK: (3) 7-5-9:43, on three sides. See map attached as Exhibit A.

When the Marketplace was initially constructed in the late 1990s, it included the State parcel through General Lease No. S-5188, and the State parcel and Private Parcels were developed as an integrated complex. At that time, there was a unity of title to the Private Parcels and the leasehold interest in the State parcel. However, that unity ended due to the foreclosure action against LRG and other parties.

At the present time, the lessees under General Lease S-5188 object to Applicant using the lease premises as part of the Marketplace, without compensating lessees for that use in any way. Applicant has submitted an application for access, drainage and utility easements over the State land to allow it to continue to use pathways, drainage features and utility lines that are already in place. A review of the lease history is necessary to put Applicant's request in context.

Lease History

At its meeting of June 24, 1988, Item F-5, the Board approved the sale of a lease of the subject State land at public auction for the purpose of "[b]y itself or in consolidation with abutting parcels, commercial use(s) as may be permitted under the zoning ordinance of the County of Hawaii." General Lease No. S-5188 covering Tax Map Key: (3) 7-5-09:43 (Parcel 43) was thereafter sold at public auction held on May 18, 1989. Lanihau Partners L.P. (Lanihau), as the successful bidder, was issued a 50-year lease for commercial purposes.

According to County of Hawaii Planning Department records, the Planning Commission issued SMA Use Permit No. 277 on December 28, 1988 to allow for the construction of a commercial specialty center and related improvements on the Private Parcels. After Lanihau acquired the lease of Parcel 43 at auction, the Planning Commission on September 27, 1990 approved an amendment to SMA Use Permit No. 277 to allow Parcel 43 to be developed as a passive park in the center of the commercial complex. General Lease No. S-5188 itself sets forth requirements pertaining to open space on the parcel at Section 37:

Lessee shall at its own expense, develop and maintain a landscaped, coastal-view park on not less than fifty percent (50%) of the leased premises in accordance with plans and specifications submitted by the Lessee to and approved by the Chairperson prior to construction.

Section 34 of the lease required lessee to expend not less than \$50,000 for on-site improvements within two years of May 19, 1989, which was the commencement date of the lease. The lease additionally required the lessee to post a performance bond in the amount of \$50,000 to guarantee construction of the improvements. On or about October 29, 1990, the Chairperson approved preliminary plans for the property that showed walkways, ponds and two small gazebos proposed for construction. However, the improvements were not constructed within the two-year deadline.

At its meeting of July 26, 1991, the Board consented to Lanihau's sublease of the land to Old Kailua Town Associates (OKTA). The Sublease was dated November 13, 1989, and the Chairperson signed the consent thereto on December 20, 1991. By mutual Cancellation and Surrender of Sublease dated April 6, 1993, Lanihau and OKTA cancelled the Sublease.

The file contains an inspection report dated March 10, 1998 stating in part "State owned area graded w/utility and foundation work begun. Buildings surrounding property partially framed." Apparently, no ponds or gazebos were ever constructed on parcel 43. At its meeting of April 23, 1999, Item D-1, the Land Board approved the release of the \$50,000 performance bond for the construction of improvements. The staff submittal states in part: "A volleyball court (sand type) ha[s] been built and the grounds ha[ve] been landscaped, per March 2, 1999 inspection." The file contains no inspection report for March 2, 1999. Nor does the file contain any revised plans showing departure from the preliminary plans approved by the Chairperson in 1990.

Although not mentioned in the staff submittal for the April 23, 1999 meeting, the volleyball court serves as a component of a larger drainage system. In heavy rains, an underground system of drains and pipes collects surface runoff at the surrounding Marketplace, as well as Kuakini Highway, and directs it to a discharge point on Parcel 43. Water exits the discharge point and enters the sand volleyball court and surrounding area, which functions as a detention basin. Staff understands that beneath the sand of the volleyball court is a porous lining over an aggregate base that allows the water to percolate into the ground.

