

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

February 22, 2013

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

PSF No.: 12HD-128

HAWAII

Assessment of \$500 Fine, Plus Assess \$320 Administrative Cost Against Applicants for Seawall Encroachment; Grant of Term, Non-Exclusive Easement to Joanna C. Savage, Katherine N. Savage, Jill A. Savage, aka: Jill Alison Savage, Trustee of the Jill A. Savage Revocable Living Trust dated January 10, 1996, for Seawall Encroachment Purposes, Lalamilo, South Kohala, Hawaii, Tax Map Key: (3) 6-9-001: portion of 002.

APPLICANT:

Joanna C. Savage, single, Katharine N. Savage, wife of Chris David Cunningham, and Jill A., aka, Jill Alison Savage, Trustee of the Jill A. Savage Revocable Living Trust dated January 10, 1996, Tenants in Common.

LEGAL REFERENCE:

Section 171-13, 53(b), Hawaii Revised Statutes, as amended.

LOCATION:

Portion of Government land (Beach Reserve) located seaward of Tax Map Key: (3) 6-9-006:016, Lalamilo, South Kohala, Hawaii, identified by Tax Map Key: (3) 6-9-001: portion of 002, as shown on the attached map labeled Exhibit A.

AREA:

303.00 square feet, more or less.

ZONING:

State Land Use District: Conservation/ Urban
County of Hawaii CZO: Open/Resort-Hotel (V-1.25)

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act

DHHL 30% entitlement lands pursuant to the Hawaii State Constitution:

YES ___ NO X

CURRENT USE STATUS:

Unencumbered with encroachments.

CHARACTER OF USE:

Right, privilege and authority to use, maintain, repair, replace and remove existing seawall /stairs/footing over, under and across State-owned land.

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:

Fifty-five (55) years.

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

See Exemption Notification attached below as **Exhibit H**.

During a site visit, Office of Conservation and Coastal Lands (OCCL) staff inspected the subject seawall and determined it appeared to be built before 1974, prior to the enactment of the EIS law and this action is therefore exempt from Ch. 343.

In accordance with Hawaii Administrative Rule Sections 11-200-8(a)(1) & (4) and the Exemption List for the Department of Land and Natural Resources approved by the Environmental Council and dated December 4, 1991, the subject request is exempt from the preparation of an environmental assessment pursuant to Exemption Class No. 1, that states "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" and Class No. 4, that states "Minor alteration in the conditions of land, water, or vegetation."

DCCA VERIFICATION:

Not applicable. Applicants, as individuals/landowner, are not required to register with DCCA.

APPLICANT REQUIREMENTS:

Applicant shall be required to:

- 1) Provide survey maps and descriptions according to State DAGS standards and at Applicant's own cost.
- 2) Pay for an appraisal to determine one-time payment.

REMARKS:

Cyrus J. Savage and Ruth C. Savage originally purchased their private property, identified as TMK: (3) 6-9-006:016 in 1957 when Mr. Savage was working for Jas. Glover, Ltd. on the Kawaihae Harbor. Part of their property improvements included the modification of the seawall along the makai portion of their property that existed on the property at the time they purchased it in 1957. In 1963, the modification consisted of raising the wall 2-3 feet.

Upon surveying their private property in June 2011, it was then ascertained that portions of the seawall encroached into the adjacent State-owned Government Beach Reserve makai of their property. The survey indicated that the encroachment consisted of an approximate 303 square foot section of the seawall. Encroachments were unintentional as the seawall predated the Savages' purchase of the property.

On July 21, 2011, the Hawaii District Land Office received an application from Mr. Roy Vitousek III of Cades Schutte, on behalf of Joanna C. Savage, Katherine N. Savage, Jill A. Savage, aka: Jill Alison Savage, Trustee of the Jill A. Savage Revocable Living Trust, for a grant of easement for seawall encroachments at Lalamilo, South Kohala, Hawaii, TMK: (3) 6-9-001: portion of 002. Mr. Vitousek also forwarded a Shoreline Encroachment Information Sheet to Sam Lemmo, at the Office of Conservation and Coastal Lands (OCCL).

By letter dated October 10, 2011, Mr. Sam Lemmo, OCCL Administrator, responded to Mr. Vitousek's July 21, 2011 letter, providing results of OCCL's findings on the matter concerning the suspected shoreline encroachments. OCCL indicated that it was unable to locate any construction permits or other land use authorization permits for the improvements to the seawall. Further, that it was necessary to determine that the structure is non-conforming prior to the disposition of any easement. OCCL requested that evidence be provided, which would clearly demonstrate that the structure was in place prior to the inception of the Conservation District rules, which became effective

October 1, 1964. Upon review and careful consideration of the information gathered to date, OCCL staff determined that the requirements stated in HRS § 205A, HRS § 183C, and in the OCCL's evaluation criteria would not support a disposition request being processed for the wall, steps, and footings. **(Exhibit B)**

By letter dated October 19, 2011, Mr. Vitousek expressed his disagreement with OCCL's determination that the evidence did not clearly demonstrate that the wall was constructed before October 1, 1964. Mr. Vitousek reminded OCCL that although the photos provided as evidence are not date stamped, the photos were taken prior to 1964 as stated in the affidavits provided. **(Exhibit C)**

On November 7, 2011, OCCL responded with a letter, reiterating its position as contained in its October 10, 2011 letter, which in part determined that the evidence provided was not acceptable/satisfactory in verifying that the wall was non-conforming.

On January 10, 2012, Mr. Vitousek provided William Aila, Chairperson, with a summary/rebuttal letter of the situation. **(Exhibit D)**

By letter dated August 14, 2012, Mr. Vitousek wrote to HDLO and OCCL to express his confusion and disappointment on how processing of the application is progressing. **(Exhibit E)**

Pursuant to the Board's action of June 28, 2002, under agenda item D-17 which established criteria for imposing fines for encroachments, staff is recommending granting of the easement and assessment of a fine of \$500 as the subject encroachment is over 100 square feet.

Joanna C. Savage, Katherine N. Savage, and Jill A. Savage, aka: Jill Alison Savage, Trustee of the Jill A. Savage Revocable Living Trust dated January 10, 1996, 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.

On October 10, 2012, various government agencies and interest groups were solicited for comments.

AGENCIES	COMMENTS
County of Hawaii:	
Planning Department	See comments below
Public Works	No response
State of Hawaii:	
DLNR - Historic Preservation	No response
DLNR - OCCL	See comments above
Other Agencies/ Interest Groups:	
Office of Hawaiian Affairs	No response

On November 9, 2012, the County of Hawaii, Planning Department provided comment, that, "We do not have any record that the seawall was determined to be a legal, non-conforming structure. Since such a request has never been submitted to our office for Special Management Area review, it is believed that the granting of an easement is premature." **(Exhibit F)**

Mr. Vitousek submitted documents to the County Planning Department, requesting it declare that the wall is a legal pre-existing nonconforming structure. By letter dated January 15, 2013, the county determined that the structure was built prior to June 22, 1970, and is therefore considered to be a legal non-conforming structure within the shoreline setback area. **(Exhibit G)**

OCCL spent eight staff hours in conducting site inspections and research involving the subject encroachment, incurring administrative costs of \$340. Staff is including a recommendation below that applicant be assessed \$340 for these administrative costs.

