

State of Hawaii  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Division of Boating and Ocean Recreation  
Honolulu, Hawaii 96813

October 12, 2012

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

REQUEST TO (1) REALIGN THE PERPETUAL PUBLIC ACCESS EASEMENT CREATED BY A 1963 AGREEMENT, RECORDED IN LAND COURT AS DOCUMENT NO. 324984 AND AFFECTING TAX MAP KEY NO. (1) 2-3-37:12, OVER THE MODERN HONOLULU (HOTEL) PROPERTY OWNED BY M WAIKIKI LLC; (2) ACCEPT A PERPETUAL NON-EXCLUSIVE EASEMENT FROM M WAIKIKI LLC OVER PEDESTRIAN OVERPASS ABOVE HOBRON LANE AS A PORTION OF THE REALIGNED EASEMENT; AND (3) GRANT A 55-YEAR NON-EXCLUSIVE EASEMENT TO M WAIKIKI LLC FOR POOL DECK AND OUTSIDE DINING PURPOSES ON ELEVATED DECK ADJACENT TO SECOND FLOOR OF THE MODERN HONOLULU; AND POSSIBLE EXECUTIVE SESSION

APPLICANT:

The applicant is M Waikiki LLC, owner of The Modern Honolulu (formerly the Waikiki Edition). During the last five years, the applicant has not had a sale, lease, license, permit, or an easement covering public lands canceled for failure to satisfy the terms and conditions thereof.

STATUTORY AUTHORITY:

Hawaii Revised Statutes §§ 171-6, 171-13, and 171-30.

CEDED LAND STATUS:

Section 5(a) lands of the Hawaii Admission Act.  
DHHL 30% entitlement lands pursuant to the Hawaii State  
Constitution: YES \_ NO X

BACKGROUND and DISCUSSION:

In 1963, an agreement was entered by the State of Hawaii, by its Director of Transportation, Ilikai Incorporated, and Makaha Valley Farms, Limited, which will be referred to as the "1963 Agreement," for development in the Ilikai area adjacent to the Ala Wai Small Boat Harbor ("Ala Wai SBH"). The 1963 Agreement included (i) construction of and acceptance by the State of an elevated pedestrian walkway ("elevated deck") above the parking area along the

APPROVED BY THE BOARD OF  
LAND AND NATURAL RESOURCES  
AT ITS MEETING HELD ON

sidewalk near the Hilton Lagoon; (ii) creation of a perpetual pedestrian easement ("public access easement") over the elevated deck; and (iii) construction of two elevated public pedestrian overpasses descending to the ground from the elevated deck. The elevated deck was supposed to have been built on the makai side of what is now the Ilikai Marina Apartment Building ("Ilikai Marina Apartments"), The Modern Honolulu and the Ilikai, in Waikiki, Oahu. Pursuant to the 1963 Agreement, the elevated deck is owned by the State.

Section 6 of the 1963 Agreement authorized the construction of the elevated deck over Lots 25 and 26, as shown in Exhibit A. Exhibit A shows that the original intent was to have the elevated deck continue from the beach access way near the Hilton Lagoon to along the second floor makai side of what is now the Ilikai, The Modern Honolulu, and Ilikai Marina Apartments (spanning Hobron Lane between The Modern Honolulu and Ilikai Marina Apartments). Exhibit A also shows a dashed line drawing labeled as "Future Overpass W/15 Min Clearance Location Subject to Architects Studies" adjacent to the Ilikai Marina Apartments, and a separate dashed line drawing labeled "Pedestrian Ramp to Beach 16' Min Clearance over Roads" across from the Ilikai.

The second page of Exhibit A is a Google Map depiction of the area.

The original plan set forth in the 1963 Agreement was not fully realized. The 1963 Agreement is attached to this submittal as Exhibit B. The original plan would have provided public pedestrian access from ground level to and along an elevated walkway spanning the length of the three lots at issue (including across Hobron Lane) and in reverse direction. In actuality, only a truncated portion of the original plan was developed and the elevated deck is essentially a walkway to nowhere and has never provided the type of access intended. The elevated deck ends at the Ewa end of The Modern Honolulu (the middle of three lots).

Currently, The Modern Honolulu has constructed large planter boxes and a part of Morimoto's restaurant on the elevated deck. According to M Waikiki LLC's application, the elevated deck "has been used for outdoor dining, pool deck space, and other recreational purposes continuously since construction of the property in 1967. Furthermore, it is also undisputed that historically the Elevated State Deck appurtenant to the Ilikai was used for a wide variety of purposes, including a putting green and planters." *See* page 2 of M Waikiki LLC's application to the Land Board for use of the elevated deck, dated May 13, 2011, attached to this submittal as Exhibit C. In the past, revocable permits have been issued by the Board. Here are the revocable permits that are in DOBOR's files:

<u>Date</u>	<u>Permittee</u>	<u>Purpose</u>	<u>Rent per Month</u>
1992	Jowa Hawaii Company, Ltd.	Outdoor dining area for restaurant and deck area for swimming pool	\$1,500
1994	Jowa Hawaii Company, Ltd.	Outdoor landscaped area for wedding ceremonies by adjoining wedding chapel operations and pool deck expansion	\$1,500
2000	Forward One	Outdoor dining area for restaurant operations and deck area for swimming pool.	\$1,800

The effect of using the elevated deck for hotel purposes is the displacement of the public from the elevated deck and the public access easement.

#### PROPOSED RESOLUTION:

Upon the department's receipt of M Waikiki LLC's application for use of the elevated deck and in order to resolve the issues regarding the uncompleted elevated deck, displacement of the public from the elevated deck, and use of the elevated deck by the hotel for hotel purposes, the Division of Boating and Ocean Recreation ("DOBOR") met with representatives of the M Waikiki, LLC. Shortly after beginning discussions, M Waikiki LLC filed for bankruptcy and all communications stopped. However, M Waikiki LLC recently contacted DOBOR through the Attorney General's Office and informed DOBOR that the bankruptcy proceedings have concluded.

M Waikiki LLC is now ready to proceed with resolving the issues. A proposal to the Board was mutually agreed upon by DOBOR and M Waikiki LLC to realign the public access easement through the M Waikiki LLC property in order to create a continuous public pedestrian right-of-way between the parking structure adjacent to the Ilikai Marina Apartments and the ground level beach access way near the Hilton Lagoon. At this time, the portion of the elevated deck from the ground level beach access way to and along the makai side of the Ilikai is open and clear and not in dispute with the State. (We note that there is ongoing litigation between the Ilikai and The Modern Honolulu, but the State is not involved in that litigation.) The proposed realignment of the public access easement would run from the point that the elevated deck adjoins The Modern Honolulu on its second floor pool deck, through the pool deck and lobby area, then over the overpass that spans Hobron Lane. The overpass is already used by the public to walk between M Waikiki LLC and the parking structure contained within the Ilikai Marina Apartments. For disabled persons, the elevators in the second floor lobby area of The Modern Honolulu would be made available to travel to the ground level of The Modern Honolulu, and disabled persons may cross Hobron Lane on the street level to get to the parking structure because the overpass was constructed prior to the adoption of the Americans with Disabilities Act and does not provide an accessible path of travel for disabled persons. (M Waikiki will provide drawings of the proposed realignment at the Board's meeting.)

This proposal, if approved by the Board, will require the execution of three easement documents. The first easement would be a perpetual easement granted to the State by M Waikiki LLC for the realignment of the public access easement across the second floor pool deck and lobby area of The Modern Honolulu (including use of the elevators for disabled persons). The second easement is a perpetual easement to the State coterminous with the first easement for the portion of the public access easement that will span Hobron Lane (the overpass) to get to the parking structure contained within the Ilikai Marina Apartments. The third easement is a non-exclusive 55-year easement granted to M Waikiki LLC by the State for use of the elevated deck adjoining the second floor pool deck of The Modern Honolulu for pool deck and outdoor dining purposes to be paid for by M Waikiki LLC at appraised value.

The 1963 Agreement contains protections, including indemnification, and maintenance of the elevated deck, by the adjoining property owners for the State, which will not change. The proposal is to take the public access easement created by the 1963 Agreement and relocate the easement across the M Waikiki LLC's hotel property and extend that easement over the overpass to achieve an alignment of the easement that makes practical sense. In accordance with the 1963 Agreement, the relocated public access easement, including the overpass portion of the easement, will remain perpetual and M Waikiki LLC will continue to maintain and repair the easement area and indemnify the State as required by the 1963 Agreement.

