

**MINUTES FOR THE
MEETING OF THE
BOARD OF LAND AND NATURAL RESOURCES**

DATE: THURSDAY, OCTOBER 28, 2010
TIME: 9:00 A.M.
PLACE: KALANIMOKU BUILDING
LAND BOARD CONFERENCE ROOM 132
1151 PUNCHBOWL STREET
HONOLULU, HI 96813

Chairperson Thielen called the meeting of the Board of Land and Natural Resources to order at 9:07 a.m. The following were in attendance:

MEMBERS

Laura Thielen
Jerry Edlao
Rob Pacheco
David Goode

Ron Agor
John Morgan
Dr. Sam Gon

STAFF

Russell Tsuji/LAND
Sam Lemmo/OCCL

Dr. Bob Nishimoto/DAR
Scott Fretz/DOFAW

OTHERS

Bill Wynhoff, Deputy Attorney General
Steve Kai, D-12
Peter Young, D-8
Eric Leong, M-1, M-2
Don Beaucage, F-2, F-3
Mark Roy, K-1
Marjorie Ziegler, C-1
Rob Parsons, D-4

Kaulana Park, D-12
Rep. Cynthia Thielen, D-8
Miles Nishijima, D-8
Marti Townsend, F-1, F-2, F-3, D-4
Randy Vitousek, D-5, K-2
Bill Spencer, D-4
Michael Kumukauoha Lee, D-4

{Note: language for deletion is [bracketed], new/added is underlined}

Item A-1 October 14, 2010 Minutes – TO BE DISTRIBUTED.

Approved as submitted (Pacheco, Gon)

Item D-12 Conveyance of Portions of Government Lands State-Wide from the State of Hawaii, by its Board of Land and Natural Resources, to the Department of Hawaiian Home Lands, Tax Map Key: (1) 2-3-09:01(portion); (2) 4-5-21:23(portion), 3-8-08:8 and 35, 4-4-01:15, 4-4-02:38, 5-2-04:46, 4-9-02:01(portion), 4-9-02:01(portion), 5-3-01:2, 97 and 100; (4) 1-2-02:01(portion), 3-9-06:16 and 20, 4-5-11:26, 4-5-04:02(portion); (3) 2-2-58:27 and 28, 7-3-10:44, and 7-3-10:42(portion).

Withdrawal of Approximately 5.334 Acres of Land from Governor's Executive Order No. 0101 to the Department of Education, for McKinley High School Purposes, Honolulu, Oahu, Tax Map Key: (1) 2-3-09:01(portion).

Withdraw Approximately 50 Acres of Land from Governor's Executive Order No. 4007 to Agricultural Development Corporation for Agricultural Related Purposes, Kekaha, Waimea, Kauai, Tax Map Key: (4) 1-2-02:01(portion).

A number of written testimonies were distributed.

Russell Tsuji representing Land Division reported that Item D-12 is a final settlement of lands that are to go to DHHL and requested an amendment to delete the McKinley High School lot from the list. He has the language for that.

Kaulana Park representing Department of Hawaiian Home Land (DHHL) introduced his staff. Mr. Park thanked the Chairperson and staff. He related some background about DHHL that their primary objective is to get as many people off their wait list onto the land. It's important for DHHL to continue building because it's affordable for their people and they continue to create jobs. The lands in the submittal will continue to provide for the future and they will dedicate these lands to the people to maintain for future generations as a community. Mr. Park related the cash flow situation. It was brought to their attention to uphold the McKinley parcel which DHHL is fine with. They did not know about the school's plan. There is also a tenant on a 50 acre parcel at Kekaha that they are fine with accommodating and will keep them there as long as possible. The DHHL is moving towards an agricultural component where the Hawaiian people could take care of, invest in and get people to know each other to prosper on these ag lands for everyone. Not only to homestead. Everyone will benefit for the greater community. Mr. Park related a solar company coming in and the funds from the lands will be used to educate the youth. Mr. Park asked the Board's approval.

Board member Goode asked whether DHHL feels whole with the income producing lands they have on Maui. Mr. Park acknowledged that he believes so. It gives the administration a trust and a chance to do some good things and give their people a chance to succeed to utilize these lands for good use which will compliment the lands next door. This is always done for the community's benefit.

The amended McKinley action was appreciated by Member Edlao where Mr. Park apologized for the mistake.

Member Pacheco was concerned with whether the terms with the lease that transfer over will be the same. Mr. Tsuji explained what they do when they transfer the properties over to DHHL staff gives them a title. If there is an encumbrance such as a lease they take it subject to the lease. Whatever remaining term is on the lease and the terms of condition of the lease come with the land. Member Pacheco wondered whether there were options to change things on that lease and Mr. Tsuji answered in the negative.

Chair Thielen summarized that the Chairman of DHHL is not going to ask for the McKinley parcel. We have language to amend which will delete that parcel from the transfer. There is a second parcel on the Island of Kauai that has a tenant on it and is an agricultural operation. DHHL will take the tenant and the existing lease keeping the tenant there with the terms of the existing lease. The rest of the parcels are vacant lands.

The Chair asked whether Ray Sasaki, Helen Sanpei, Lauren Shimizu, Ann Antal, Neal Takamori, Matthew Rose, Nick Nichols and Janna Mihana wanted to come up to testify and they all declined.

Steve Kai represented the Kekaha Agriculture Association and Pioneer Hybrid which is one of the tenants testified in support, but suggested the Board look at other alternative parcels with respect to infrastructure. The parcel is across the ditch which he had photos to share and suggested a DLNR parcel adjacent to the current property.

Member Pacheco asked whether this is a concern of infrastructure cost to DHHL and not the affected use to the agribusiness. Mr. Kai said he doesn't see an impact to the term of this lease on how it would impact their members. He reiterated his suggestion to look at alternatives. The parcel is accessible to the highway that doesn't involve the Executive Order to ADC (Agribusiness Development Corporation) and he shared some photos. Mr. Tsuji clarified that staff talked with Mr. Park about a revocable permit that is encumbered with the land and DHHL agreed to allow the tenant to stay on the property. Member Pacheco asked whether ADC has a revocable permit or a lease. Mr. Kai said they have a license from ADC and noted that all the tenants are members of the Association. The ADC representative (Matthew Rose) said ADC will stand on their testimony. Mr. Park said they are always able to move the 50 acres around.

Chair Thielen said that the 1920 Hawaiian Homes Act is part of a trust to allow housing. In 1995, Act 14 was short acreage. Now DHHL is getting the last 800 acres parcel by

parcel, but there is finite supply of desirable lands. This is to approve with the amended language. Mr. Tsuji read his recommendation.