RECOMMENDATION: That the Board:

1. Impose a \$500 fine for illegal encroachment and assess \$340 for OCCL staff time incurred in researching the encroachment, under Section 171-6.
2. Authorize the subject requests to be applicable in the event of a change in the ownership of the abutting parcel described as Tax Map Key: (3) 6-9-006:016, 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 Joanna C. Savage, Katharine N. Savage, Jill A. Savage, aka: Jill Alison Savage, Trustee of the Jill A. Savage Revocable Living Trust dated January 10, 1996, covering the subject area for seawall encroachment 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 shoreline encroachment 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) 6-9-006:016, 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 Grantor of such transaction in writing, and shall notify Grantee's successors or assigns of the insurance requirement in writing, separate and apart from the easement document;

- C. Review and approval by the Department of the Attorney General; and
- D. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.
- E. Any shoreline hardening policy that may be adopted by the Board prior to execution of the grant of easement

Respectfully Submitted,



Wesley T. Matsunaga
Land Agent

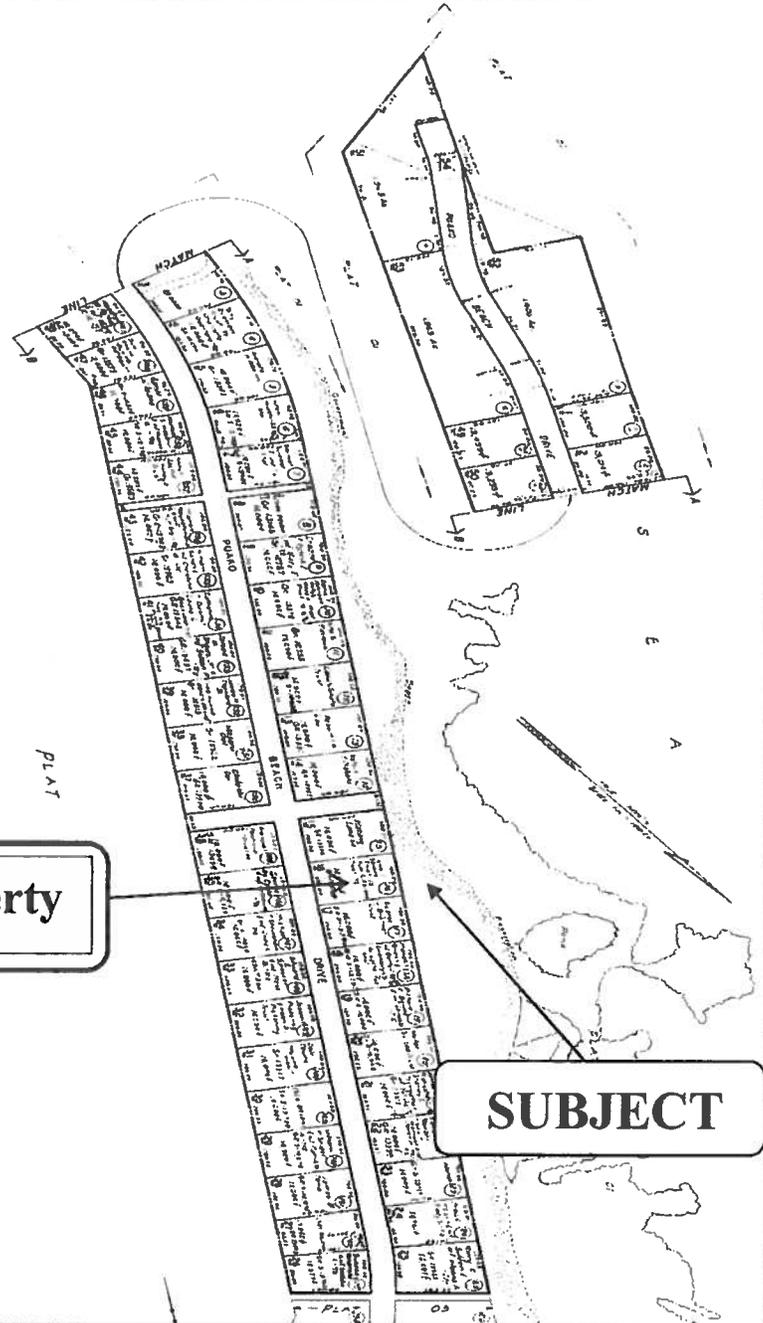
APPROVED FOR SUBMITTAL:



William J. Aila, Jr., Chairperson

BPS NO. 1120
 SOURCE: 1178
 BY: [illegible]

FOR QUAD BEACH UNIT CUMULO. & NON-CUMULO (Form 6-9-01)



- 1. [illegible]
- 2. [illegible]
- 3. [illegible]
- 4. [illegible]
- 5. [illegible]
- 6. [illegible]
- 7. [illegible]
- 8. [illegible]
- 9. [illegible]
- 10. [illegible]