At its meeting of May 15, 1998, the Board consented to the assignment of General Lease No. S-5188 from Lanihau, as assignor, to L. Radcliffe Greenwell, as Trustee under the certain unrecorded L. Radcliffe Greenwell Revocable Living Trust Agreement dated April 28, 1983 (Radcliffe Greenwell Trust), as assignee. The Board additionally consented to the assignment of the lease from the Radcliffe Greenwell Trust, as assignor, to Patricia G. Greenwell, as Trustee under the certain unrecorded Patricia G. Greenwell Revocable Living Trust Agreement dated May 5, 1983 (Patricia Greenwell Trust), as assignee. Further, the Board consented to a sublease by Patricia Greenwell Trust, as sublessor, to Brian Anderson and Joan Greenwell Anderson, as sublessee (Brian and Joan

Anderson). The Chairperson signed the necessary consent instruments for these transactions. The sublease to Brian and Joan Anderson was apparently cancelled in 2010.

At its meeting of January 8, 2010, Item D-15, the Board consented to the assignment of General Lease No. S-5188 from the Patricia Greenwell Trust to Brad Radcliffe Anderson, Cord Dominis Anderson, and D.G. Anderson (Lessees). The Chairperson signed the consent to the assignment on August 31, 2010.

Ownership of the Private Parcels

According to public records, at the time the Marketplace was constructed, the Private Parcels were owned by the Patricia Greenwell Trust and later by LRG Real Estate LP. Records of the Department of Commerce and Consumer Affairs show that LRG was formed on December 24, 1998. The current general partner of LRG is lolani CGM LLC, a member-managed Hawaii limited liability company whose member is Brad Anderson.

Analysis of Easement Request

To summarize the foregoing, at the time the drainage system, utility lines and pathways were developed on the subject State Parcel 43, the owner of the Private Parcels was Patricia Greenwell Trust or LRG, the lessee of Parcel 43 was Patricia Greenwell Trust, and the sublessee of Parcel 43 was Brian and Joan Anderson. Ideally, what should have happened prior to the construction of the improvements on Parcel 43 is the submission of detailed plans of the construction to Land Division. A review of the plans would then have shown the drainage system, utility lines and other features serving the adjoining Private Parcels, and Land Division staff could have alerted the parties that easements should be secured for these items. This did not happen.

Now the ownership of the Private Parcels has changed as a result of the foreclosure action. The Lessees of Parcel 43 have requested Applicant to remove the drainage system from the lease premises. An engineering report dated March 3, 2010 estimates the cost of the relocation of the drainage system at \$763,585. See Exhibit C attached.

Staff's assessment is that the re-design of the drainage system to remove it from Parcel 43 is not the preferred solution. The lease premises were developed as an integral part of the Marketplace. To physically sever Parcel 43 from the surrounding Private Parcels, including the removal of the underground drainage system and utilities, does not seem to promote anyone's interest. Staff is therefore recommending that the requested easements for drainage and utilities be issued after-the-fact subject to Applicant fulfilling the Applicant Requirements above. Additionally, staff is including a requirement that Applicant carry liability insurance that names both the State and the Lessees as additional insureds. The easement would be coterminous with General Lease No. S-5188, so that at

lease expiration the use of the State land can be re-evaluated.

The alignments and locations of the drainage and utility easements are approximately as shown on Exhibits D and E attached. Exhibit E shows that the drainage easement will encumber approximately 7,085 square feet. The underground pipeline for the drain will need a 10-foot wide easement, and the utility lines will require 5-foot wide easements. As is evident from Exhibit E, these easements will encumber a substantial area of the lease premises.

For two reasons, staff is recommending against the issuance of access easements over the pathways on Parcel 43. First, as a policy matter, the Board generally issues access easements only to landlocked private property. In the present case, the Private Parcels are not landlocked. Rather, the Applicant is seeking the right to use existing paved pathways that cross Parcel 43 in various directions. See Exhibit E attached.