Member Edlao suggested working with DHHL and staff to accommodate tenants.

Member Gon moved to amend as described and Member Edlao seconded it.

The Board:

Taking off McKinley High School property, so, staff is recommending and the Board approved the following amendments to the staff's Recommendation section:

1. Amend recommendation 1 to read:

“Approve conveyance of +/- 817 acres of State land minus the McKinley High School site of approximately 5.334 acres (TMK: (1) 2-3-09:01(portion), as selected by DHHL and identified as Exhibit A...[continue with remainder as submitted]”

2. Delete Recommendation 2 in its entirety.

3. Renumber paragraphs 3 and 4 accordingly to be 2 and 3.

4. New Recommendation no. 4 to read:

4. The Board encourages the Chairperson of the Department of Hawaiian Home Lands to work with the existing tenant or occupant on the lands, particularly those 50 acres of lands on the island of Kauai in Kekaha.

Unanimously approved as amended (Gon, Edlao)

Item D-8 Approval in Principle of Land Exchange between the State of Hawaii, on behalf of the Department of Education, and Castle Residuary LLC to Acquire Privately-Owned Land at Kalaheo Hillside, Kailua, Oahu, Tax Map Key: (1) 4-4-011:portion of 003, as an addition to Kalaheo High School, in Exchange for State-Owned Land at Castle Junction, Oahu, further described as road remnants abutting Tax Map Key: (1) 4-5-035:003 and 005.

Written testimonies were received and distributed.

Mr. Tsuji conveyed this item is a proposed land exchange stemming from land jurisdiction under the Department of Transportation – Highways that has some remnants. The proposal is to do an exchange for the Department of Education to acquire some lands for the expansion of the athletic field.

Representative Cynthia Thielen disclosed that Chairperson Laura Thielen is her daughter.

Peter Young testified that the submittal explains what is intended here. This is a school with a field that is not of sufficient size to have home games like other schools. It's a consequence of a middle school turned into a high school. Kaneohe Ranch is interested in adjoining lands and wants to exchange property. DOT can rid of lands they don't need and DOE can get lands it needs. There is strong support from the community for the expansion and he asked to move this process forward.

Chair Thielen said the Department asks as the land bank holding the unencumbered lands. These lands going to Kalaheo High School have no other purpose because it's right on the high school and would have to do some excavation to expand the field and if it didn't go for that purpose the land would sit there. The language in the submittal is the transfer wouldn't occur until the portion for the foot ball field was sub-divided under the conservation district use permit and then DOE would be willing to take it. She asked whether the parties were acceptable of this. Mr. Young confirmed that in all his discussions everyone was fine with the submittal.

Miles Nishijima representing Kaneohe Ranch agreed.

The Chair said the DOE superintendent was in support of this.

Unanimously approved as submitted (Morgan, Gon)

Item M-1 Consent to Assign Harbor Lease No. H-01-08, Equilon Enterprises, LLC, Assignor, to Aloha Petroleum, Ltd., Assignee, Nawiliwili Harbor, Lihue, Island of Kauai, Tax Map Key: 4th/3-2-04:17 & :40

Item M-2 Issuance of Revocable Permit to Swinerton Builders, at Pier 19, Honolulu Harbor, Oahu, Tax Map Key:1st / 1-5-39: 63 (Portion)

Eric Leong, Property Manager for DOT – Harbors described Items M-1 and M-2.

Chair Thielen commented that the mock-up of the court room was interesting.

Unanimously approved as submitted (Agor, Morgan)

Item F-1 Request for Authorization and Approval to Issue a Papahānaumokuākea Marine National Monument Conservation and Management Permit to the Monument Co-Trustee Representatives of the U.S. Department of the Interior, U.S. Fish and Wildlife Service; U.S. Department of Commerce, National Oceanic and Atmospheric Administration; and State of Hawai'i Department of Land and Natural Resources, for Access to state Waters to Conduct Conservation and Management Activities

Dr. Bob Nishimoto representing Division of Aquatic Resources (DAR) conveyed that the area is the whole chain from Nihoa Island to Kure Atoll. This permit activity request will last for 1 year. The activity proposes to conduct management activities for the conservation management of the Hawaii National Wildlife Refuge – Midway Atoll, National Wildlife Refuge, the Northwestern Hawaiian Islands Coral Reef System Reserve, the State Marine Refuge, Kure Atoll – Seabird Sanctuary and the Monument. All the activities are necessary to effectively co-manage the area. The scope of the activities is listed on page 2. The activities proposed directly support the Monument Management Plan. The activities are in compliance with NEPA and HRS 343. And DAR recommends the Board authorize and approve the permit for the co-trustees to participate in these activities following recommendation items 1-6 on page 4.

Member Gon asked whether these are standard management conditions. Mr. Nishimoto acknowledged that.

Marti Townsend representing KAHEA distributed her written testimonies to the Board members. She felt the permits were not being properly issued. Her concern was regulations do not allow for ship operations to be exempted from environmental review and an environmental assessment needs to be completed which it hasn't. There have been efforts to amend the regulations to allow ship operations to be exempted, but has not been completed. The environmental council has not concurred with the changes to DLNR's exemption list. We are operating under the current rules and ship operations are not listed. Also, the Board is considering permits in a segmented way – the ship operations as one permit and the research activities as separate permits, but needs to be heard all together. It's cumulative both in time, space and a long period of time. This is information that was brought before and hoped the Board would take the time to review it. It's important to have the necessary research, but also follow the rules and regulations meant to protect one of most protected marine resources.

Member Gon asked what the exemption procedure is and the time frame. Ms. Townsend said the Environmental Council was on hiatus for a year and a half and meets monthly. They have about 11 exemption lists to go through and DLNR has 5 or 6 of those where they will do about 4 or 5 first and they will get through one meeting with each agency that would take about 6 months. The Exemption Committee has committed to get through the existing the exemption list pending their concurrence as quickly as possible. Member Gon inquired whether Ms. Townsend attended any of these meetings and she said she goes to all of them. Member Gon asked about the discussion so far with regards to the exemption of the ship operations whether it was going smoothly. Ms. Townsend said it's been muddled so far. The draft exemption list that was given to the Environmental Council was broad where all kinds of issues are lumped into one. They haven't gotten to whether they should exempt ship operations or not. She suggested taking the word "all" out of permits issued by DAR.

Member Pacheco commented that Item 1 has a FONSI for that subject activity. Both items 2 and 3 have the exemption declaration. Ms. Townsend said she spoke to staff and learned there was a hang up on-line, but the declaration was before the Board members.