Applicant's property

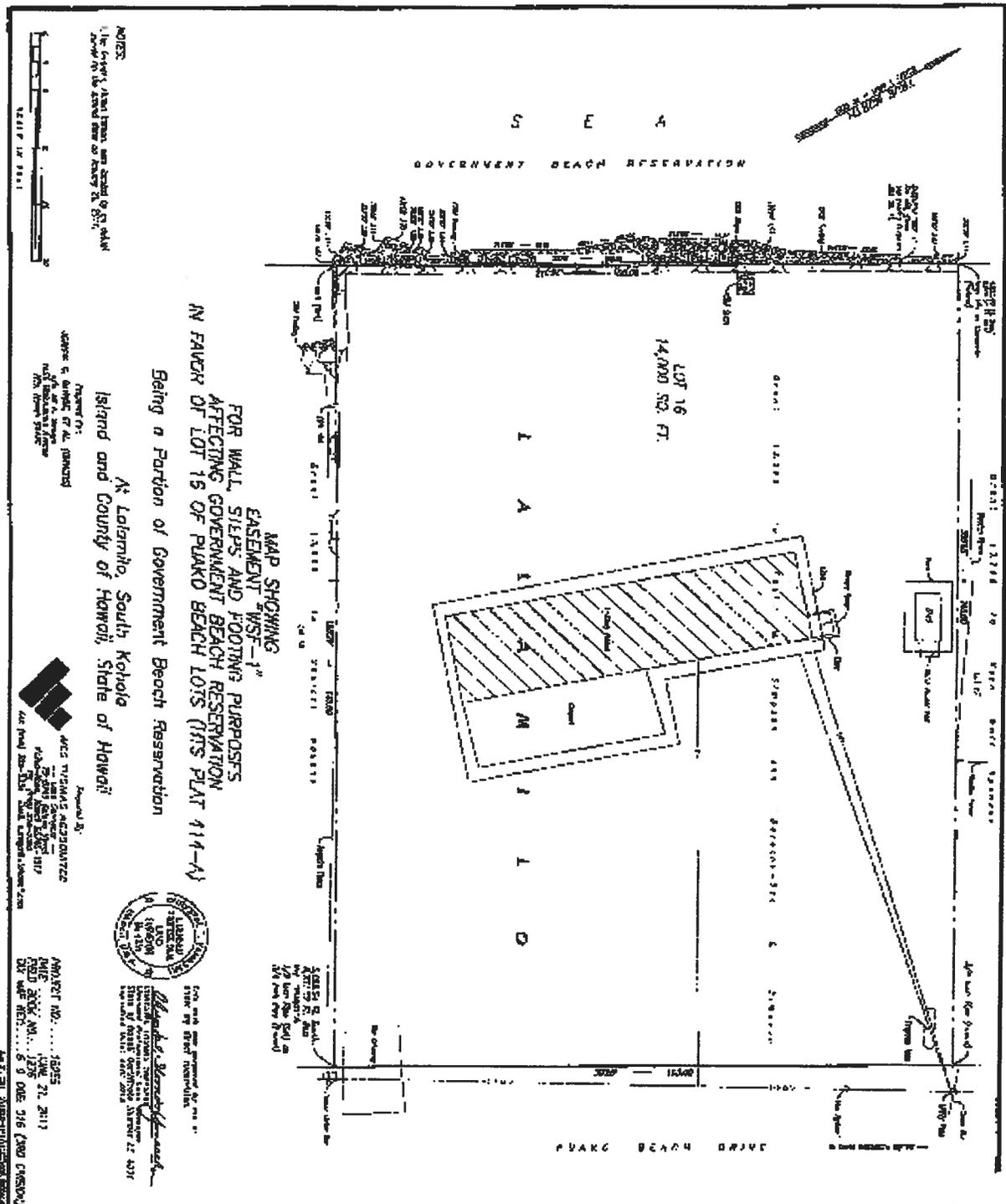
SUBJECT

This map was prepared by
 [illegible]
 under authority of the
 [illegible]

SUBJECT TO CHANGE

DATE	6	9	06
TIME			
BY			
FOR			
SCALE	AS SHOWN		

EXHIBIT A



NOTES:
 1. The Project Area shown was located by GPS Global
 survey to the second order of accuracy in 2011.

**MAP SHOWING
 EASEMENT "WISF-1"
 FOR WALL STEPS AND FOOTING PURPOSES
 AFFECTING GOVERNMENT BEACH RESERVATION
 IN FAVOR OF LOT 15 OF PUAKO BEACH LOTS (TTS PLAT 414-A)**

Being a Portion of Government Beach Reservation
 At Lalanika, South Kohala
 Island and County of Hawaii, State of Hawaii

Prepared by:
 James S. Smith, Jr., Licensed
 Professional Engineer
 No. 10844
 1001 Puako Road
 Puako, Hawaii 96771

Checked by:
 APCS TITIMAS ACCREDITED
 412-221-1111
 1001 Puako Road
 Puako, Hawaii 96771



For more information, please contact:
 Mr. James S. Smith, Jr.
 1001 Puako Road
 Puako, Hawaii 96771
 Phone: 808-251-1111
 Fax: 808-251-1112

ANALYST NO.: 15255
 DATE: 06/27/2011
 FILE NO.: 15255
 DRAWING NO.: 15255-01
 DATE: 06/27/2011

EXHIBIT A



EXHIBIT A



EXHIBIT A

NEIL ABERCROMBIE
GOVERNOR OF HAWAII



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Office of Conservation and Coastal Lands
POST OFFICE BOX 621
HONOLULU, HAWAII 96809

WILLIAM J. AILA, JR.
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT
GUY B. KAULUKUKUI
FIRST DEPUTY
WILLIAM M. TAM
DEPUTY DIRECTOR - WATER
AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

OCT 10 2011

REF:DLNR:.AB

File Number Encroachment: HA-12-01

Mr. Roy Vitousek III
Cades Schutte

Kailua-Kona, HI 96740

Dear Mr. Vitousek,

SUBJECT: Request for Shoreline Encroachment Easement Relating to TMK: (3)6-9-011:002 (por.) (owned by the State of Hawaii) and 6-9-006:016 (owned by Joanna C. Savage; Katharine N. Savage; Jill A. Savage, aka Jill Alison Savage, Trustee of the Jill A. Savage Revocable Living Trust dated January 10, 1996)

This is in response to your July 2011 request to resolve the shoreline encroachments at Tax Map Key (3)6-9-011:002 (por.) and 6-9-006:016. According to information and maps contained with your request, you have identified 303 square feet of encroachment (wall, steps, and footing) makai of the subject property onto State land.

OCCL staff was unable to locate any construction permit or other land use authorization permits at the State for the subject improvements. Given the lack of documentation for the structure, it is necessary to determine that the structure is non-conforming prior to the disposition of any easements. Furthermore, upon reviewing the evidence provided with the original request (photographs and affidavits), OCCL staff has determined that the information does not meet the necessary requirements to establish non-conforming status.

Please provide evidence clearly demonstrating that the structure was in place prior to the inception of the Conservation District rules on October 1, 1964. Evidence can consist of aerial photographs, prior surveys conducted by a licensed surveyor, or a signed statement by a licensed engineer. See the attached guidance for established non-conforming status of shoreline structures. This information is also available on our website at <http://hawaii.gov/dlnr/occl/documents-forms/applications-forms>

RECEIVED
LAND DIVISION
2011 OCT 10 A 11:40
DEPARTMENT OF LAND & NATURAL RESOURCES
HONOLULU, HAWAII

RECEIVED
LAND DIVISION
HILLO, HA
2011 OCT 12

EXHIBIT B

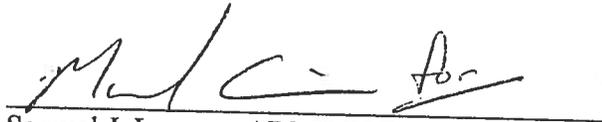
It is necessary to determine non-conforming status prior to the disposition of an easement. The Board of Land and Natural Resource (BLNR) established a policy to allow the disposition of shoreline encroachments by either removal or issuance of an easement. In carrying-out this policy, the Department established criteria to guide decision-making over specific cases. The criteria are as follows:

1. Protect/preserve/enhance public shoreline access;
2. Protect/preserve/enhance public beach areas;
3. Protect adjacent properties;
4. Protect property and important facilities/structures from erosion damages; and
5. Apply "no tolerance" policy for recent or new unauthorized shoreline structures

It has been a general policy and practice of the OCCL to support disposition requests that have no discernable effect on beach and recreational resources, and do not act as a detriment to public access. Upon review and careful consideration of the information gathered on this case, staff has determined that the requirements stated in HRS § 205A, HRS § 183C, and in the OCCL's evaluation criteria would not support a disposition request being processed for the wall, steps, and footing.

Please feel free to contact Sea Grant Extension Agent Andy Bohlander, at the Office of Conservation and Coastal Lands at Andrew.P.Bohlander@hawaii.gov.

Sincerely,



Samuel J. Lemmo, ADMINISTRATOR
Office of Conservation and Coastal Lands

cc: Land Division

EXHIBIT B

LINDA LINGLE
GOVERNOR OF HAWAII



**STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
OFFICE OF CONSERVATION AND COASTAL LANDS**

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

PETER T. YOUNG
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

ROBERT K. MASUDA
DEPUTY DIRECTOR

DEAN A. NAKANO
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

Non-Conforming Shoreline Structures

Hawaii Revised Statutes 13-222-19

Encroachment upon state land and unauthorized shoreline improvements.