The proposal also includes that a 55-year non-exclusive easement along the elevated deck abutting The Modern Honolulu be issued to M Waikiki LLC for pool deck and outdoor dining purposes. The public would not have to use the elevated deck for access because of the realignment of the public access easement. The cost of the easement would be determined by appraisal and the easement would be subject to the Board's standard terms and conditions subject to any language modifications approved by the Chairperson.

#### EXEMPTION FROM AN ENVIRONMENTAL ASSESSMENT:

Hawaii Administrative Rules ("HAR") § 11-200-8 A.1. provides for a particular class of action that is exempt from the preparation of an environmental assessment as follows:

#### §11-200-8 Exempt Classes of Action

- A. Chapter 343, HRS, states that a list of classes of actions shall be drawn up which, because they will probably have minimal or no significant effect on the environment, may be declared exempt by the proposing agency or approving agency from the preparation of an environmental assessment provided that agencies declaring an action exempt under this section shall obtain the advice of other outside agencies or individuals having jurisdiction or expertise as to the propriety of the exemption. Actions declared exempt from the preparation of an environmental assessment under this section are not exempt from complying with any other applicable statute or rule.
- B. In accordance with the "Comprehensive Exemption List for the Division of the Boating and Ocean Recreation, Department of Land and Natural Resources, State of Hawaii, as concurred by the Environmental Council, State of Hawaii", dated

March, 1998, the subject request is exempt from the preparation of an environmental assessment pursuant to Exemption Class No. 1 that states in pertinent part, "Operations, repairs or maintenance of existing structures, facilities, equipment or topographical features, involving negligible or no expansion or change of use beyond that previously existing."

\* \* \*

According to M Waikiki LLC's application, the elevated deck was constructed in 1967 and has continually been used for hotel purposes, such as pool deck and outdoor dining. Furthermore, revocable permits have been issued by the Board for the use of the elevated deck for hotel purposes. The public access easement over the elevated deck has encumbered the elevated deck since its construction.

The Hobron Lane overpass is used by the public to walk between M Waikiki LLC and the parking structure adjacent to the Ilikai Marina Apartments. The realignment of the public easement over the pool deck, lobby, and overpass and the granting of an easement over the elevated deck to the hotel owner for pool deck and outdoor dining purposes would probably have negligible or no expansion or change of use beyond that previously existing and would therefore be exempt from the preparation of an environmental assessment under HAR § 11-200-8 A.1.

#### **RECOMMENDATIONS:**

1. That the Board approve the realignment of the public access easement through the acceptance of two perpetual easements to be granted by M Waikiki LLC as described above and incorporated herein, subject to the following terms:

All of the terms, provisions, conditions, covenants, and restrictions of the 1963 Agreement, except to the extent that such terms, provisions, conditions, covenants, or restrictions may directly conflict with the realignment of the public access easement, will apply to the two easements to be granted by M Waikiki LLC. This includes but is not limited to the following:

- (i) M Waikiki LLC shall keep any and all structures and improvements of the elevated deck abutting M Waikiki LLC's property and area of the realigned easement including the overpass, in good order and repair, and shall comply with all rules, regulations, ordinances, and laws of the City and County of Honolulu and State of Hawaii authorities, and shall indemnify and hold harmless the City and County of Honolulu and the State of Hawaii against all actions, suits, damages, and claims by whomsoever brought or made by reason of the nonobservance and nonperformance of this covenant or of the said rules, regulations, ordinances, and laws.

- (ii) M Waikiki LLC shall allow the State at all times, with 24-hour notice to M Waikiki LLC, to enter upon and examine the condition of any and all structures and improvements relating to the elevated deck abutting M Waikiki LLC's property and realigned easement area including overpass, and M Waikiki LLC shall repair any defects within thirty (30) days after receipt of written notice thereof from the State.
- (iii) M Waikiki LLC shall hold the State of Hawaii harmless from any claim or demand by third persons for loss or damage, including claims for property damage, personal injury or wrongful death, arising out of any accident within the elevated deck abutting M Waikiki LLC's property or the realigned easement area including overpass, or occasioned by any nuisance or damage or claims growing out of or caused by any failure on the part of the M Waikiki LLC to observe or perform the covenants on their part to be observed and performed, and shall reimburse the State of Hawaii for any reasonable attorney's fees and/or other costs incurred in connection therewith.
- (iv) M Waikiki LLC shall not commit or suffer any act or neglect whereby the elevated deck abutting M Waikiki LLC's property shall become subject to any attachment, lien charge or encumbrance whatsoever, and shall indemnify and hold the State of Hawaii harmless from all such liens, charges and encumbrances and all expenses resulting therefrom, including reasonable attorney's fees.
- (v) In the event the State of Hawaii shall, without any fault, be made a party to any litigation commenced by or against the M Waikiki LLC in connection with the elevated deck abutting M Waikiki LLC's property or the realigned easement including overpass, M Waikiki LLC shall pay all costs and reasonable attorney's fees incurred by or imposed on the State of Hawaii and shall also pay all costs and reasonable attorney's fees which may be incurred or paid by the State of Hawaii in enforcing the covenants.
- (vi) M Waikiki LLC shall procure at its own cost and expense and keep in force a policy or policies of comprehensive general liability insurance in such form and with such insurance company or companies as shall satisfy the State that M Waikiki LLC will be able to fulfill M Waikiki LLC's covenants to the State in the easements for realignment of the public access easement, including the overpass, with minimum limits for personal injury and property damage that are usual in the Hawaii hotel industry, and shall provide DOBOR with a copy of said policies.
2. That the two easements addressed in recommendation no. 1 shall run with the land.
  3. That the specific language of the two easements addressed in recommendation no. 1 be negotiated by the Department of the Attorney General and approved by the Chairperson.
  4. That the Board grant to M Waikiki LLC a non-exclusive 55-year easement over and along the elevated deck abutting The Modern Honolulu for pool deck and outdoor dining purposes, for which M Waikiki LLC shall pay the State the value of the easement determined by appraisal and pay all costs of the appraisal; that the easement be subject to the Board's most current standard terms and conditions with any modifications of the

language to be negotiated by the Department of the Attorney General and approved by the Chairperson; that such easement shall benefit the property owned by M Waikiki LLC (The Modern Honolulu) and run with the land so long as each succeeding owner has not, during the five years before it acquired the property, had any sale, lease, license, permit, or easement covering public lands canceled for failure to satisfy the terms and conditions thereof.

5. That M Waikiki LLC shall prepare for all easements, all metes and bounds descriptions and maps for submission to and approval by the department and the Survey Division of the Department of Accounting and General Services.
6. That all easements be properly filed in the Land Court.
7. That the Board declare that the realignment of the public easement over the pool deck, lobby, and overpass and the granting of an easement over and along the elevated deck abutting The Modern Honolulu for pool deck and outdoor dining purposes would probably have negligible or no expansion or change of use beyond that previously existing and would therefore be exempt from the preparation of an environmental assessment under HAR § 11-200-8 A.1.
8. That other terms and conditions as prescribed by the Chairperson to serve the best interests of the State shall be applicable.
9. That all recommendations above be subject to review and approval by the Department of the Attorney General.