Only the permit application and staff recommendation was posted. That's a technicality. She referred to her written testimony's Exhibit C which shows the cumulative impact analysis which highlights research activity over time and ship operations are not on the list of things that are reviewed for cumulative impact. The Natural Sciences Plan was suppose to address this problem and now we've lost the momentum in getting that Science Plan done. We need to do something else to do this correctly. These research voyages are planned a year in advance referring to the 4th Exhibit with a timeline and they know far in advance what is coming down. They have an opportunity to weigh in on that process with an environmental review that ensures that they aren't going to make any mistakes that were made in the past. She doesn't understand why it isn't feasible to do this.

Member Morgan made a motion to approve staff's recommendation. Member Agor seconded it.

Chair Thielen commented the cumulative analysis presented to them this past summer did consider those operations as well as those research permits and she appreciated KAHEA recognizing how thorough that is. Given the number of activities the analysis said it would require an order magnitude increase before there would be a cumulative impact. She doesn't think it necessary to undergo a presentation of each permit.

Unanimously approved as submitted (Morgan, Agor)

Item F-2 Request for Authorization and Approval to Issue a Papahānaumokuākea Marine National Monument Conservation and Management Permit to Commanding Officer John Caskey, National Oceanic and Atmospheric Administration (NOAA) Ship Hi'ialakai for Access to State Waters to Conduct Shipboard Support Activities

Item F-3 Request for Authorization and Approval to Issue a Papahānaumokuākea Marine National Monument Conservation and Management Permit to Commanding Officer Anita Lopez, National Oceanic and Atmospheric Administration (NOAA) Ship OSCAR ELTON SETTE, for Access to State Water to Conduct Shipboard Support Activities

Dr. Nishimoto related that items F-2 and F-3 are similar requests that it's for the same area between Nihoa Island to Kure Atoll. The purpose is to provide a FC platform to support research education and management activities within the Monument. DAR recommends authorizing and approving to both Commanding Officers and their respective ships.

A Don Beaucage representing NOAA was here for any questions.

Chair Thielen noted that the Board has KAHEA's testimony on the record.

Unanimously approved as submitted (Morgan, Edlao)

Item D-5 Grant of Term, Non-Exclusive Easement to Jeffrey A. Frederick, Trustee of the Helen J. Thomas Maddock Revocable Trust, dated May 12, 1981 for Seawall Encroachment Purposes, Puako Beach Lots, Lalamilo, South Kohala, Hawaii, Tax Map Key: 3rd/ 6-9-001: portion of 002.

Mr. Tsuji reported that Item D-5 is a routine proposed easement to rectify a seawall encroachment. There are no changes and he is here for any questions.

Randy Vitousek, Attorney for the Maddock Revocable Trust testified by thanking staff. This is a short section of wall added to reinforce a legal wall and this is a portion of the wall where the public uses to traverse the shoreline. The managed property butts up to a public right-of-way and the public uses the portion of the wall that butts up to the State property as a means of getting access south from the right-of-way.

Unanimously approved as submitted (Pacheco, Gon)

Item K-2 Request for Contested Case as to Petition for Deviation from Permit Conditions and Rules Prohibiting Vacation Rentals of Properties Located at Haena, Kauai, TMK Nos. (4) 5-9-002:018, 021, 022, 035, 039, 041, 043, 044, 050, 051, 052, 061; (4) 5-9-003:046; (4) 5-9-005:021

Written testimonies were distributed to the Board.

Sam Lemmo representing Office of Conservation and Coastal Lands (OCCL) noted that he wanted to make a correction where Items K-1 and K-2 were reversed on the agenda from the submittals. Item K-2 on the agenda is Item K-1 on the submittal. This is a contested case petition to deviate from conditions of permits that prohibit vacation rentals in Haena. As you can see from the submittal there is a list of property owners that Mr. Vitousek represented, but Mr. Vitousek indicated he is only representing the parties that are bolded, but all of these people appeared on the original petition for a deviation that was filed back in 2007. We don't know for sure whether the parties that are not bolded are still seeking a contested case on this matter, but staff left them on the document because they didn't think it was appropriate to delete it from the original petition. Each of the owners Mr. Vitousek is representing at various times from 40 years ago wanted to build houses in Haena. They applied and received conservation district use applications to do so from the Land Board. Each of these permits was issued subject to various conditions. One of those conditions was that the single family residence(s) will not be used for rental or commercial purposes. There is an example of a condition prohibiting rental or commercial use in the submittal. Despite the no rental condition in the CDUPs some of the owners rented their properties for short term vacations which have been happening for decades and there are other people who would like to do so in the future. When staff found out about the vacation rentals they asked people to stop issuing the owners letters and gave them timetables to cease the activity. As indicated in the report

owners would be giving up their commercial enterprise to rent these single family residences. The owners filed for a petition. The petition was seeking an approval from the Board to deviate from that condition that prohibits rental. The rules allow you to approve deviations from certain conditions, permits or projects. So they applied for the deviation and that application was made back in 2007. The deviation request came before the Land Board on 2 occasions. On the second occasion the Board denied the deviation to change the condition permitting vacation rental use. The owners filed for a contested case hearing and the request was denied by the Chair. The denial of the contested case was not addressed by the Board. Mr. Vitousek on behalf of his clients filed a lawsuit. Judge Kathleen Watanabe of Kauai agreed that the contested case was not required. However, when it went to the ICA (Intermediate Court of Appeals) without addressing the merits ruled that the Board not the Chair must make the decision whether or not to go to a contested case hearing. And, that is why we are here today to take up the issue of whether or not these people should have standing to have a contested case. Mr. Wynhoff has helped staff with writing up the rationale for why the contested case should not be granted where he turned it over to Mr. Wynhoff.

Bill Wynhoff, Deputy Attorney General testified that the only thing he would add from the AG's (Attorney General) point of view its their belief that the Board does not have to grant a contested case. If you want to that's up to you and staff. Also, with respect to applicant's claims that the rule is unconstitutional or otherwise invalid the Board cannot grant a contested case with respect to that because the Statute is pretty clear as are in cases that this Board doesn't have jurisdiction to determine whether its own rules are unconstitutional. That is his only addition. As Sam pointed out we went through the litigation. We gave exactly the same explanation to Judge Watanabe as summarized in here as to why using your discretion and it is not something you are required to do. She accepted that and they continue that's correct.