The chairperson shall not certify the shoreline in cases where an unauthorized improvement encroaches upon state land or where an unauthorized improvement interferes with the natural shoreline processes. The property owner shall first resolve the encroachment or violation problem with the applicable department prior to the chairperson certifying the shoreline. [Eff 12/10/88]

Persons seeking to establish non-conforming status for structures in coastal areas should provide the following supporting evidence to OCCL. Optimally, non-conforming status of a structure should be determined by a letter from the local County Planning department that confirms the status according to the applicable County Shoreline Rules. When such written confirmation is unavailable, as many of the following documentation as possible should be obtained and submitted for use as evidence for that determination. All documents should state or include information that can support the non-conforming status, as applicable and appropriate. A structure may be deemed non-conforming to state rules if it existed in the same form and location, on or prior to October 1964. With the exception of minor repairs and maintenance, the structure must not have been altered or improved in any manner from its pre-October 1964 condition.

Documentation (in order of preference)

- Stamped and signed letter from a licensed structural or civil engineer certifying the structure is in the original form and dimension as prior to October 1964
- Dated and stamped aerial photo showing the existence of the structure before October 1964¹
- Datable ground photo showing the existence of the structure before October 1964
- Legal affidavit from an individual with personal knowledge about the structure who can attest to the information confirming the non-conforming status of the structure
- Other form of datable evidence that can verify the structure's non-conforming status²

This documentation is necessary for the OCCL to make a determination on the structure. Presentation of these documents does not ensure a finding of non-conformity for the structure. If you have any questions, please call OCCL at 587-0377.

¹ R.M. Towill Corporation in Honolulu, Air Survey Hawaii in Honolulu, and the University of Hawaii Coastal Geology Group's web site <http://www.soest.hawaii.edu/coasts/data/index.html> (as an index for some of the available images)

² Army Corps of Engineers, Department of Transportation, original contract data for

EXHIBIT B

2011 OCT 24 P 1:19

October 19, 2011

RECEIVED
LAND DIVISION
HILO, HAWAIIRoy A. Vitousek III
Direct Line: (808) 329-5811
Direct Fax: (808) 326-1175
E-mail: rvitousek@cades.com

Samuel J. Lemmo, Administrator
Office of Conservation and Coastal Lands
P. O. Box 621
Honolulu, Hawaii 96809

Andrew P. Bohlander
Sea Grant Extension Agent
Office of Conservation and Coastal Lands
P. O. Box 621
Honolulu, Hawaii 96809

Re: Your File Number Encroachment: HA-12-01
Request for Shoreline Encroachment Easement
Relating to TMK No.: (3) 6-9-001: 002 (por.) (Owned by State of Hawaii) and
TMK No. (3) 6-9-006: 016 (Owned by Joanna C. Savage; Katharine N. Savage;
Jill A. Savage, aka Jill Alison Savage, Trustee of the Jill A. Savage Revocable
Living Trust dated January 10, 1996)

Dear Mr. Lemmo and Mr. Bohlander:

This is a response to Mr. Lemmo's letter of October 10, 2011, which, in turn, purports to respond to my July 21, 2011, request for a grant of easement for the Savage family property at Puako, Hawaii, TMK No. (3) 6-9-006: 016.

The letter of October 10, 2011, states that we have not clearly demonstrated that the wall in question was constructed before October 1, 1964. We find this statement to be inconsistent with the evidence we provided. Specifically, we have provided (1) datable ground photographs showing the existence of the wall before October 1964, and (2) legal affidavits from two individuals with personal knowledge about the structure who can and did attest that the structure meets the criteria for a nonconforming use. The datable on-the-ground photographs provide a more reliable record than an aerial photograph.

Based on this evidence, there can be no serious doubt that the wall was constructed before October 1, 1964.

EXHIBIT C

Cades Schutte Building
1000 Bishop Street, Suite 1200
Honolulu, Hawaii 96813
Tel: 808.521-9200
Fax: 808.521-9210
www.cades.com

Kona Office
75-170 Hualalai Road, Suite B-303
Kailua Kona, Hawaii 96740
Tel: 808.329-5811
Fax: 808.326-1175

Samuel J. Lemmo, Administrator
Andrew P. Bohlander
October 19, 2011
Page 2

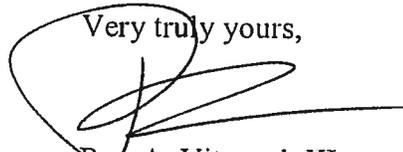
Further, there is no evidence that the land on which the wall was constructed was in the conservation district in 1964 or at any other time, including at the present time. The State land in question is part of the beach reserve surrounding the Puako Beach Lots Subdivision. The beach reserve is identified as TMK (3) 6-9-001: 002. This parcel is in the State land use "urban" district. Thus, if the wall encroaches over the property line between TMK 6-9-006: 016 owned by the Savage family members and TMK 609-001: 002, it encroaches from one urban-classified lot into another urban classified lot.

While lands makai of the certified shoreline may be in the conservation district, the OCCL cannot prove the location of the shoreline in 1957 (when the wall was built) or 1964 (when the conservation district was created) or at any other given point of time in the past.

In short, the wall is not and never was an illegal encroachment into the conservation district. The wall does encroach into State-owned urban-classified land and the owner is attempting to follow appropriate procedures to address the encroachment.

We respectfully request that the Department simply process the application. If you have questions or require additional information, please contact me.

Very truly yours,



Roy A. Vitousek III

for

CADES SCHUTTE

A Limited Liability Law Partnership

RAV

cc: Kevin E. Moore, Hawaii Land Division Agent

EXHIBIT C

AFFIDAVIT OF

STATE OF HAWAII)
) SS
COUNTY OF HAWAII)

Cyrus J. Savage, being first duly sworn on oath, deposes and says:

1. I am a widowed male, born in Newbury, Massachusetts on . I am currently retired after working as a construction supervisor with Jas. Glover Ltd. between 1954 and 1991. I am the father of Jill, Joanna and Katharine Savage, who are the current owners of the house and property at , Kamuela, Hawaii.
2. I am 87 years old. My wife, Ruth C. Savage, and I originally purchased the house as described above in 1957 while I was working on the Kawaihae Harbor. The existing seawall was present when we bought the house and the only modification to the wall was made when I raised it 2-3 ft.
3. Exhibit A (2 photos), 1958. These photos are of my daughters, Jill (3) and Joanna (5), playing on the kiawe tree in front of the house. The mauka side of the wall may be seen in the background.
4. Exhibit B (1 photo), , 1963. This photo includes my wife and me sitting on the steps of the makai side of the wall.
5. Exhibit C (2 photos), These photos show the process of increasing the height of the wall by 2-3'.

FURTHER AFFIANT SAYETH NAUGHT.

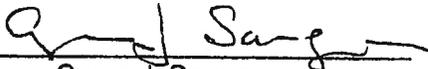

Cyrus J. Savage

EXHIBIT C

Subscribed and sworn to before me

this 10th day of January, 2011.