Respectfully submitted,



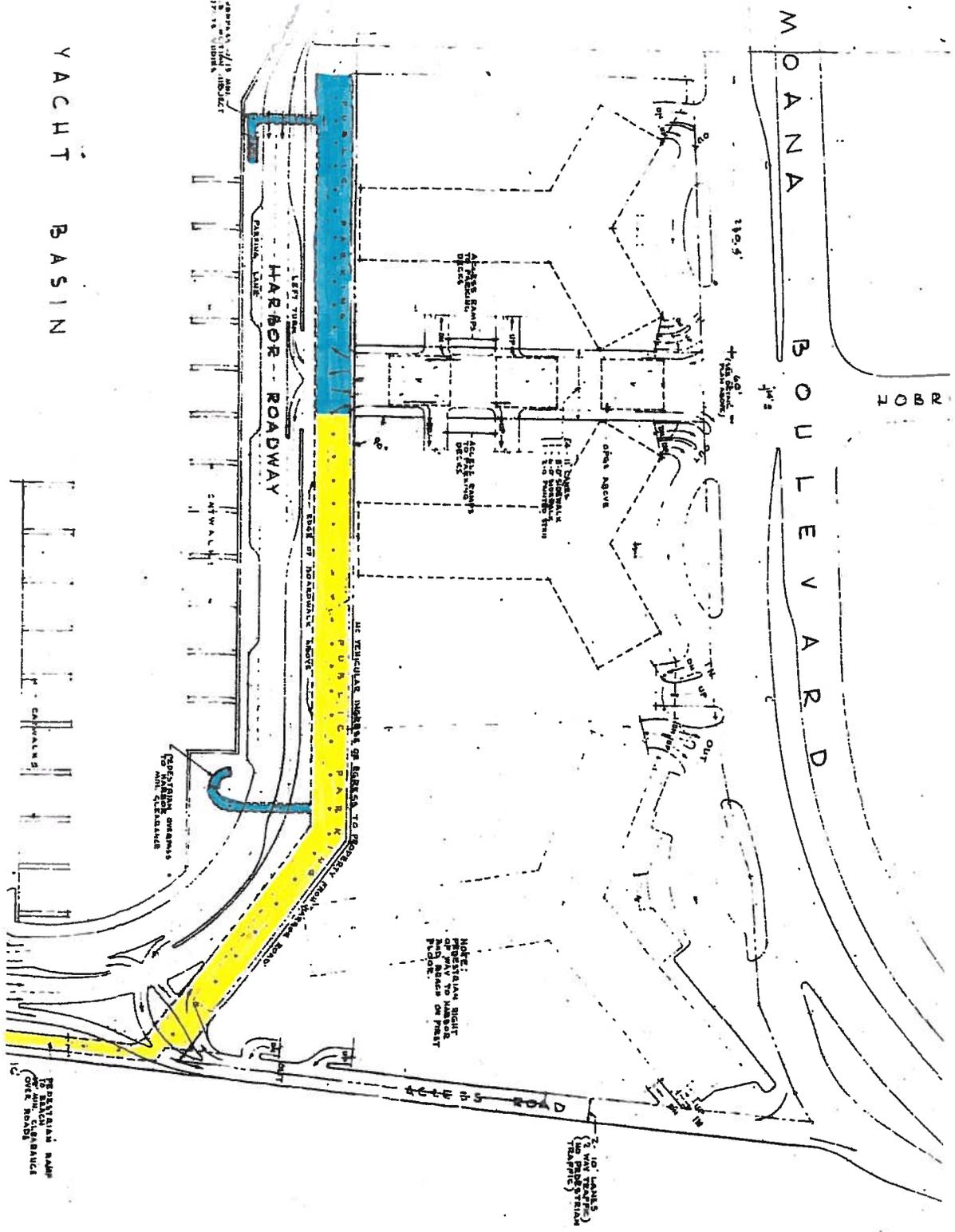
Edward R. Underwood  
Administrator

Attachments

APPROVED FOR SUBMITTAL:



William J. Aila, Jr.  
Chairperson and Member



 Current elevated walkway.

 Portion of elevated walkway not constructed.

EXHIBIT A



Google earth

feet 600  
meters 100



EXHIBIT A



AGREEMENT

THIS INDENTURE made this 23<sup>rd</sup> day of December, 1963, by and among the STATE OF HAWAII, by its Director of Transportation, hereinafter called the "STATE", and ILIKAI, INCORPORATED, and MAKAHA VALLEY FARMS, LIMITED, both Hawaii corporations, whose principal places of business are located in Honolulu, Hawaii, hereinafter called "OWNERS",

WITNESSETH THAT:

WHEREAS, on July 11, 1961, the STATE entered into an Agreement with Hawaiian Dredging & Construction Company, Limited, now known as Dillingham Corporation, a Hawaii corporation, and ILIKAI, INCORPORATED, with respect to Lot 1, as shown on Map 1 of Land Court Consolidation 64 and other parcels of land, which agreement has not been publicly recorded; and

WHEREAS, Lot 1 has since been subdivided into Lots 1-A, 1-B, 1-C and 1-D, as shown on Map 2 of Land Court Consolidation 64 and Lot 1-D has been further subdivided into Lots 1-D-1 and 1-D-2 as shown on Map 3 of Land Court Consolidation 64; and

WHEREAS, the owners of said lots and the corresponding Transfer Certificates of Title Numbers are as follows:

<u>LOT</u>	<u>OWNERS</u>	<u>T.C.T.</u>	<u>MAP NO.</u>
1-A	Ilikai, Incorporated	85,450	2 LCC 64
1-B	Ilikai, Incorporated	81,553	2 LCC 64
1-C	Ilikai, Incorporated	85,451	2 LCC 64
1-D-1) 1-D-2)	Makaha Valley Farms, Ltd.	84,862	3 LCC 64

and

WHEREAS, pursuant to paragraphs 1, 8 and 11 of the aforementioned unrecorded Agreement dated July 11, 1961, the access rights affecting Lots 1-D-1 and 1-D-2 have been conveyed to the STATE and Lot 1-C and the access rights affecting Lots 1-A and 1-B are to be conveyed to the STATE; and

WHEREAS, it is the intent and desire of the parties herein that the terms and conditions of the aforementioned unrecorded Agreement dated July 11, 1961 and certain additional agreements to effectuate said terms and conditions should be incorporated in this Agreement in a form acceptable for filing with the Assistant Registrar of the Land Court and that the said unrecorded Agreement shall be hereby cancelled.

NOW, THEREFORE, in consideration of the foregoing premises and of the agreements hereinafter contained, it is hereby mutually agreed by and among the parties as follows:

1. ILIKAI, INCORPORATED shall convey Lot 1-C, together with all appurtenances and encumbrances thereon to the STATE, in fee simple and without cost to the STATE, and the STATE shall improve and use said Lot 1-C for a vehicular and pedestrian right-of-way, subject, however, to this Agreement.

2. ILIKAI, INCORPORATED shall subdivide Lot 1-A into two (2) lots to be designated as Lot 1-A-1, containing 122,071 square feet, more or less, and Lot 1-A-2, containing 143 square feet, more or less, or such other designation as shall be used and shall grant and convey to the STATE a perpetual easement for a public right-of-way over, across, along and upon said Lot 1-A-2 as subdivided.

3. All of the access rights into and from Lot 25 of Land Court Consolidation 32, over and across the boundary common to said Lot 25 and

Lot 1-A-1 and Lot 1-B, as shown on Map \_\_\_\_\_ and Map 2 of Land Court Consolidation 64 and all of the access rights over and across the common boundary of Lot 1-A-1 and Lot 1-A-2, as shown on Map \_\_\_\_\_ of Land Court Consolidation 64 shall be conveyed by ILIKAI, INCORPORATED to the STATE, provided, however, that ILIKAI, INCORPORATED shall reserve the right to use Lot 1-A-2 for a right-of-way in common with the public.

4. A perpetual overhead easement over and across the aforementioned Lot 1-C as conveyed to the STATE shall be reserved unto the OWNERS, and said perpetual overhead easement shall be utilized by said OWNERS in a manner which will not interfere with the free flow of vehicular and pedestrian traffic on said land and the plans and specifications for construction of any structure reserved herein shall be subject to the prior approval of the STATE. The ramps over and across said land shall be constructed substantially in the manner shown on the plan, entitled "Ilikai Apartments" prepared by John Graham and Company and dated February 3, 1961, which plan is attached hereto as Exhibit A and made a part hereof.

5. A perpetual easement under, over and across said Lot 1-C shall be reserved unto the OWNERS, for utility, communications, sewer, and other like purposes in a manner which will not interfere with the free flow of vehicular and pedestrian traffic on said land.

6. The OWNERS shall have the right to construct, repair, replace, maintain, and improve for and on behalf of the STATE, and the STATE shall accept, substantially as shown and designated in Exhibit A, the following:

(a) An elevated pedestrian right-of-way over Lots 25 and 26 of Land Court Consolidation 32 (said Lot 26 now being designated as Lot 2, as shown on Map 1 of Land Court Consolidation 64) and

the public right-of-way adjoining Land Court Consolidation 1716.