Chair Thielen said Judge Watanabe has already found there was no right to a contested case and the ICA has the ability to overturn that if they wanted to and instead they said it was a technical error that it's the Board that needs to make the ruling and not the Chairperson. Mr. Wynhoff said he quoted what the ICA said BLNR has discretion to deny the request and/or petition which we believe is correct and that is what Judge Watanabe found as well.

Member Pacheco asked normally when we have a request for contested case hearing it comes back to the Board is whether they have standing. Mr. Wynhoff said at some extent they've been getting better at contested cases and coming to a better understanding of what the issues and who is going to decide. The first time they went through the Chair decided and we all not knowing agreed it was wrong. With respect to your question there are 2 issues in a contested case. The first issue is anybody is entitled to a contested case. The easiest one is if there is a statute that says a contested case shall be granted. There could also be a rule or a due process requirement. It's a little different although similar to standing because the standing one is whether this particular person is entitled. An example is if you fine somebody \$500 for a CDUP violation. The person fined is entitled to a contested case hearing. The first issue is yes somebody is entitled to a contested

case. If it's a violation on the Island of Oahu and somebody on the Big Island thinks \$500 is too little and that person wants to ask for a contested case that person doesn't have standing. In this particular instance the issues are overlapped, but the right to a contested case fails on the first one. There isn't any statute or rule that requires a contested case the applicable rule clearly puts it into the discretion of the Board whether or not to do it. The real issue is whether or not these folks have any property rights. This is exactly the argument – he anticipates Randy's argument. The argument at the ICA and Judge Watanabe was look we own these houses and we have a right to use it for stuff and you are infringing on our prescription rights to use and own our house. Our position is and which Judge Watanabe accepted was you don't have a right to rent these houses. You never had a right to rent these houses. You don't have a property right to rent them because you wouldn't even have the houses unless you agreed in advance not to rent the houses when they gave you the CDUP. Our position was and remains if you don't have a property interest in it. And that is why he said standing and right kind of overlap obviously. If they had a right to a contested case because they had property interest then they would have standing, but analytically they are 2 separate issues. They have to ask first does anybody have a right and in this case no and then before getting to the question of standing whether a particular person has a right.

Member Pacheco asked if we act on this to allow the contested case basically they are allowing the contested case and at the same time we're saying these folks have standing. Mr. Wynhoff agreed if you allow the contested case and exercise your discretion. If you don't allow he suppose it will go back to Judge Watanabe and they will make the same arguments again and see if she changes her mind. And, if she doesn't regardless of what she rules it will likely go back to the Appellate Court to get a determination. That determination will be whether they had a right to it. Member Pacheco asked normally when we have these things the AG's Office comes forward basically gives the opinion through the staff whether the applicants have standing or not. They make the recommendation. Mr. Wynhoff said he had written about 4 or 5 of these in the last 6 months and they go through the analysis he discussed earlier. The first question is anybody entitled to a contested case. He is not sure what the Board would see or what we end up writing, but the analysis is what we've said. Many times it's pretty clear. If somebody gets a CDUP its pretty clear that there is a right in the abstract and then the question is whether it's a particular person. The fish cages off the Island of Hawaii as an example. There was a right in the abstract for somebody to challenge that CDUP, but the people are challenging the fish cages 2 miles off the coast of the Big Island have never been there and lived on Oahu so those people don't have standing. You only got the standing as the first part of the testimony.

Member Pacheco asked he can't remember since he has been on the Board having this issue brought forward where they had a contested case hearing that wasn't required that they are having this discretion. What do we evaluate in order to make that decision? Mr. Wynhoff said that's a good point. The rules are pretty clear that the Board has discretion with respect to standing. We haven't taken on at the AG's the issue of what the limits of discretion of disputed people the contested cases. If the Board wants to do something we won't want stand in your way. If you wanted to it wouldn't be our position in advance

that you don't have discretion if you wanted to give somebody a hearing and we didn't discuss it or think about it in this case. It is our opinion that you would have discretion to give this person a hearing even if you don't have to. Whether in some future cases somebody wanted to send a letter to Mark Bennett and ask him what the scope of that discretion would be, we don't know. There would be some areas like the constitutionality of the rule that you can't have a contested case on that. You can't define it, you don't have jurisdiction. There are certain summaries to your discretion.

Member Pacheco said that is one of his concerns, too. We could be setting policy or something coming down the line that he wanted a clear path down that if they make a certain decision what that means in other situations. Mr. Wynhoff said if you set the precedence that you have discretion to grant a contested case hearing even though you don't have to it is one brick in the wall if you went that way.

Member Agor asked that some people questioned whether the sub-division should be conservation. Mr. Lemmo said these are all in conservation and he doesn't think there is a question. Member Pacheco said there are houses in that situation. One place it's a conservation district and in another spot in a similar location, but it's not. There are artificial boundaries of some sort. Mr. Lemmo confirmed these are definitely conservation which Member Agor agreed. Mr. Lemmo reported that the County did take up the vacation rental issue where there were similar lots in the urban district.

Chair Thielen said she is going to give Mr. Vitousek a certain amount of time to testify and recommended that you may disagree with Mr. Wynhoff and may want to address his argument, but what it seems to her is they got a discretionary decision that they were asked to make on whether to give a deviation. The Board made a discretionary decision not to. There is a court decision that says we don't have to give a contested case and we have a discretionary choice in front of us on whether we want to. Mr. Vitousek may disagree with a bunch of things, but you may want to focus on the discretionary choice in front of the Board. She asked Mr. Vitousek to take about 5 minutes.

Randy Vitousek testified requested a call of limitation imposed on the attorney for the Department to have a fair opportunity to present their side of the case. There have been several misstatements to what the courts ruled and not ruled. The ICA reversed and vacated to the circuit court judge's decision. Let Mr. Wynhoff representing what the judge may have held or not is not appropriate because the ICA vacated both the appeal and the decision relative to the declaratory relief petition. There is nothing there. There is nothing to refer to. It is a clean slate. The other issue whether there is discretion or not he had said in his letter that he was astounded that the AG has not referred you to the case of Kaleikini versus Thielen which was a Hawaii Supreme Court case that was issued on August 18, 2010 that dealt specifically with the issue of discretion to grant or not grant a contested case hearing. In that case the Hawaii Supreme Court directly reversed the position that the AG took on this case before the Circuit Court and before the Court of Appeals and ruled that the fact that a contested case hearing was not held before the Board did not deprive the Appellate Court or the Circuit Court jurisdiction. When they remanded Kaleikini...and again this involves you. This is an appeal from a decision of the Board on the issue of contested case hearings and the AG hasn't even cited that to