Syleste Williams

Notary Public, State of Hawaii
My Commission Expires:

NOTARY CERTIFICATION

Doc. Date: None at time of notarization # Pages: 1

3rd Circuit

Doc. Description: Affidavit of

Syleste Williams
Notary Signature

01/10/11
Date

Doc. Date: not dated # Pages: 1
Notary Name: Syleste Williams Third Circuit
Doc. Description: Affidavit of

Syleste Williams 01/10/11
Notary Signature Date

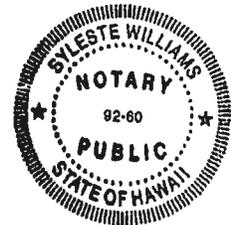


EXHIBIT C

Affidavit for Puako property shoreline survey
Cyrus J. Savage, Jan. 10, 2011

EXHIBIT A



EXHIBIT C

Affidavit for Puako property shoreline survey
Cyrus J. Savage, Jan. 10, 2011

EXHIBIT B



EXHIBIT C

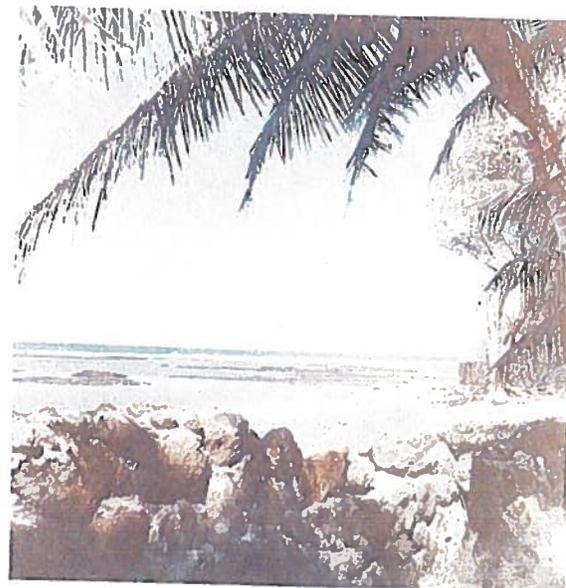
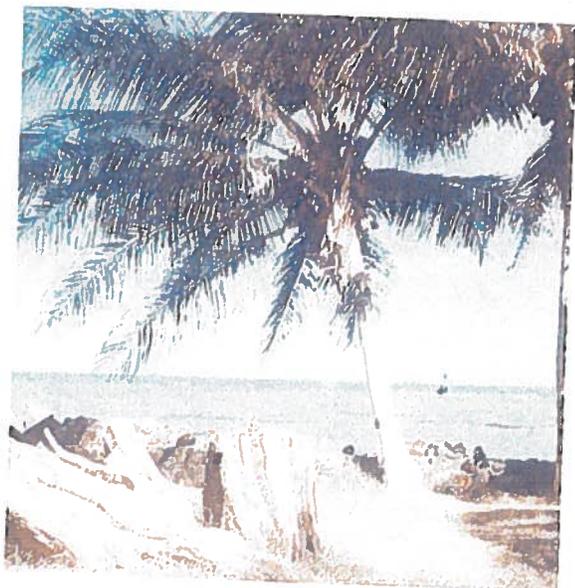


EXHIBIT C

AFFIDAVIT OF

STATE OF HAWAII)
) SS
COUNTY OF HAWAII)

Katharine N. Savage, being first duly sworn on oath, deposes and says:

1. I was born [redacted] Hilo, Hawaii. I currently live in Juneau, Alaska with my husband and two children where I work for NOAA as a veterinarian/marine mammal specialist.
2. I am 54 years old. My family obtained the house and property at [redacted] soon after I was born. We spent a great deal of time at the house while I was growing up. My mother passed away in 1998, at which time my two sisters and I inherited half of the property. My father has since conveyed the remainder of the property to us. We continue to spend time at the property in Puako.
3. Exhibit A (1 photo), [redacted], 1958. This photo includes me (right, 2 yrs.), my sister Joanna (middle, 5 yrs) and a family friend in the yard at Puako. The wall is in the background and is the same structure that exists today.
4. Exhibit B (1 photo), [redacted], 1963. This photo includes me (left, 7 yrs), my sister Jill (middle, 8 yrs.) and my sister Joanna (right, 10 yrs.) in a hammock with the wall in the background.
5. Exhibit C (1 photo), [redacted], 1960's. In the mid to late 1960's our neighbor built a large wall that extended quite a way out into the beach. A number of years later – possibly in the early 70's? – a storm demolished his wall. Since the neighbor's wall and stairs are still intact in this photo, it was probably taken sometime in the mid to late 1960's. The mauka side of our wall and stairs can be seen to the right.
6. Exhibit D, [redacted], 1998. This is a photo of my two children and a family friend with the wall in the background.

EXHIBIT C

FURTHER AFFIANT SAYETH NAUGHT.

Katharine N. Savage
Katharine N. Savage

Subscribed and sworn to before me
this 10th day of January, 2011.

Syleste Williams

Notary Public, State of Hawaii
My Commission Expires:

NOTARY CERTIFICATION
Doc. Date: None at time of notarization # Pages: 2

3rd Circuit

Doc. Description: Affidavit of

Syleste Williams
Notary Signature

01/10/11
Date

Doc. Date: not dated # Pages: 2
Notary Name: Syleste Williams Third Circuit
Doc. Description: Affidavit of