(b) Two elevated public pedestrian overpasses extending from said elevated public pedestrian right-of-way in 6(a) hereinabove, provided, however, the said overpasses may be relocated with the approval of the STATE; and

(c) An elevated public pedestrian ramp to descend from the Waikiki (east) end of said elevated public pedestrian right-of-way of 6(a) hereinabove.

TOGETHER with the foundations and columns to support the structures in subparagraphs 6(a), 6(b) and 6(c) hereinabove, and, also, together with the installation, repair, replacement, and maintenance of utilities and other similar appurtenances in conjunction with the structures mentioned in subparagraphs 6(a), 6(b) and 6(c) hereinabove.

7. The OWNERS shall not construct any structure on or over their approximately ten (10) foot wide strip of land, which consists substantially of Lots 14, 15, and 19 of Land Court Consolidation 32 (presently identified respectively as Lots 3, 4 and 5 of Land Court Consolidation 64) and Lot 5-C-2 of Land Court Application 852 owned by the STATE, which are adjacent to the ten (10) foot wide public right-of-way bordering Land Court Applications 1716 and 1549, and shall forever keep the use of the above-mentioned land as public roadway.

8. Notwithstanding anything contained in Exhibit A to the contrary, the reservations contained in paragraphs 4 and 5 herein and the structures specified in subparagraphs 6(a), 6(b) and 6(c) herein shall be, wherever applicable, subject to the following:

a. The structures to be constructed pursuant to paragraphs 4 and 5, and subparagraphs 6(a), 6(b) and 6(c) herein shall be

constructed only in accordance with plans and specifications approved by the STATE; it being the intent of the STATE to provide easy, safe, and esthetically beautiful access to Duke Kahanamoku Beach and Ala Wai Boat Harbor for the public at a minimum cost to the STATE. The STATE shall consider the wishes of the adjoining land owner and the engineering and architectural feasibility of construction on the part of the OWNERS in the fulfillment of the intentions expressed in this Section in the construction of the structure provided for under subparagraph 6(c).

The OWNERS agree to the following:

(1) Any structure constructed pursuant to subparagraph 6(a) herein over any roadway shall have a minimum clearance above such roadway of fourteen (14) feet.

(2) Any structure constructed pursuant to subparagraph 6(b) herein over any roadway shall have a minimum clearance above such roadway of sixteen (16) feet.

(3) Any structure constructed pursuant to subparagraph 6(c) herein over any roadway shall have a minimum clearance of sixteen (16) feet; provided, however, with the approval of the Director of Transportation, a structure of a lesser clearance may be constructed.

(4) Any structure constructed pursuant to paragraphs 4 and 5 herein over any roadway shall have a minimum clearance of sixteen (16) feet over such roadway.

b. The structures specified in subparagraphs 6(a), 6(b) and 6(c) herein shall be used only for pedestrian traffic and shall be forever open to the use of the public.

c. The OWNERS shall keep any and all structures and improvements constructed pursuant to paragraphs 4 and 5, and subparagraphs 6(a), 6(b) and 6(c) of this agreement in good order and repair and shall comply with all rules, regulations, ordinances, and laws of the proper county and state authorities, and will indemnify and hold harmless the applicable county and the STATE against all actions, suits, damages, and claims by whomsoever brought or made by reason of the nonobservance and nonperformance of this covenant or of the said rules, regulations, ordinances, and laws.

d. The OWNERS shall allow the STATE at all times to enter upon and examine the condition of any and all structures and improvements constructed pursuant to paragraphs 4 and 5 and subparagraphs 6(a), 6(b) and 6(c) of this agreement and the OWNERS shall repair any defects within thirty (30) days after receipt of written notice thereof from the STATE.

e. The OWNERS shall hold the STATE harmless from any claim or demand by third persons for loss or damage, including claims for property damage, personal injury or wrongful death, arising out of any accident within said perpetual overhead easement, right-of-way, pedestrian ramp, overpasses and any other constructions and structures constructed pursuant to paragraphs 4 and 5 and subparagraphs 6(a), 6(b) and 6(c) herein or occasioned by any nuisance or damage or claims growing out of or caused by any failure on the part of the OWNERS to observe or perform the covenants on their part to be observed and performed, and shall reimburse the STATE for any reasonable attorney's fees and/or other costs incurred in connection therewith.

f. The OWNERS shall not commit or suffer any act or neglect whereby said right-of-way, pedestrian ramp, and overpasses mentioned in subparagraphs 6(a), 6(b) and 6(c) herein, including improvements thereon, shall become subject to any attachment, lien charge or encumbrance whatsoever, and shall indemnify and hold the STATE harmless from all such liens, charges and encumbrances and all expenses resulting therefrom, including reasonable attorney's fees; provided, however, that in the event that subordination of the STATE's interests in the structures constructed pursuant to subparagraphs 6(a), 6(b) and 6(c) herein is required by any lending institution financing their construction, the STATE hereby agrees and consents to said subordination; provided, further, that in any event, said structures shall be used only for pedestrian traffic and shall be forever open to the use of the public.

g. In case the STATE shall, without any fault, be made a party to any litigation commenced by or against the OWNERS, in connection with said perpetual overhead easement, right-of-way, pedestrian ramp, and overpasses, mentioned in paragraphs 4 and 5, and subparagraphs 6(a), 6(b) and 6(c) herein, the OWNERS shall pay all costs and reasonable attorney's fees incurred by or imposed on the STATE and shall also pay all costs and reasonable attorney's fees which may be incurred or paid by the STATE in enforcing the covenants herein.

h. The OWNERS shall not (except as provided in subparagraph 8 f herein), without the consent in writing of the STATE, assign or mortgage any interest in said right-of-way, pedestrian ramp, and overpasses mentioned in subparagraphs 6(a), 6(b) and 6(c) herein;

provided, however, that the STATE shall not unreasonably withhold such consent and shall not require the payment of any money for giving such consent, other than reasonable charge for the processing of an application for and preparation of the form of consent.

i. The OWNERS shall procure at their own cost and expense and keep in force a policy or policies of comprehensive general liability insurance in form and with such insurance company or companies as shall be satisfactory to the STATE, with minimum limits of not less than \$200,000 for injury to one person and not less than \$500,000 for injury to more than one person, and not less than \$25,000 against the claim of third persons for property damages, and will deposit a copy of said policy or policies with the STATE.

9. The OWNERS further agree that the STATE shall be granted without cost any excess fill from any construction of the land described in the third "WHEREAS" paragraph hereinabove, as and when available, immediately upon excavation for the purpose of widening that portion of the Harbor Road adjoining the above described premises of the OWNERS or for such other purpose as the STATE may require for the development of Ala Wai Harbor; provided, however, that if such fill is not accepted by the STATE, as and when available, immediately upon excavation, the OWNERS shall deal with said fill as they see fit in their sole discretion. The cost of transporting said fill away from the place of excavation for the above stated purposes shall be the responsibility of the STATE.

10. Approval of the State whenever required pursuant to this agreement shall not be unreasonably withheld by the STATE.

11. The parties hereto shall do any and all acts and shall

delivery any and all documents and papers necessary to effectuate the terms and covenants of this agreement.

12. This Agreement shall be binding upon and inure to the benefit of the parties herein and their successors and assigns.

13. The term "OWNERS" whenever and wherever used herein, shall mean the OWNERS, their successors and assigns; and the term "STATE" whenever and wherever used herein shall mean the State of Hawaii and any political subdivision, agency, department, instrumentality, or officer thereof.

14. The certain unrecorded Agreement dated July 11, 1961 hereinabove mentioned is hereby cancelled.

AND, CAPITAL PROPERTIES, LIMITED, a Hawaii corporation, the Buyer of said Lot 1-B under an Agreement of Sale dated December 1, 1960, and filed in the Office of the Assistant Registrar of the Land Court as Document No. 278,530 and KAISER FOUNDATION HOSPITALS, a California corporation, the Buyer of Lot 1-D-2 under an Agreement of Sale dated August 15, 1963, and filed in the said Office of the Assistant Registrar as Document No. 315,145, in consideration of the foregoing premises and the mutual promises of the parties herein, do hereby consent to and join in the terms and conditions of this Agreement.

AND, BANK OF HAWAII, a Hawaii corporation, the Mortgagee of Lots 1-A-1 and 1-A-2 under that certain Mortgage dated January 2, 1962, and filed in said Office of the Assistant Registrar as Document No. 284,430, in consideration of the foregoing premises and the mutual promises of the parties herein, does hereby consent to the terms and conditions of this Agreement.