you and he really doesn't understand that. Because what that decision held was when the statute in that case related to Historic Preservation. In that case where it talked about discretion in the Chair to grant or deny a contested case hearing. What the Supreme Court said is the discretion is to decide whether or not the applicant meets the criteria for a contested case and if they do meet it they are mandated to do it. In other words its not discretion about you might have a hearing, you might not. Discretion means discretion to evaluate whether the applicants met the criteria the procedural criteria for a contested case. And, as Board Member Pacheco pointed out, ordinarily they look at the question of whether there is standing involved. In this case, remarkably, the AG admitted in their recommendation to you that these people have standing. We recognize these people have standing. But, if you look at what standing is standing is whether the applicant had an injury in fact. In other words whether the applicant could be injured by the decision of the Board and whether an appeal could rectify that injury. The AG has conceded that these people would be injured by the decision of the Board. Have an interest injured by the decision of the Board and yet he is arguing that our contested case hearing is not required by law and he thinks that's really a problem. The ICA did not decide that the Board could grant a contested case hearing or could not in its discretion. It only said that the Board has the discretion to decide not the Chair. Then the Thielen versus Kaleikini case came along and said that discretion is just to decide whether or not the criteria been met. It's not to decide whether or not there should be a contested case hearing. We were here on October 26, 2007, Commissioner Agor, you made a motion for a contested hearing in this case and you said the fair way to decide it would to put the issues to contested case, maybe refer the parties to mediation and see whether there is a way to flush out the issues. And, the AG advised the Board that it could not grant a contested case with respect to the petition. If you want me to read the quote from the AG I could do that. But, what they said was you couldn't have a contested case hearing. We are not entitled to one under any circumstances of this petition. Now, three years later we've gone to Circuit Court, we've gone to ICA and now coming back you say now you can. You can grant it, but you don't have to which is just as wrong as the previous advice. What we're asking for here is these peoples' properties are limited by a condition which says it can't be used for rental or other commercial purposes. It never defined rental. It's never been defined. Our position is if that means that any occupancy of the property in exchange for any form of consideration is illegal. That means that if I'm the owner and I get called up to military service I can't let my parents stay in my house if they mow the lawn for me. If that is what this condition says its overbroad and it is also in excess of the authority of the Board has under Chapter 183(c) to impose conditions on conservation district uses. In other words it's not authorized. It's too broad and the Department itself has recognized this. The Department since 1998 came up with a proposed amendment saying the rule as written is overbroad, unreasonable and should be amended because it cuts too deeply into property rights. That amendment never went forward. But, now there is another opportunity given to amend the rules. The proposed amendment to the rule that would clarify whether it was long term rental or short term rental then they withdrawn that application and they are sticking back with the same vague terms rental or other commercial purposes. We just want an opportunity to have this addressed by the Board. The last time they were here the Board could not articulate. Board members kept asking the AG what does this mean, no rental, and they never got an answer. In Circuit

Court they never got an answer and in the ICA they never got an answer. What he is asking is if these owners instead of applying for a petition to deviate from the condition started violating it and if OCCL initiated an enforcement action against them like they said for a \$500 fine then we would unquestionably be entitled to a contested case hearing as to whether that is a legal condition. What the AG, OCCL and the Board are forcing is an owner has to risk an enforcement action in order to get this issue addressed in the proper manner. That is all they are trying to do is getting the issue addressed. What limitation, what is the scope of the limitation imposed on these owners use of their own homes and is that scope of limitation consistent with the statutory authority and the constitutional protections for private property.

Member Pacheco asked about the letter Mr. Vitousek submitted. Mr. Vitousek said he submitted 2 letters. One was dated September 7, 2010 that was addressed to Ms. Thielen and the Board and I submitted another letter July 15, 2010 that was addressed to Ms. Thielen and Members of the Board. A staff member went to get copies of those letters. Mr. Vitousek said those letters were part of an agenda item a couple months ago.

Member Pacheco referred to the note at the bottom of the first page of the submittal and he read the last sentence asking whether there are other clients. What does that mean? Mr. Vitousek explained that there is a difference between the people who are petitioners and the people who are plaintiffs in a clarified relief action. There is a reason for that because the Department only initiated enforcement actions against people who had conditions in their permit. There are other people who live right next door who don't have a "no rental condition" in the permit who are vacation renting and the Department didn't initiate an action against it. We went to a declaratory route so the ones who had conditions we petitioned the Board to amend those conditions or remove them. When they had to file this declaratory relief action we filed on owners in the Conservation District both who had the condition in their permit and those who did not. Because it makes the point that there is no rule that prohibits rental use in the conservation district. It's only if you have a condition in your permit that the Department will prosecute you for renting the property. Also, DLNR vacation rents in the conservation district – Waianapanapa, Mauna Kea State Park, Koke'e, Hapuna – these are all facilities that are in the conservation district that the Department rents on a 3 night maximum. We don't understand why the Department is able to vacation rent in the conservation district and then take the position that owners can't long term rent theoretically because it's damaging to the conservation district uses. Chair Thielen asked whether he was talking about the State Park's areas set up for cabins. Mr. Vitousek said he is talking about where the Department rents facilities in the conservation district on a 3 night maximum. Yes.

Member Pacheco moved to go into Executive Session in order to consult with their attorney on questions and issues relating to departmental permits, and questions and issues pertaining to the board's powers, duties, privileges, immunities and liabilities. Member Agor seconded that. All were in favor.

Mr. Vitousek asked that this issue came up previously and he is asking for a finding as to why the Board is going into Executive Session under the AG's opinion about executive sessions because the last time they had a situation where the Board...Chair Thielen said we had a motion where we are out of session now. We can go back on the record to make your request when we come back in. We will note that.

10:20 AM EXECUTIVE SESSION

10:40 AM RECONVENED

Chairperson Thielen said they were handed copies of the 2 letters and asked whether any one else from the public wanted to testify on Item K-1. Mr. Wynhoff asked if he might have a minute to respond to a couple things that Mr. Vitousek said. The Chair agreed and suggested giving an opportunity to Mr. Vitousek and himself to supplement their earlier remarks, but to keep it short because the Board may have questions and discussions, too.