Second, to the extent Parcel 43 is maintained as a coastal-view park (the lease requires at least 50% of the premises to be maintained as such a park), Applicant, its tenants and patrons have the same right to transit the park as the public does. Applicant has not shown why it needs the right to use all of the pathways on Parcel 43, including those that may not be located on the portion of the property devoted to a coastal-view park.

Applicant will need to enter the lease premises to properly map the drainage system and utility lines, and possibly to maintain the same. Staff is therefore recommending the issuance of a six-month right-of-entry for these purposes, which the Chairperson may extend for good cause.

The Lessees of Parcel 43 object to the grant of the easement on multiple grounds that are detailed in Lessee Andy Anderson's email of March 5, 2012, a copy of which (including attachments) is submitted herewith as Exhibit F. Staff has reviewed the objections and does not believe that Lessees' arguments justify the denial of the grant of easement, or the removal of the infrastructure previously installed in Parcel 43.

Staff recognizes that the grant of the easement may impact the fair market value of the lease premises and the rent payable under General Lease No. S-5188. The current rent under the lease is \$31,150 per year. The appraisal report that was prepared for the last rental reopening for the lease in 2009 did not factor in the burden of the drainage feature or utility lines. The report states in part that a "[r]eview of the Tax Map and Legal Description indicate[s] that there are no easement or restrictions affecting the property except the ground lease. . . . The land is improved with a sand volleyball court with adjacent landscaping including palm trees, shrubs and grass. There are also bleachers and land terracing." Accordingly, staff has included an Applicant Requirement above that Applicant pay for an appraisal to determine the fair market value of the lease premises

with the drainage and utility easements encumbering the land. In the event that such an appraisal results in a downward adjustment of the rent payable under the lease, staff will need to return to the Board with a recommendation for a rent reduction under General Lease No. S-5188.

On March 7, 2012, staff solicited comments on the proposed grant of easement from the State and County agencies identified below, with the results indicated.

Agency	Response
State:	
DLNR – Historic Preservation	“Because there is no new construction, there is no potential for Historic properties to be adversely affected.”
DLNR – Engineering	No response.
Department of Health, Clean Water Branch	No response.
Office of Hawaiian Affairs	No response.
County:	
Planning	No comments.
Public Works	No response.
Property Management	No objections.
Water Supply	No objections.

RECOMMENDATION: That the Board:

1. 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.
2. Authorize the subject requests to be applicable in the event of a change in the ownership of the abutting parcels described as Tax Map Key: (3) 7-5-9:25 & 28, 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. Subject to the Applicant fulfilling all of the Applicant requirements listed above, authorize the issuance of a term non-exclusive easement to LBUBS 2007 – C2 Alii Drive, LLC, covering the subject area for drainage and utility 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: (3) 7-5-9:25 & 28, provided however: (1) it is specifically understood and agreed that the easement shall immediately cease to run with the land upon the expiration or other 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. Liability insurance in the amount required by the easement instrument shall be maintained with the Lessees under General Lease No. S-5188, as well as the State, named as additional insureds;
 - D. Review and approval by the Department of the Attorney General; and
 - E. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.
4. Grant a right-of-entry to Applicant, its consultants, contractors, and/or persons acting for or on its behalf, onto the subject land 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 right-of-entry form, as may be amended from time to time;
 - B. The right-of-entry shall be for an initial term of six months. Additional six-months extensions may be granted by the Chairperson for good cause shown; and

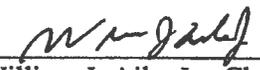
- C. The Department of Land and Natural Resources reserves the right to impose additional terms and conditions at any time if it deems necessary while this right-of-entry is in force.

Respectfully Submitted,



Kevin E. Moore
Assistant Administrator

APPROVED FOR SUBMITTAL:



William J. Aila, Jr., Chairperson

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