AND, DILLINGHAM CORPORATION, (formerly known as

*Approved for Registration  
this 2nd day of Feb. 1964.  
Sec. No. 285283.  
Karl G. T. Espinoza  
Assistant Registrar*

Hawaiian Dredging & Construction Company, Ltd.), a Hawaii corporation, the Assignee/Mortgagee of that certain Mortgage dated October 1, 1960, filed in said Office of the Assistant Registrar as Document No. 263,994 affecting Lot 1-B pursuant to an Assignment of the same from Ala Moana Properties, Limited, dated November 28, 1960, and filed in said Land Court as Document No. 266,364, in consideration of the foregoing premises and the mutual promises of the parties herein, does hereby consent to the terms and conditions of this Agreement.

IT IS HEREBY FURTHER AGREED by and among the parties herein that this Agreement shall be noted on Transfer Certificates of Title Nos. 85,450, 81,553, 85,451, 84,862 and 66,816.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed the day and year first above written.

STATE OF HAWAII  
BY ITS DEPARTMENT OF TRANSPORTATION

By *Luigi Matos*  
Its Director

APPROVED AS TO FORM:

*Johnson McCoy*  
Deputy Attorney General

ILIKAI, INCORPORATED

By *[Signature]*  
Its President

By *[Signature]*  
Its Secretary





STATE OF HAWAII )  
 : SS.  
CITY AND COUNTY OF HONOLULU )

On this 29<sup>th</sup> day of December, 1963, before me appeared  
CHINN HO and ALTA MAE GOFFIN,  
to me personally known, who, being by me duly sworn, did say that they  
are the PRESIDENT and SECRETARY, respectively,  
of MAKAHA VALLEY FARMS, LIMITED, a Hawaii corporation; that the seal  
affixed to the foregoing instrument is the corporate seal of said corpora-  
tion; that said instrument was signed and sealed in behalf of said corpora-  
tion by authority of its Board of Directors; and said \_\_\_\_\_  
CHINN HO and ALTA MAE GOFFIN acknow-  
ledged said instrument to be the free act and deed of said corporation.

W. A. [Signature]  
Notary Public, First Judicial  
Circuit, State of Hawaii.

My commission expires: 9/6/64

STATE OF HAWAII )  
 : SS.  
CITY AND COUNTY OF HONOLULU )

On this 29<sup>th</sup> day of December, 1963, before me appeared  
WILLIAM H. HEEN and ALTA MAE GOFFIN,  
to me personally known, who, being by me duly sworn, did say that they  
are the PRESIDENT and SECRETARY, respectively,  
of CAPITAL PROPERTIES, LIMITED, a Hawaii corporation; that the seal  
affixed to the foregoing instrument is the corporate seal of said corpora-  
tion; that said instrument was signed and sealed in behalf of said corpora-  
tion by authority of its Board of Directors; and the said  
WILLIAM H. HEEN and ALTA MAE GOFFIN  
acknowledged said instrument to be the free act and deed of said corpora-  
tion.

W. A. [Signature]  
Notary Public, First Judicial  
Circuit, State of Hawaii.

My commission expires: 9/6/64

STATE OF HAWAII )  
 : SS.  
CITY AND COUNTY OF HONOLULU )

On this 17<sup>th</sup> day of ~~December~~, <sup>January, 1964,</sup> 1963, before me appeared

Robert Jack and Conrad Bohuslav, to me personally known, who, being by me duly sworn, did say that they are

the Regional Manager and Regional Controller, respectively, of KAISER FOUNDATION HOSPITALS, a ~~Nevada~~ <sup>Nevada</sup> corporation; that the seal affixed to the foregoing instrument is the corporate seal of said corporation; that said instrument was signed and sealed in behalf of said corporation

by authority of its Board of Directors; and said \_\_\_\_\_

Robert Jack and Conrad Bohuslav acknowledged said instrument to be the free act and deed of said corporation.

Donald H. Allen  
Notary Public, First Judicial  
Circuit, State of Hawaii.

My commission expires: June 5, 1966

STATE OF HAWAII )  
 : SS.  
CITY AND COUNTY OF HONOLULU )

On this 2nd day of ~~December~~, <sup>January, 4</sup> 1963, before me appeared

D. I. Austin Jr and \_\_\_\_\_, to me personally known, who, being by me duly sworn, did say that they are

~~the~~ is a Vice President and \_\_\_\_\_, respectively, of BANK OF HAWAII, a Hawaii corporation; that the seal affixed to the foregoing instrument is the corporate seal of said corporation; that said instrument was signed and sealed in behalf of said corporation by authority

of its Board of Directors; and said D. I. Austin Jr.

and \_\_\_\_\_ acknowledged said instrument to be the free act and deed of said corporation.

Barbara T. ...  
Notary Public, First Judicial  
Circuit, State of Hawaii.

My commission expires: June 11, 1966

STATE OF HAWAII )  
 ) : SS.  
CITY AND COUNTY OF HONOLULU )

On this 13<sup>th</sup> day of <sup>January</sup> ~~December~~, 1960, before me appeared

R. A. CROCK and R. A. GIRTON,

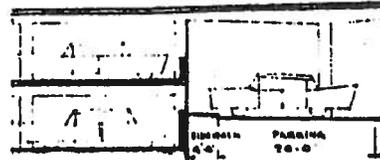
to me personally known, who, being by me duly sworn, did say that they are the FINANCIAL VICE PRESIDENT and VICE PRESIDENT and SECRETARY, respectively, of DILLINGHAM CORPORATION, a Hawaii corporation; that the seal affixed to the foregoing instrument is the corporate seal of said corporation; that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors; and said R. A. CROCK and R. A. GIRTON acknowledged said instrument to be the free act and deed of said corporation.

*Emmaline Handaath*  
Notary Public, First Judicial  
Circuit, State of Hawaii.

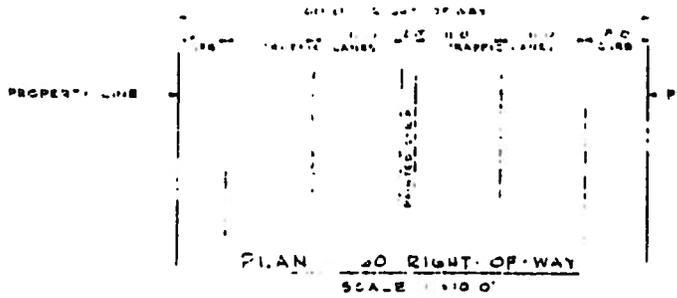
My commission expires: MAY 5, 1963

PROPERTY LINE

35' 0" (MAX)



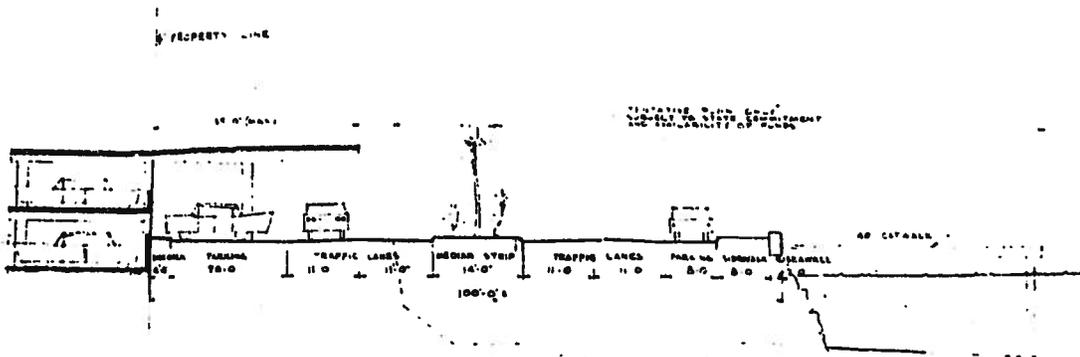
PRO



NOTE: MINIMUM CLEARANCE  
16' 0\"