Mr. Wynhoff said he had talked to Sam (Lemmo) and it is his understanding that there are some in the conservation district that has this permit condition and some don't as Mr. Vitousek said. I wasn't aware of that. However, Mr. Vitousek misspoke because there is in fact a rule that prohibits rentals in the conservation district in all cases and that is cited in HRS § 13-5-42 (a) 5 – a single family dwelling shall not be used for rental or any other commercial purposes. With respect to Mr. Vitousek's...Member Pacheco asked whether that is a permit condition. Mr. Wynhoff said that is a rule in the conservation district. Also, that is in some, but not all of the permits in this area that he now understands. With respect to Mr. Vitousek's contention that the rule and the permit conditions are vague, he would say two things. It may or may not be vague in some instances if you rented it to...if you let your father use it and he mows the lawn, it maybe covered it maybe not, but that is not the situation. These people are doing short term vacation rentals and it's not vague with respect to that. And the argument that a vacation rental isn't a rental is specious. No. 1 with respect to vague. No. 2 with respect to vague. I told you before you do not have the power – the argument made in the Circuit Court was that because it's vague its unconstitutional you do not have the power to make that determination. Even if you wanted to have a contested case you cannot have a contested case with respect to whether the rules are unconstitutional. There is a statute, 91-7 specifically says that constitutionality of a rule is a matter for the Circuit Court and also there are cases that say you don't have the power to determine your own rules are unconstitutional.

Member Pacheco asked how that question would be brought forward by the applicant. Mr. Wynhoff said it's going to have to be brought forward in his lawsuit to the Circuit Court. If he does rule the ruling is unconstitutional the only place that can be determined is the Circuit Court. They do that by filing a lawsuit which they've already done.

Member Pacheco asked it's his understanding that the main argument that Mr. Vitousek is using to request a contested case hearing is something that can't be addressed in a contested case hearing. Mr. Wynhoff said he don't know what his main argument is, but he wants you to say the rule is unconstitutional that can't be addressed in a contested case

hearing. The question whether the rule prohibiting a rental encompasses a vacation rental is something that could be addressed in a contested case hearing.

Member Pacheco asked could issues such as the fairness of the rule or consistency of the rule and the fact people have that condition and other people don't would that be something that could be addressed in the contested case hearing. Mr. Wynhoff confirmed that the contested case he supposed would include...he doesn't want to say what it doesn't include because of the constitutionality, but I supposed from what I'm is hearing Mr. Vitousek would want to include whether vacation rentals or rental or what the rule means and the sooner that he does prohibit what his clients want to do whether that's in fairness or consistency is something you want to weigh in your discretion in these instances. That certainly would be within a contested case if you gave one. A constitutionality would certainly not be within a contested case.

Member Gon asked as to the inconsistency of the particular condition of some of the parcels in the conservation district and not in others wouldn't the fact that it exists in the rules mean that it is implicating any of those because you are in the conservation district whether you are aware of the rules or not those rules apply to you if you are within that district. The inconsistency of the condition could very well be a historic thing where the first one wasn't stated because it's in the rules and later on the decision was made to explicitly indicate by a condition to be completely aware of the rules in the conservation district that forbid rental agreements. Mr. Lemmo confirmed that is correct, but the only time that a vacation rental would be allowed in the conservation district, unless you explicitly approved it, is if it was occurring in 1964 and it would be considered non-conforming. We have a couple cases where that happened throughout the state. That is the only case because your permit doesn't have a condition that says no commercial use it's a condition of stated rule in the conservation district that doesn't allow without the Board's consent. I don't want to get into an enforcement proceeding. We chose to focus on the people that had an explicit condition that say you can't do vacation rentals in a violation proceeding, but technically everybody who is doing vacation rentals unless you are non-conforming its not allowed without your (the Board) approval.

Member Morgan asked just for the historical perspective, as a new Board member, have we had an approval. Mr. Lemmo said not for a conversion of a single family residence for a commercial use. I don't recall anything. Member Agor said he doesn't recall any application either.

Member Pacheco asked why did you chose to go after...if everybody there by rule are not allowed to do rental then when you went through enforcement action why did you chose the ones who had it spelt out in their the permit which is a redundant thing. It's like DAR rules. We don't put everything in that's already in the rules these permit conditions. Why was it decided that condition could be stated explicitly in those certain new permits you are doing it to. Mr. Lemmo said the rules have evolved over time. The original conservation rules didn't have a no vacation rental, standard condition. These applications coming before the Land Board in the 1960s and 1970s were approved for single family residential use. Not rental. However, there was no prohibition condition.

The rules changed in the 1980s and that was when the Board started imposing explicit conditions – no commercial or rental use. Then it was subsequently evolved into the rule as it is today. It went from no condition to being imposed by the Board on a case by case basis to then becoming a formal part of the rules.

Mr. Vitousek said the section Mr. Wynhoff just quoted that states a rule against rental is Section 13-5-42 which relates to standard conditions. There is no rule that says there will be no rental use in the conservation district. There is a rule that says any land use in the conservation district will be subject to the following standard conditions. Five is single family residence shall not be used for rental or other commercial purposes. There is just a condition. There is no rule. There is no statute that says rental use is prohibited. There is no rule saying rental use is prohibited. There is only a condition that is imposed in a use permit that prohibits rental use. That is why they only went after people who had a condition. He is reading from the rules, but the rule he is reading from sets out what standard conditions can be imposed on a conservation district.

Member Pacheco said he doesn't see the distinction. Mr. Vitousek said the distinction is it's in a section on conditions. There's no rule stand alone that says rental use in the conservation district is prohibited. It says the Board imposes conditions on permits. So all there is a condition on the permit and what the owners are challenging is that condition. They are saying that condition prohibiting any and all rental use is in excess of statutory authority because 183(c)3 allows the Board to impose conditions provided they are in furtherance of the purposes of the chapter. The purposes of the chapter of 183(c)1 which include preservation of natural resources in the conservation district. And there have been no effort to tie a blanket prohibition of all rental use to preservation of natural resources in the conservation district. It's our position that the condition imposed by the Board is in excess of the Board's statutory authority and we do have a right to have that addressed in a contested case. We are not just challenging the constitutionality of something. We are challenging whether the Board was authorized by statute to impose that condition. Whether it's imposed in the rule or imposed as another condition on a permit.

Member Goode asked that is the contention that the rule is in excess of HRS § 183 and Mr. Vitousek confirmed that. Member Goode said in that instance any time there is a rule that goes beyond the statutory authority, my understanding is and we heard this earlier that is for the courts to decide not for DLNR contested case to decide. Mr. Vitousek said no, that is completely for the Board to decide in a contested case because the Board is the agency that imposed that condition. We have an owner saying you imposed a condition on me that is in excess of your statutory authority and we are using the procedure set out by the statute which is a petition to deviate conditions in order to address it. That is the procedure that the rule set out. The rules also say that any final decision ordered by the Board with respect to conservation district use permit or any final order is subject to appeal to Circuit Court. And we all know we can't appeal to Circuit Court unless we have a contested case. What we are saying is the rule is vague so we don't know what's prohibited and what's not prohibited. It doesn't specify what conduct is prohibited or not prohibited. First you have to say in order to impose a condition

what's prohibited and what's not. If what you are saying absolutely any use in exchange for consideration is prohibited then we are saying that is in excess of statutory authority because it's never been tied to protecting natural resources in the conservation district.