Syleste Williams 1/10/11
Notary Signature Date

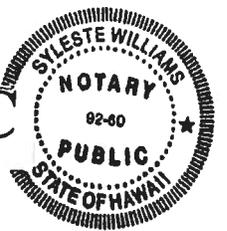


EXHIBIT C

Affidavit for Puako property shoreline survey
Katharine N. Savage, Jan. 10, 2011

EXHIBIT A



EXHIBIT B



EXHIBIT C

Affidavit for Puako property shoreline survey
Katharine N. Savage, Jan. 10, 2011

EXHIBIT C



EXHIBIT D

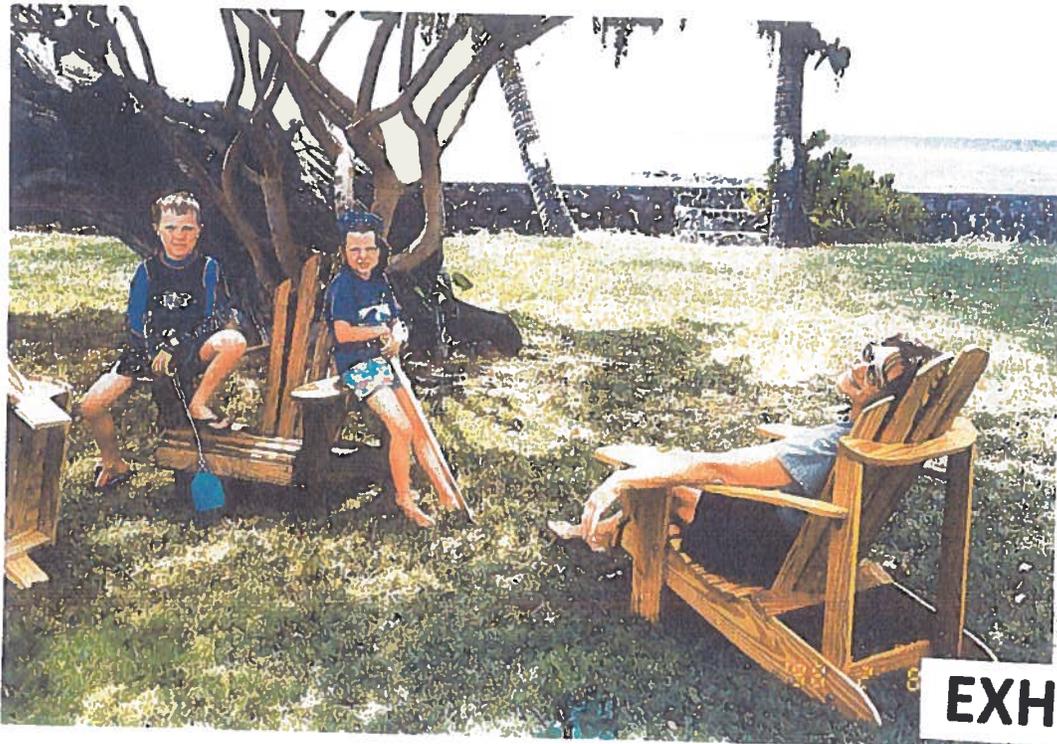


EXHIBIT C



EXHIBIT C

January 10, 2012

William J. Aila, Jr., Chairperson
Board of Land and Natural Resources
P. O. Box 621
Honolulu, Hawaii 96809

2012 JAN 11 P 1: 26

RECEIVED
LAND DIVISION
HILO, HAWAII

Roy A. Vitousek III
Direct Line: (808) 329-5811
Direct Fax: (808) 326-1175
E-mail: rvitousek@cades.com

Re: Request for Shoreline Encroachment Easement Relating to TMK: (3) 6-9-001: 002 (por.) (Owned by State of Hawaii) and 6-9-006: 016 (Owned by Joanna C. Savage; Katharine N. Savage; Jill A. Savage, aka Jill Alison Savage, Trustee of the Jill A. Savage Revocable Living Trust dated January 10, 1996)

Dear Mr. Aila:

This office represents the above-named Savage family members, owners of the above-identified property at Puako Beach Lots, Lalamilo, South Kohala, Island of Hawaii. Cyrus J. and Ruth C. Savage purchased the subject property and home in 1957 when Mr. Savage was working for Jas. Glover Ltd. on the Kawaihae Harbor. Part of their property improvements included modification of the wall along the makai portion of the property that was existing on the property at the time they purchased it in 1957. The modification consisted of raising it 2-3 feet in 1963.

When the Savage family surveyed their property in June 2011, it was ascertained that portions of the wall encroach into the State-owned Government Beach Reserve makai of their parcel. A copy of the survey dated is attached hereto as Exhibit A.

The Savage family retained this office to apply to the Department of Land and Natural Resources for an encroachment easement. We submitted an application on July 21, 2011, which included declarations or affidavits from Cyrus J. Savage and his daughter Katharine N. Savage, stating that the wall was constructed before 1964 and submitted family photographs from that era showing the wall in place.

The Department rejected the application by letter dated October 10, 2011, saying that the evidence submitted failed to establish that the subject wall is a nonconforming use constructed before October 1964. This letter enclosed the Department's informational memo outlining supporting evidence/documentation suggested by the Department to establish nonconforming status for structures in coast areas. We are familiar with the content of this memo as we had reviewed it as a basis to prepare the instant request for easement. It states that the applicant should obtain and include as many of the documents listed, including but not limited to "Datable ground photo showing the existence of the structure before October 1964" and "Legal affidavit from an individual with personal knowledge about the structure who can attest to the information

EXHIBIT D

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William J. Aila, Jr.
January 10, 2012
Page 2

confirming the non-conforming status of the structure.” Insofar as we had submitted both affidavits and photographs with our initial application, I wrote back to the Department on October 19, 2011, requesting reconsideration of the Department’s determination. A copy of the Department’s letter to me dated October 10, 2011, is attached as Exhibit B; a copy of my letter of October 19, 2011, requesting reconsideration is attached as Exhibit C.

By letter dated November 7, 2011, the Department responded to my request for reconsideration and again rejected the application citing insufficient evidence of nonconforming use, stating,

Specifically, the ground photographs you provided are not date/time stamped so there is no effective means to determine the actual date the photographs were taken. Furthermore, the legal affidavits you provided are from the current and former property owners who, despite having personal knowledge about the structure, have a clear and vested interest in the property that may result in a conflict of interest. While we appreciate their statements, we cannot establish non-conforming status sole on the testimony of individuals with interests in the subject property. In this case, the legal affidavits must be corroborated by a dateable form of evidence.

In this letter, Michael Cain, acting for Office of Conservation and Coastal Lands Administrator Samuel J. Lemmon (who was apparently on vacation) has taken the position that the position that the Affidavits of Cyrus J. Savage and Katharine N. Savage are not credible because they have an interest in the proceeding. The Department offered no evidence that contradicts the affidavits and photographs attached thereto but simply dismissed the family’s sworn affidavits because they are the applicants. This position of the Department is totally inappropriate as it imputes dishonesty to a member of the public who is simply applying for an encroachment easement.

According to the list of preferred documentation for nonconforming structures, the Department lists “Dated and stamped aerial photo showing the existence of the structure before October 1964,” which is footnoted to reference “R.M. Towill Corporation . . . and the University of Hawaii Coastal Geology Group’s web site . . . (as an index for some of the available images).” My office staff had researched the referenced SOEST site looking for coastal aerial photographs of the subject property. What we found on the SOEST website (and what DLNR staff would have found had they had conducted an independent review) is that there are no historical aerial photographs on the website for the Island of Hawaii. The shoreline imagery (by NOAA/NOS) available on the website for the Island of Hawaii was dated 2000 and does not show the area of Puako where the Savage family property is located. The availability of “historical” aerial photographs that might predate October 1964 is limited to the islands of Oahu, Kauai, and Maui.

The list of documentation preferred by the Department refers to “Dateable ground photo.” It does not require “date/time stamped” ground photographs. The affidavits of Cyrus and

EXHIBIT D

Katharine Savage date the photographs to prior to 1964. May we point out that ground photographs taken by individuals in 1964 were not “date/time stamped” as that technology was not generally available until the following decade. Mr. Cain is apparently confusing dating ground photographs with “Dated and stamped aerial photograph[s]” that would have been taken by a professional surveyor.

Further, and as we attempted to point out to the Department in my letter of October 19, 2011, the question of whether or not the wall was built before October 1, 1964, is relevant only if the DLNR can demonstrate that the wall encroached into the Conservation District at the time it was constructed. The Puako Beach Lots Subdivision was created by the Territory of Hawaii, in which lots were created by surveyed boundaries described in metes and bounds, including the makai boundaries. In other words, the makai boundary was not described as “ma ke kai” or “along the high water mark.” The land makai of the surveyed makai boundary was the parcel identified as TMK (3) 6-9-001: 002 and described as the Government Beach Reserve. This parcel is in the State land use **Urban** District.

Consequently, unless the Department can show that at the time the wall was built it encroached makai of the certified shoreline (as it existed at that time)¹, the Department cannot prove that the wall ever encroached into the Conservation District. Thus, there can be no Conservation District violation and the “non-conforming” status of the wall is not relevant to the Conservation District issue. The wall is not and never was an illegal encroachment into the Conservation District.