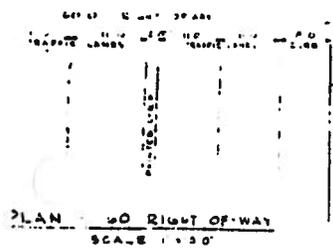
A L A M O A N A

TRAFFIC



TYPICAL SECTION  
PROPOSED HARBOR ROAD SYSTEM

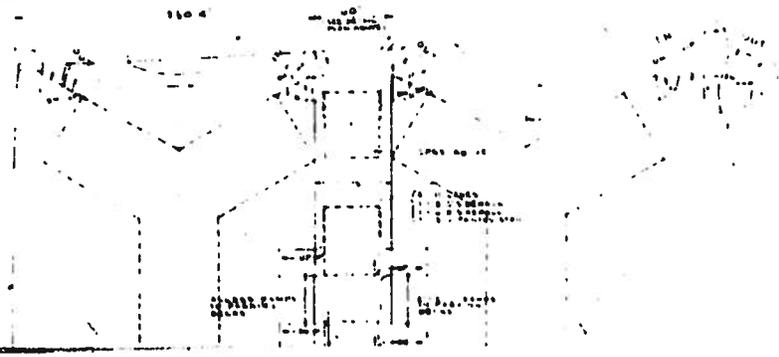
NOTE: MINIMUM CLEARANCE OVER TRAFFIC AREA - 15'-0"  
MINIMUM CLEARANCE ABOVE SIDEWALK CURBS - 16'-0"



PLAN - 50' RIGHT OF WAY  
SCALE 1" = 20'

NOTE: MINIMUM CLEARANCE  
OVER CURBS - 16'-0"

A MOANA BOULEVARD



NOTE: PROVISIONS SHOWN  
ON THIS PLAN ARE  
FOR GENERAL USE ONLY  
AND DO NOT CONSTITUTE  
A GUARANTEE OF ANY  
KIND.

SCALE 1" = 20'

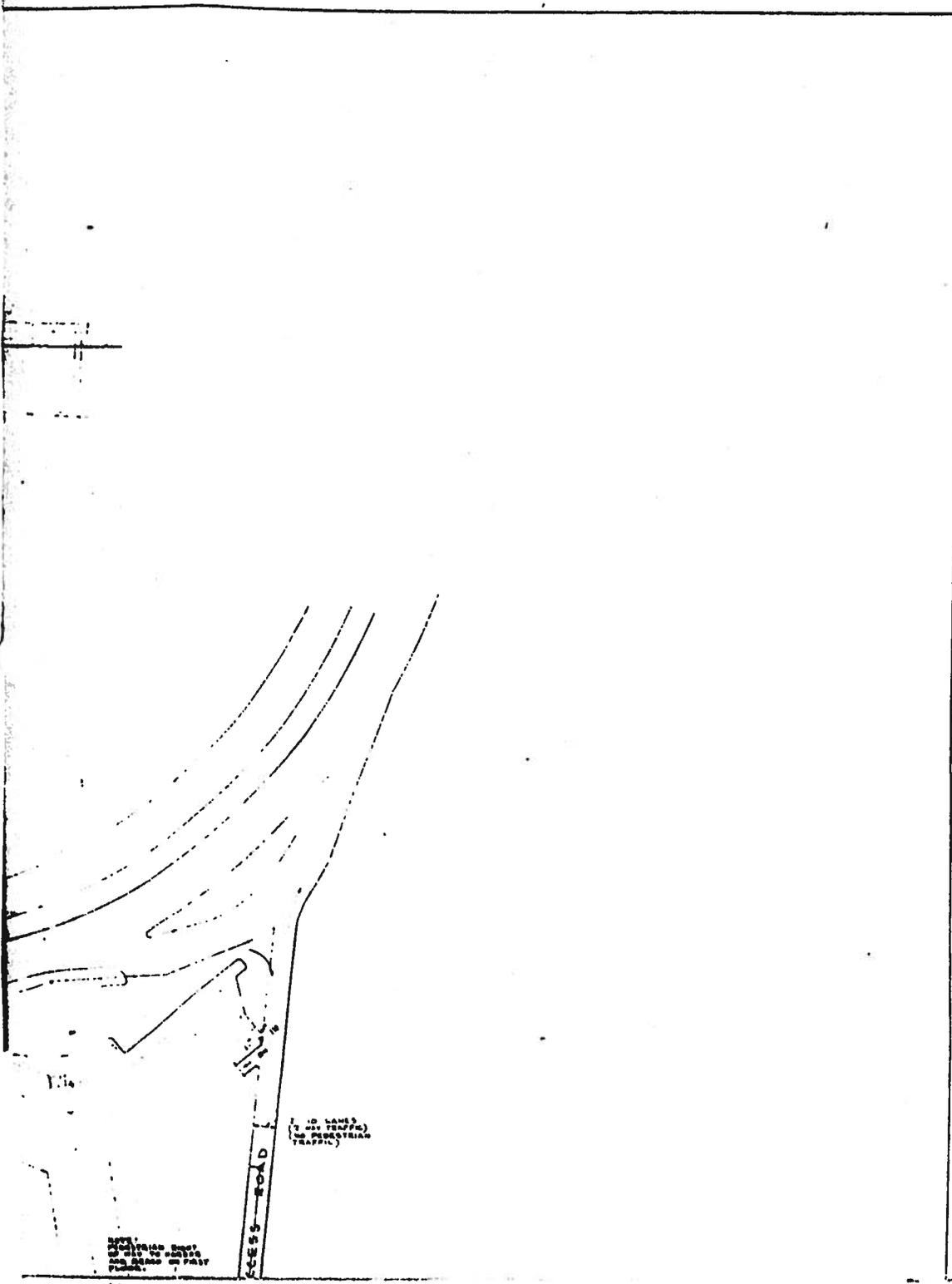
ALA MOAN

2 WAY TRAFFIC

FUTURE OVERPASS w/ 40' MIN. CLEARANCE - DESIGN SUBJECT TO ARCHITECTS STUDIES

ALA WAI YACHT

ACCESS R



10 LANE  
(20 FT TRAFFIC)  
(10 FT PEDESTRIAN  
TRAFFIC)

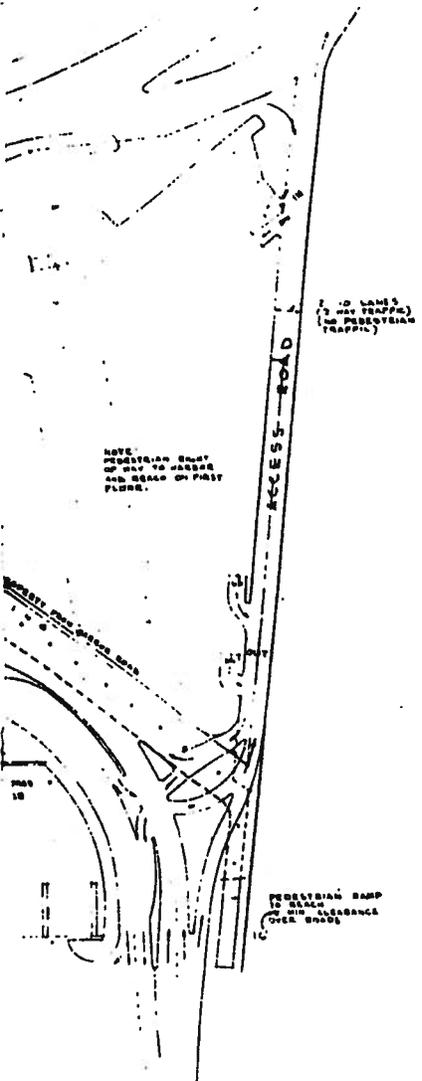
SEE  
SECTION 1001  
FOR  
DETAILS  
OF  
CONSTRUCTION  
AND  
MATERIALS  
TO  
BE  
USED.