Chair Thielen said so Mr. Vitousek I think what you said is the only way you can get to court is to have a contested case, but I don't think that is accurate. You came before this Board and you asked us to give a discretionary decision to authorize the vacation rentals. This Board denied it and you asked for a contested case. We can deny that and you can appeal that to court. Again file your declaratory action and go to a court and have them address the issue of whether the rule exceeds the statutory authority. Mr. Vitousek said we can and we have filed a petition for declaratory relief, but that's a separate matter. You can do that without having to go through the contested case. The Chair said I am going through your statement that you can't go to court without a contested case, but you can get to court without a contested case is my understanding. Mr. Vitousek said right, but the question is not whether we can or not. That is not one of the criteria in determining whether or not a request for a contested case is proper. The idea that you will get to court some other way is no where in the issues to be considered. The issues to be considered are whether we made a proper and timely request. The answer is obviously yes and they conceded that. The next issue is do we have standing and the answer is yes and they conceded that. The next question is did the proceeding involve our rights, duties or privileges and it does because it involves our use of our own home versus a restriction imposed by a government agency.

Chair Thielen said I understand you think that the Circuit Court vacated Justice Watanabe's decision, but a Circuit Court judge has found that your clients did not have a right to a contested case hearing. To me the issue that is in front of this Board right now is we we're asked several years ago do we want to authorize vacation rentals in Haena in these homes? Do we want to amend that condition that was in their conservation district use permit? And while the argument being made today is we didn't have the authority to do that these people were more than happy to accept those permits at the time to build the single family homes and I think they full well understood what the condition was. This Board made a decision back in 2007 not to change that and we went through court. Now we are sitting here facing it again. The question in front of us today is do we want to send this to a contested case hearing to have a hearing officer hold a hearing and come back to make another recommendation to this Board which may then be appealed. Or do we not deny a contested case hearing and go straight to court and file an appeal of that denial as well as a declaratory action to go back to Judge Watanabe. To me the arguments you are making Mr. Vitousek is about the vagueness would resonate more if it were that situation where your clients are getting notice that you are violating the condition because your father is staying there in exchange for mowing the lawn, but we're not. I think it's not vague. I would like to end the legal discussion because we are not going to be the final decision makers on the legal issues and I think this Board should get to the decision and discussion amongst ourselves on which route would be the most appropriate route to send the parties to go and have that legal discussion whether it would be a contested case or directly to court. Mr. Vitousek said the petition is not to authorize the vacation rental use of these homes. The petition is to either remove the condition or

define it so that our people can know what they can or can't do. That is the petition. We are not trying to say approve vacation rental. We are trying to say that we need to know what is allowed and what is prohibited by this condition so we can conform our conduct accordingly. And, if it prohibits everything, any kind of revenues like my grandfather living in the house then you should show us how that affects preservation of resources in the conservation district because that is all the authority you have to impose conditions. We are not asking for vacation rentals. We are asking for a definition of what we are allowed to do and not allowed to do with our homes under this condition.

Member Gon asked in the draft presented by OCCL is there clarification on definition of rental? It's been a long time since I read through that. Mr. Lemmo confirmed there is some amended language for that condition to clarify transient rentals. Identifying a transient rental and identifying a period of time for which something qualifies as a transient rental or doesn't qualify as a transient rental and that's proposed. Member Gon said it's proposed but it's not in there right now. Mr. Lemmo confirmed that. Member Pacheco said we've had that discussion before when they came back with the litigation. Chair Thielen said I think those were the ones that were out when the staff finished the packet and finished the public hearings addressing the comments that came in. That was the large review in the conservation district concerning rules. Member Gon acknowledged that. It's a valid point in this case when I think about the conservation district and the fact that we have conservation, urban, ag and other districts that are defined in order to clarify appropriate land use in those zones. It is not strictly a matter of whether or not conservation district is designed for resource protection that is only one subset of the conservation district. But, it is in my mind a guidance as to the appropriate use of lands depending on a plan for action. If there is something in ag and you put a house on that the rent might go up and you would say is this a residence or is this a true agricultural use? If it is urban and a house goes up no rent price goes up. For me it is always a matter of filtering what is appropriate land use in a particular district. And, it does not necessarily on the basis of it have to go to ...All the rules that go to analyze each and every one and say whether or not an endangered species is protected by this or similar resources made more sustainable are in fact the idea residential units should be on conservation lands at all is a question in my mind. And, certainly when you take it to commercial or rental use it pushes it even further away from the idea of the existence of a conservation district.

Member Agor said he is just one Board member, but I feel like I want to be part of the process to bring clarity to this issue and I feel I need the process of facts and findings to be able to take part in the final decision and based on that I would like to make a recommendation to deny staff's recommendation. Member Pacheco said so you allowing the contested case hearing. Member Agor said if he (Mr. Vitousek) takes it to court then we have no say. Member Pacheco said at this point for us to sit here and argue the merits of the case I don't think that is really the issue facing us here. I think it's what Mr. Vitousek said whether the parties have standing and under the laws do they have a right to a contested case hearing. By the time we have discussion two, to have a contested case hearing that means there is an opening there. For me I would agree with Member Agor from a different perspective, but I would also be inclined and seconded that motion.

Member Gon said what I said prior to this also has very little to do whether or not the idea of this Board allowing a contested case and I also am inclined to be involved rather than to push it through the judicial. It's an interesting situation.

Member Morgan said and I agree too. I think there needs to be clarity and I support having involvement in this level, too.

Member Edlao said I also. This has always since I've been on this Board always confused me from the get go when these situations came up and he would like to end this by getting more clarity and he would like to support the motion.

Chair Thielen said the Board raised a good point about being involved in the process opposed to passing it to the judiciary. I guess one question I want to raise is going back to those draft rules that completed public hearing what's the timetable now, OCCL is estimating given the public comment that came on in, do you think it will have changes that would require additional public hearings? Do you think those rules will be coming back before this Board any time soon or not? The reason I'm asking is because the Board is saying they want some clarity on this term "rental" and be bringing it back. Ultimately, if it goes through the contested case process instead of the court process it will come back to this Board. But, I was thinking you have a parallel process going on where you may be amending those rules to provide some clarity. You don't want these two efforts to be totally separate. Mr. Lemmo said I would like to come back to the Board within the next few months. I can't guarantee...we'll come back to you with something. I can't say much more because I'm in the process of evaluating the severity of the changes that were made. I have to say one comment, if we do amend the condition and provide clarity we are already working on it. It is a bit frustrating for staff if we have to go through a contested case hearing on this when you've already figured it out. It's a huge input of resources, time, effort and money. We should have contested cases, but in this case I feel we corrected it and would like to move on.