The purpose of this letter is to request that this matter be placed on the agenda of the Board of Land and Natural Resources for review of the Department’s decision rejecting the affidavits as evidence of nonconforming use and asking the Board to make determinations (1) as to whether the wall was constructed before 1964; (2) whether the land upon which the wall was built was, at that time, in the Conservation District; and (3) whether to approve an encroachment easement. Because the Board is a discretionary decision-making body for the Department, we believe it is appropriate to give the Board an opportunity to make a determination on these issues before going to Court.

I am also enclosing a Declaration of Dr. Christian L. Gulbrandsen, the former Dean of the University of Hawaii’s John Burns School of Medicine, and a next-door neighbor to the Savage family. As you can see, Dr. Gulbrandsen’s declaration corroborates that the wall was in place when he first became familiar with the property in 1966.

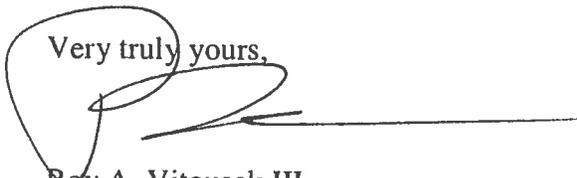
If you have any questions or require additional information, please contact me at 521-9345 (Oahu direct line) or 808-329-5811.

¹ The shoreline certification process did not even exist in 1964.

EXHIBIT D

William J. Aila, Jr.
January 10, 2012
Page 4

Very truly yours,



Roy A. Vitousek III
for
CADES SCHUTTE
A Limited Liability Law Partnership

cc: Samuel J. Lemmo
Kevin E. Moore ✓

EXHIBIT D

DECLARATION OF CHRISTIAN GULBRANDSEN

I, CHRISTIAN L. GULBRANDSEN, M.D., declare as follows:

1. I am a retired physician and former Dean of John H. Burns School of Medicine. I am married to Dorothy Nakano Gulbrandsen. My wife's family is from Waimea, Hawaii, and has owned property at Puako Beach Lots since 1958, which eventually came to be owned by my wife and which she deeded to our sons. The Nakano-Gulbrandsen family properties are identified as TMK Nos. (3) 6-9-006: 014 and 015. The Savage property, TMK No. (3) 6-9-006: 016, is located immediately adjacent to what was our parcel 15 (this property was sold in 2010).
2. I have known and have been familiar with the Savage family, including Cyrus J. Savage, his wife Ruth C. Savage (now deceased), and their daughters Jill, Joanna, and Katharine, since 1966.
3. I personally find Cyrus Savage to be of high moral character, honest and forthright.
4. I am familiar with the conditions on the makai portion of the Savage property since 1966. Specifically, I am aware that there was a wall located along the makai portion of the property as of 1966.

I declare, verify, and certify that the foregoing is true and correct.

Executed at Waimea, Hawaii, on January 9, 2012

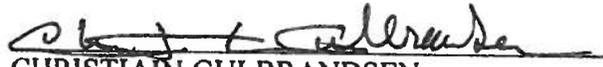

CHRISTIAN GULBRANDSEN

EXHIBIT D

2012 AUG 20 1 P 1: 28

RECEIVED
LAND DIVISION
HILO, HAWAII**Roy A. Vitousek III**
Direct Line: (808) 329-5811
Direct Fax: (808) 326-1175
E-mail: rvitousek@cades.com

August 14, 2012

Samuel J. Lemmo, Administrator
Office of Conservation and Coastal Lands
Department of Land and Natural Resources
P. O. Box 621
Honolulu, Hawaii 96809

✓ Kevin E. Moore
Hawaii Land Division
Department of Land and Natural Resources
75 Aupuni Street, Room 204
Hilo, Hawaii 96720

Re: Your File Number Encroachment: HA-12-01
Request for Shoreline Encroachment Easement
Relating to TMK No.: (3) 6-9-001: 002 (por.) (Owned by State of Hawaii)
and TMK No. (3) 6-9-006: 016 (Owned by Joanna C. Savage; Katharine N.
Savage; Jill A. Savage, aka Jill Alison Savage, Trustee of the Jill A. Savage
Revocable Living Trust dated January 10, 1996)

Dear Mr. Lemmo and Mr. Moore:

This is a response to your letter of August 1, 2012. I remain confused (and disappointed) as to how this application is progressing.

This office submitted a "Request for State Lands Application Form" and attachments to the Land Division on July 21, 2011. A copy of the transmittal memorandum of the Application was also sent to Mr. Lemmo (*see attached transmittal to Land Division*). Also on July 21, 2011, we submitted the Shoreline Encroachment Information Sheet and Exhibits to the Office of Conservation and Coastal Lands and copied the Land Division (*see attached transmittal to OCCL*). We received no response to the Application from either OCCL or Land Management by September 2011 so I wrote to you both requesting a response (*see attached letter dated September 30, 2011*).

EXHIBIT E

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Kailua Kona, Hawaii 96740
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Fax: 808.326-1175

Samuel J. Lemmo, OCCL
Kevin E. Moore, Land Division
August 14, 2012
Page 2

We received a letter dated October 5, 2011, from Mr. Moore acknowledging receipt of the July 21, 2001, Application and saying the Land Division would need a determination from OCCL before it could take the easement request to the Board of Land and Natural Resources. *See attached October 5, 2011, letter from Land Division.*

On October 10, 2011, we received a letter from Mr. Lemmo asking for further information showing that the wall was built before October 1, 1964. As you are aware, we had submitted an Affidavit of one of the owners with family photos from the late 1950s and early 1960s which clearly showed the wall in place. We also included an Affidavit of Cyrus Savage, the father of the current owners, who stated that the wall was built before 1964 and attached 1958 and 1963 photos of him and his wife and daughters (the current owners/Applicants) showing the wall in the background. The OCCL has rejected this documentation as being unreliable because it came from the owners. We repeatedly objected to this position but submitted a further Declaration of a neighbor.

We have also repeatedly pointed out that there is no way that OCCL can demonstrate that the wall was a conservation district violation at the time it was constructed. The land makai of the Savage property is part of TMK (3) 6-9-001: 002 which is in the State land use urban district. There is no way that OCCL can prove where the shoreline was located at the time the wall was built and thus no way of establishing a conservation district violation. The owner is aware that the wall encroaches into TMK parcel 002 and is, for this reason, applying for an easement.

Your department has never responded to this point. You have only repeatedly stated that we have not demonstrated that the wall is nonconforming. We believe this position is dead wrong and we have repeatedly asked that this issue be placed on the agenda of the Board for a determination.

We have been proceeding with OCCL because we believed, based on the letter from Land Management dated October 5, 2011, that Land Management "need[ed] a determination from the Office of Conservation and Coastal Lands (OCCL) . . . before Land Division can take the easement request to the Board of Land and Natural Resources" and that a "favorable recommendation" was needed.

In the OCCL's letter of August 1, 2012 (responding to my April 24, 2012, letter), you advise me that "you must apply directly o the Department of Land and Natural Resources, Land Division" and that OCCL has "been involved only to the extent of providing input/advice to you and the Land Division on whether we think an easement should be granted." This letter seems to forget that this process started when the owners submitted the Application for easement directly to the Land Management Division on July 21, 2011.