ACCESS ROAD

21-1  
100

A





NING

# EXHIBIT A

10-61 ROAD & RAMP FOR PLANET

PROJECT NO.	2113	DATE	10-61	BY	J. W. H.
PROJECT NAME	ACCESS ROAD & HARBOR ROAD WIDENING				NO. 10
CLIENT	ILIKAI APARTMENTS				P I
	HONOLULU, HAWAII				
ARCHITECT	JOHN SHARAH AND COMPANY ARCHITECTS AND ENGINEERS				
	1435 KEELE ST. HONOLULU, HAWAII				

# CASE LOMBARDI & PETTIT

A LAW CORPORATION

Lissa H. Andrews  
James M. Crnbley  
Stacey W.E. Foy  
Gregory M. Hansen  
Michael L. Lam  
Dennis M. Lombardi†  
Michael R. Marsh

Ted N. Pettit, Ph.D.  
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David G. Brittin  
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Megan K. Kau  
Michael G. Kozak  
Dana R.C. Lyons  
Kate S. Metzger

\*Admitted California only

Of Counsel  
Daniel H. Case  
Frederick W. Rohlfling III

Bruce C. Bigelow (1946-2001)

† A Law Corporation

## LETTER OF TRANSMITTAL

To: Mr. Edward Underwood – DLNR Administrator      Date: May 13, 2011  
State of Hawaii  
Department of Land and Natural Resources  
333 Queen Street, Suite 300  
Honolulu, Hawaii 96813

From: David G. Brittin

Re: Submittal of Application to Board of Land and      Our File: 28490-3  
Natural Resources

I am transmitting to you the following:

1. Case Lombardi & Pettit's May 13, 2011 correspondence with enclosures addressed to Board of Land and Natural Resources, Attention: Mr. William J. Aila, Jr.

<input type="checkbox"/> For your information	<input checked="" type="checkbox"/> <b>For necessary action</b>
<input type="checkbox"/> For your files	<input type="checkbox"/> For signature in <b>BLACK</b>
<input type="checkbox"/> For review and comment	<b>INK</b>
<input type="checkbox"/> Per your request	<input type="checkbox"/> For payment
<input type="checkbox"/> Per our agreement	<input type="checkbox"/> Disapproved
<input type="checkbox"/> Per our conversation	<input checked="" type="checkbox"/> <b>See remarks below</b>

**REMARKS:** I have enclosed our May 13, 2011 application to the Board of Land and Natural Resources. If you have any questions, please feel free to contact me. Thank you.

By



David G. Brittin

DGB:11-95  
Enclosures  
28490/3/1261838.1

**EXHIBIT "C"**

# CASE LOMBARDI & PETTIT

A LAW CORPORATION

Lissa H. Andrews  
James M. Cribley  
Stacey W.E. Foy  
Gregory M. Hansen  
Michael L. Lam  
Dennis M. Lombardi†  
Michael R. Marsh

Ted N. Pettit, Ph.D.  
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David G. Brittin  
Malia S.L. Day  
Ryan M. Hamaguchi\*  
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Michael G. Kozak  
Dana R.C. Lyons  
Kate S. Metzger

\*Admitted California only

Of Counsel  
Daniel H. Case  
Frederick W. Rohlfing III

Bruce C. Bigelow (1946-2001)

† A Law Corporation

May 13, 2011

Board of Land and Natural Resources  
Kalanimoku Building  
1151 Punchbowl St.  
Honolulu, HI 96813  
Ph: (808) 587-0400  
Honolulu, Hawai'i  
Attention: Mr. William J. Aila, Jr.

Application to: 1) amend a 1963 Agreement, recorded in Land Court as Document No. 324984, for Tax Map Key No. (1) 2-3-37:12, so that it conforms to the as built configuration of the improvements in Lot 25 of Land Court Consolidation 32, and 2) clarify permissible uses within a portion of the elevated deck described in the Application and the Agreement to reflect all the authorized uses that have existed since 1967, or, in the alternative, 3) obtain a lease or exclusive easement for the elevated deck area adjacent to Applicant's property.

## APPLICANT (PETITIONER):

M Waikiki, LLC,  
c/o Dennis M. Lombardi, Esq.  
Case Lombardi & Pettit  
737 Bishop St., Suite 2600 Mauka Tower  
Honolulu, Hawai'i 96813

## LEGAL REFERENCE:

Sections 171-13, 35, 54 and 55, Hawai'i Revised Statutes. Reference is also made to the July 15, 1991 Opinion of the Attorney General of the State of Hawaii regarding the power of the State to enter into a disposition of the State owned land subject to this Application, attached hereto as Exhibit "A".

## LOCATION:

Elevated deck over Lot 25 of Land Court Consolidation 32, Honolulu, Hawai'i, Tax Map Key No. (1) 2-3-37:12, as shown on the attached map. See Exhibit "B". The elevated deck extends from Lot 1-B, as shown on Map 2, Land Court Consolidation 64, which is owned by the Applicant, and continues along the adjacent Lot 1-A, as shown on Map 2, Land Court Consolidation 64. The Applicant seeks either to amend the Agreement as to the portion of the

lands subject to the Agreement that are abutting Applicant's property, or to obtain a lease or easement from the State of Hawaii on the portion of the elevated deck abutting Applicant's property that would permit the continuation of outdoor dining and pool deck uses.

**AREA AFFECTED BY APPLICATION:**

The portion of the Elevated State Deck, defined below, abutting Lot 1-B, as shown on Map 2, Land Court Consolidation 64 containing approximately 6,584 square feet.

**ZONING:**

State Land Use District:	Urban
City and County of Honolulu LUO:	Public Precinct

**CURRENT USE STATUS:**

The Elevated State Deck has been used for outdoor dining, pool deck space, and other recreational purposes continuously since construction of the property in 1967.

**CHAPTER 343 – ENVIRONMENTAL ASSESSMENT:**

In accordance with Hawai'i Administrative Rules §11-200-8, the subject request is exempt from the preparation of an environmental assessment based on the following exemption:

(1) "Operations, repairs or maintenance of existing structures, facilities, equipment or topographical features, involving negligible or no expansion or change of use beyond that previously existing."

**BACKGROUND:**

This application relates to the elevated deck over Lot 25 of Land Court Consolidation 32, Honolulu, Hawai'i, Tax Map Key No. (1) 2-3-37:12 (the "Elevated State Deck"). The Elevated State Deck was created pursuant to that certain Agreement, dated December 23, 1963, by and between Ilikai, Inc., Makaha Valley Farms, Ltd. ("Makaha") and the State of Hawaii (the "1963 Agreement"). A copy of the 1963 Agreement is attached hereto as Exhibit "C". The 1963 Agreement defines Ilikai and Makaha as the "Owners".

Ilikai, Inc. owned Lots 1-A and 1-C as shown on Map 2 of Land Court Consolidation 64, and Makaha owned Lots 1-D-1 and 1-D-2 (now Lot 6 as shown on Map 6 of Land Court Consolidation 64). Ilikai, Inc. had previously sold Lot 1-B to Capital Properties, Limited, which we believe was an affiliated company, through an Agreement of Sale, but still held bare legal title to Lot 1-B pursuant to the terms of that document. The Ilikai Apartment Building was constructed on Lot 1-A (the "Ilikai Parcel"), the Waikiki Edition building was constructed on Lot 1-B (the "Edition Parcel"), and the Ilikai Marina Apartment Building was constructed on Lot 6 (the "Marina Parcel").

Section 6 of the 1963 Agreement creates a right to construct and obligates the Owners to maintain and improve the Elevated State Deck:

The OWNERS shall have **the right to construct, repair, replace, maintain, and improve for and on behalf of the STATE, and the STATE shall accept,** substantially as shown and designated in Exhibit A, the following:

(a) An elevated pedestrian right-of-way over Lots 25 and 26 of Land Court consolidation 32 (said Lot 26 now being designated as Lot 2, as shown on Map 1 of Land Court Consolidation 64) and the public right-of-way adjoining Land Court Consolidation 1716.

(b) Two elevated public pedestrian overpasses extending from said elevated pedestrian right-of-way in 6(a) herein above, provided, however, that said overpasses may be relocated with the approval of the STATE; and

(c) An elevated public pedestrian ramp to descend from the Waikiki (East) end of said elevated public pedestrian right-of-way of 6(a) hereinabove.

Together with the foundations and columns to support the structures in subparagraphs 6(a), 6(b) and 6(c) hereinabove, and, also, together with the installation, repair, replacement, and maintenance of utilities and other similar appurtenances in conjunction with the structures mentioned in subparagraphs 6(a), 6(b) and 6(c) hereinabove.

(Emphasis added).

Section 8 provides in pertinent part:

Notwithstanding anything contained in Exhibit A to the contrary, the reservations contained in paragraphs 4 and 5 herein and the structures specified in subparagraphs 6(a), 6(b) and 6(c) herein shall be, whenever applicable, subject to the following:

a. The structures to be constructed pursuant to paragraphs 4 and 5, and subparagraphs 6(a), 6(b) and 6(c) herein shall be constructed only in accordance with plans and specifications approved by the STATE; it being the intent of the STATE to provide easy, safe, and aesthetically beautiful access to Duke Kahanamoku Beach and Ala Wai Boat Harbor for the public at a minimum cost to the STATE.

...

b. The structures specified in subparagraphs 6(a), 6(b) and 6(c) herein shall be used only for pedestrian traffic and shall be forever open to the use of the public.

c. The OWNERS shall keep any and all structures and improvements constructed pursuant to paragraphs 4 and 5, and subparagraphs 6(a), 6(b) and 6(c) of this

agreement in good order and repair and shall comply with all rules, regulations, ordinances, and laws of the proper county and state authorities, and will indemnify and hold harmless the applicable county and the STATE against all actions, suits, damages, and claims by whomsoever brought or made by reason of the nonobservance and nonperformance of this covenant or the said rules, regulations, ordinances, and laws.

Section 6 is in contrast to Sections 4 and 5 of the 1963 agreement which specifically refer to the creation of perpetual easements. For example, Section 4 provides, in pertinent part:

4. A perpetual overhead easement over and across the aforementioned Lot 1-C . . .

Section 5 provides, in pertinent part:

5. A perpetual easement under, over and across said Lot 1-C . . .

Furthermore, Section 8 provides:

Notwithstanding anything contained in Exhibit A to the contrary, the reservations contained in paragraphs 4 and 5 herein and the structure specified in paragraphs 6(a), 6(b) and 6(c) herein.....

Therefore, the parties to the 1963 Agreement made a clear distinction between the easements that were created pursuant to paragraphs 4 and 5, and the structures constructed for and on behalf of the State. Once the Elevated State Deck was completed, ownership transferred to the State automatically pursuant to Section 6's requirement that the State "shall" accept the improvements. Only the maintenance and repair obligations remain as to the Ilikai and Waikiki Edition properties<sup>1</sup>.

While Section 8 of the 1963 Agreement provides that the Elevated State Deck is to be used for pedestrian purposes, and is to be open to the public in perpetuity, it is undisputed that the portion of the Elevated State Deck on Lot 1-B, the Edition Parcel, which is now owned by M. Waikiki and operated as the "Waikiki Edition" hotel, has been used for outdoor dining, pool deck, and other recreational purposes since construction of the Edition property in 1967. Historic photos demonstrating these uses are attached hereto as Exhibit "D".

Furthermore, it is also undisputed that historically the Elevated State Deck appurtenant to the Ilikai was used for a wide variety of purposes, including a putting green and planters. Subsequent to the removal of the putting green, a large planter was constructed on the Ilikai property that completely obstructed access across the Elevated State Deck from Ilikai property to the Edition Parcel and visa-versa. The Ilikai planter was only removed in 2010 after numerous demands from M. Waikiki that access across the Elevated State Deck no longer be obstructed.

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<sup>1</sup> Arguably the Ilikai Marina has a maintenance obligation as to the Elevated State Deck as well; however, we understand that historically, the Ilikai Marina has not contributed toward maintenance of the Elevated State Deck.

While the 1963 Agreement is binding on the successors and assigns of the Owners, the Ilikai AOA is not the successor in interest to Ilikai, Inc. Nothing in the 1963 Agreement states that the Agreement shall run with the land, and therefore, other than the easements created pursuant to Sections 4 and 5, the rights and obligations contained in the 1963 Agreement were easements in gross and personal to Ilikai, Inc. and Makaha. The Certificates of Title for the Ilikai do not contain a "together with" identifying the 1963 Agreement, and the First Restatement of the Declaration of Condominium Property Regime of the Ilikai Apartment Building likewise does not contain any conferral of the benefits of the 1963 Agreement to the Ilikai AOA. The 1963 Agreement is noted only as an encumbrance.

The Ilikai Marina and Lot 1-B were conveyed rights with regard to Section 6 of the 1963 Agreement, but this transfer appears to convey to each the right to create an additional pedestrian walkway over what is now Holomoana. Section 6(c) of the 1963 Agreement authorized the construction of two Elevated State Decks over Lots 25 and 26, as shown on the Exhibits to the 1963 Agreement. The Exhibit shows that the original intent was to have the Elevated State Deck continue along the makai side of the Ilikai Marina property. The Exhibit also shows a dashed line drawing labeled as "Future Overpass W/1[6]<sup>2</sup> Min Clearance Location Subject to Architects Studies" adjacent to the Ilikai Marina, and a separate dashed line drawing labeled "Pedestrian Overpass to Harbor [16'] Min Clearance" across from the Ilikai. The Marina CPR Declaration transfers the right to build only one overpass, and the legal description for Lot 1-B also contains the right to build only one overpass. Therefore, it appears that the intent was to have the Ilikai Marina build one overpass, and the owner of the Edition property build the other.

As ownership of the improvements of the Elevated State Deck has transferred to the State, the Elevated State Deck is State property. The State, by law, has the exclusive authority to dispose of such property as it sees fit. See HRS §§171-13, 55. While the 1963 Agreement makes clear that the Elevated State Deck is open to the public, nothing in the 1963 Agreement states that the Elevated State Deck is for the benefit of either the Ilikai or the Waikiki Edition. Indeed, the 1963 Agreement states that "it being the intent of the STATE to provide easy, safe, and aesthetically beautiful access to Duke Kahanamoku Beach and Ala Wai Boat Harbor for the public at a minimum cost to the STATE." Nothing in the 1963 Agreement requires that the State obtain the consent of any of the parties prior to exercising its statutory authority to dispose of State property. Therefore, the State may freely grant a permit, license, lease, or easement over any portion of the Elevated State Deck, and no consent from the Ilikai or Ilikai Marina is required. This is precisely what happened when Forward One obtained the Revocable Permit for use of a portion of the Elevated State Deck for outdoor dining and pool deck purposes, and no consent was required from either the Ilikai or Ilikai Marina. The fact that Ilikai, Inc. and Makaha agreed to repair, maintain, insure the Elevated State Deck and indemnify the State from claims arising out of use of the Elevated State Deck as part of the consideration for the 1963 Agreement does not change this analysis.

---

<sup>2</sup> The writing is poorly legible. It appears to state "19'", however Section 8 of the 1963 Agreement calls for a 16' clearance.

Furthermore, the original plan for the Elevated State Deck was never fully realized. This original plan would have provided access from the boat harbor across Holomoana and would have run the entire length of the three lots at issue. Had such a system been fully constructed, it may have made sense to have the Elevated State Deck be solely for pedestrian uses. However, in this case, where only a truncated portion of the original plan was developed, the Elevated State Deck is essentially a walkway to nowhere, and has never provided the type of access intended, as is clearly shown by the fact that the Ilikai blocked off the Elevated State Deck in its entirety for many years. The Elevated State Deck has always been used as primarily an extension of the Edition and Ilikai pool decks, and there is little reason for such uses to change.

RESERVED RIGHT TO SUPPLEMENT:

Applicant reserves the right to further supplement this application and to submit further evidence supporting the continued use of the Elevated State Deck in the manner the Elevated State Deck is currently used.

PROPER PARTIES TO THE APPLICATION:

Notwithstanding the parties to the Agreement, the State is the owner of the Elevated State Deck pursuant to the express terms of the Agreement, and by statute has the exclusive authority to dispose of State lands. Furthermore, as the Applicant's request relates only to the portion of the Elevated State Deck abutting Applicant's property, the rights and obligations of other parties, such as the Ilikai and Ilikai Marina, who may or may not be the successors in interest to the original parties to the Agreement, are not implicated, and thus no other consent or joinder is required.

REQUEST FOR ACTION:

M. Waikiki respectfully requests that the Board: 1) amend the 1963 Agreement so that it conforms to the as built configuration of the improvements in Lot 25, and 2) clarify permissible uses within a portion of the elevated deck described in the Application and the Agreement to reflect all the authorized uses that have existed since 1967, or, in the alternative, 3) issue a lease or exclusive easement for the elevated deck area adjacent to Applicant's property that would permit the continuation of outdoor dining and pool deck uses. To the extent a declaratory ruling by the Board is required pursuant to the Hawaii Administrative Rules Section 13-1-27, such a ruling is also requested by Applicant.

Respectfully Submitted,



Dennis M. Lombardi, Esq.  
David G. Brittin, Esq.