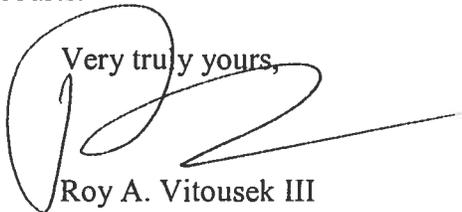
This process has been a total runaround, which needs to stop. We request that the Application be placed on the Board's agenda as soon as possible.

EXHIBIT E

Samuel J. Lemmo, OCCL
Kevin E. Moore, Land Division
August 14, 2012
Page 3

If we are unable to have this matter progress through the Department process, we will have to consider other avenues, including the courts.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Roy A. Vitousek III', written over the closing 'Very truly yours,'.

Roy A. Vitousek III
for

CADES SCHUTTE
A Limited Liability Law Partnership

RAV

EXHIBIT E

William P. Kenoi
Mayor



BJ Leithead Todd
Director

Margaret K. Masunaga
Deputy

West Hawai'i Office
74-5044 Ane Keohokalole Hwy
Kailua-Kona, Hawai'i 96740
Phone (808) 323-4770
Fax (808) 327-3563

County of Hawai'i 2012 NOV 13 1 P 20
PLANNING DEPARTMENT

East Hawai'i Office
101 Pauahi Street, Suite 3
Hilo, Hawai'i 96720
Phone (808) 961-8288
Fax (808) 961-8742

RECEIVED
LAND DIVISION
HILO, HAWAII

November 9, 2012

Mr. Wesley Matsunaga
Department of Land and Natural Resources
Land Division
75 Aupuni Street, Room 204
Hilo HI 96720

Dear Mr. Matsunaga:

Subject: Grant of Term, Non-Exclusive Easement for Seawall Encroachment Purposes
PSF No.: 12HD-128
Tax Map Key: 6-9-1:Portion of 2, Lalamilo, South Kohala, Hawai'i

This is in response to your memorandum dated October 15, 2012.

Although the subject parcel is zoned Open (O) and Resort-Hotel (V-1.25) by the County, the subject area is zoned Open.

We do not have any record that the seawall was determined to be a legal, non-conforming structure. Since such a request has never been submitted to our office for Special Management Area review, we believe the granting of an easement is premature.

Thank you for allowing us to comment on this request. If you have questions, please feel free to contact Esther Imamura of this office at 961-8139.

Sincerely,

BJ LEITHEAD TODD
Planning Director

ETI:

P:\Wpwin60\ETIDLNR\Matsunaga 6-9-1-2 & Savage 6-9-6-16 Seawall.Rtf
xc: Planning Department, Kona
TMK: 6-9-6:16

EXHIBIT F

William P. Kenoi
Mayor



BJ Leithead Todd
Director

Margaret K. Masunaga
Deputy

West Hawai'i Office
74-5044 Ane Keohokalole Hwy
Kailua-Kona, Hawai'i 96740
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Fax (808) 327-3563

County of Hawai'i
PLANNING DEPARTMENT

East Hawai'i Office
101 Pauahi Street, Suite 3
Hilo, Hawai'i 96720
Phone (808) 961-8288
Fax (808) 961-8742

January 15, 2013

Mr. Roy A. Vitousek
Cades Schutte LLP
75-170 Hualalai Road, Suite B-303
Kailua-Kona, HI 96740

Dear Mr. Vitousek:

SUBJECT: Determination of Existence of Wall along the Shoreline Prior to 1970
TMK: (3) 6-9-001:002 (por.) and 6-9-006:016; Lalamilo, South Kohala, Hawai'i

This is in response to your request received on December 26, 2012. We understand the land owner is seeking a grant of easement for a seawall encroachment into the adjacent State-owned Government Beach Reserve. However, the Department of Land and Natural Resources (DLNR) Land Management Division is holding the request pending the legal nonconforming status of the wall. You have requested that our office confirm the wall was built prior to June 22, 1970 and is therefore considered to be legal non-conforming structure within the Shoreline Setback area.

Pursuant to Planning Department (PD) Rule No. 11-7(a) (6), "Structures which were completed by or activities which commenced prior to June 22, 1970" can be allowed within the shoreline setback area provided written clearance is secured from the Planning Department.

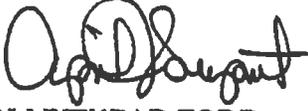
With the receipt of the two (2) sworn affidavits and the photo exhibits, our office concurs that the wall is visible in the photographs and therefore determines that the structure was built prior to June 22, 1970. In addition, we hereby provide clearance to allow the subject wall within the shoreline setback area.

EXHIBIT G

Mr. Roy A. Vitousek
Cades Schutte LLP
January 15, 2013
Page 2

If you have questions or require further information, please feel free to contact Bethany Morrison of this office at 961-8138.

Sincerely,



 BJ LEITHEAD TODD
Planning Director

BJM:cs

P:\wpwin60\CZM\Letters\2013\tnk 69001002- determination of existing wall prior to 1970.doc

cc: Long Range Planning

Planning Department- Kona Office

Mr. Wesley Matsunaga
Department of Land and Natural Resources
Land Division
75 Aupuni Street, Room 204
Hilo, HI 96720

EXHIBIT G

NEIL ABERCROMBIE
GOVERNOR OF HAWAII



WILLIAM J. AILA, JR.
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT



**STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
LAND DIVISION**

75 Aupuni Street, Room 204
Hilo, Hawaii 96720
PHONE: (808) 961-9590
FAX: (808) 961-9590

EXEMPTION NOTIFICATION

Regarding the preparation of an environmental assessment pursuant to Chapter 343, HRS and Chapter 11-200, HAR.

Project Title: Grant of Term, Non-Exclusive Easement to Joanna C. Savage, Katherine N. Savage, Jill A. Savage, aka: Jill Alison Savage, Trustee of the Jill A. Savage Revocable Living Trust dated January 10, 1996, for Seawall Encroachment Purposes.

Project / Reference No.: PSF No.: 12HD-128

Project Location: Lalamilo, South Kohala, Hawaii, Tax Map Key: (3) 6-9-001: portion of 002.

Project Description: Grant of Term, Non-Exclusive Seawall Encroachment Easement.

Chap. 343 Trigger(s): Use of State land.

Exemption Class No. and Description: In accordance with Hawaii Administrative Rule Sections 11-200-8(a)(1) & (4) and the Exemption List for the Department of Land and Natural Resources approved by the Environmental Council and dated December 4, 1991, the subject request is exempt from the preparation of an environmental assessment pursuant to Exemption Class No. 1, that states "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" and Class No. 4, that states "Minor alteration in the conditions of land, water, or vegetation."

Exemption Item Description from Agency Exemption List: Operations, repairs or maintenance of existing structures, facilities, equipment, or topographical features, involving negligible or no expansion or change of use beyond that

EXHIBIT H

previously existing

Minor alterations in the conditions of land, water or vegetation.

Recommendation:

The issuance of a term, non-exclusive easement for seawall encroachment over a portion the land in itself will probably have minimal or no significant effect on the environment. The existing seawall was constructed in the 1960s. It is recommended that the Board of Land and Natural Resources find that the action is exempt from the preparation of an environmental assessment. Inasmuch as the Chapter 343 environmental requirements apply to any future use of the lands, assessment.



William J. Aila, Jr., Chairperson



Date

EXHIBIT H