Chair Thielen asked Mr. Vitousek I assume you've seen the draft administrative rules on what's been proposed to address that term rental is it something that you'll still be seeking clarity on that version? Or is that something that provides the definition that you are looking for? Mr. Vitousek said what is interesting about it is the first iteration of the proposed amendments that came out did clarify that rental was modified by saying short term rental. In other words it prohibited any short term rental in the conservation district 13-5-42 is amended to add short term. This rule was amended to change the condition. Interestingly, the most recent version that short term rental was taken out so that portion of 13-5-42-5 under the currently proposed amendment reads the same as the old one and there is no definition of rental. The interim draft had a clarification and we were happy with that, but the final draft they took that out. Maybe they shouldn't have pointed out they were happy with it. The Chair said that the contested case process could take a significant amount of time and you maybe getting some definition through the rule amendments, but sometimes those take longer than people desire. It maybe worthwhile if this Board goes and approves a contested case to be working together on the timing

because it could be a mute thing if you end up in rules that provide the definition you want.

Member Goode said I am inclined to support the motion. My feeling is that I've seen enough examples where it goes through Circuit Court, Immediate Court Appeals and Supreme Court and somebody is going to bounce it back. Often times courts don't like it when there is an opportunity for an administrative procedure and it wasn't had and rather than bouncing I'm inclined to support the motion to go through the process as difficult as it maybe. Chair Thielen said what I would like to ask is to provide in this motion the definition of what the contested case would be on. Member Goode agreed because of that previous point and maybe they should ask Bill about this. Is the contention whether it's vague or unconstitutional? Is that something we can look at, at all or is that portion strictly for the courts? Mr. Wynhoff said I think it's for the court. The statute says the court shall find the ruling valid if it finds it violates constitutional or statutory provisions or exceeds the statutory ruling of the agencies. The application is to have the rule waived with respect to these particular rules. Mr. Vitousek said it is what it is and it's on file. The Chair said this is why she is asking because when you two are in a room it's too much. I think we need to provide some definition. She asked it seems the Board wants clarity over something what do you want? Member Pacheco said he always thought that people who petition for a contested case fills out a form which is what is stated and is what the Board votes on. He asked are they able to limit the argument of what happens? The Chair suggested we could ask our counsel, but if they have the right to deny this contested case which is what their counsel is telling us and is what a Kauai Circuit Court judge said I don't see any reason why if we are going to exercise discretion to grant a contested case, but you can't specify what the issue is that we're seeking clarity on behalf of the Department. We don't necessarily need to open the door up to anything would that be accurate? Mr. Wynhoff said he thinks so. Why not have Randy say what he wants to say. Mr. Vitousek said under your rules we filed an application, it was denied, we requested a contested case, I think we are entitled to a contested case. The issue here is whether we are entitled to a contested case hearing on that application. Under your contested case hearings rules the Board conducts the contested case or a hearings officer has the authority in a pre-hearing conference to limit the issues. I think the place in which the issues are identified and limited is when the matter goes to contested case hearing that you have a pre-hearing conference with either the hearings officer or the Board and they say these are the issues. The Department takes its position and the applicant takes its position and the hearings officer makes a decision. I believe that process will occur. Mr. Wynhoff said I don't disagree with that, but honestly if you have to do it here I don't care. It's very important that you understand you have the right to find what the issues are. If you're wrong, you're wrong. If it's too broad, they are too broad. We have said a bunch of times where people have said this should be an issue, but you said no. You have a right to do that. Whether you want to do that in this case I don't know. I would like to know what the issues are, but we could thrash it out later and that is fine with me too. What I'm saying is you guys can do what you want.

Member Morgan said he felt more comfortable going with the motion as is and defining all the issues whatever it is.

Member Gon asked so in other words the recommendation would be to scratch deny and put allow? That the Board of Land and Natural Resources allow the request for a contested case in regards to the subject petition for deviation. Re-phrase it so it goes from deny to allow. Member Agor said yes. Mr. Wynhoff said that's fine with me.

Member Pacheco said I appreciated Sam's (Lemmo) comments perspective that this is a time consuming process, but for me it's looking at whether the applicant has standing. We make a decision, it's contested and it comes back to us, I don't think it's our privy at that point to say no I think our decision was right and I won't grant a contested case which we don't have that choice when it's allowed by law. In this case we have the discretion to do that, but I don't think we should do that based on our strength of what we think our position is if they have standing. Mr. Lemmo said I don't agree. I stand by the recommendation firmly, but I stand by your desire to have a contested case hearing as well if that is what you choose to do. The Chair said it will provide a big incentive to finish up those rules.

Chair Thielen said we have a motion and second and asked all those in favor. All Board members said aye. None opposed.

Mr. Vitousek thanked the Board.

Unanimously approved as amended (Agor, Pacheco)

The Board approved to amend staff's recommendation by deleting the word [deny] and replacing it with the word allow.

Item K-1 After the Fact Conservation District Use Application (CDUA) MA-3543 for a Seawall by Hale Kai AOA Condominiums Located at Honokowai, Island of Maui, Makai of TMK: (2) 4-4-001:042

Mr. Lemmo noted that Item K-2 is listed as Item K-1 on the agenda. Someone wrote complaints with concerns about the project and staff felt the consultant did a good job addressing all the complaints by this individual. Some outside the scope of the Board's preview and some of them inside the scope where corrections were made based on what this person was saying which Mr. Lemmo thought was great that the applicant made the effort in the EA to correct things brought to their attention. This is an after the fact shoreline structure for Hale Kai AOA is the applicant. The reason before you is because a major part of this structure lies seaward of the shoreline within the conservation district and a portion of it is in state land. This is the west side of the Island of Maui. This came up as an enforcement action a couple years ago where the applicant was told several options. Option 1 was you can remove the improvements that you made. The Board also gave them the option to apply for an after the fact CDUP to see if they could keep the improvements in place. It was clear that just because they could apply for an after the fact CDUP it didn't mean they would get it. This is the culmination of the application process looking for approval of all of the structure that is in the conservation district that is within 1500 square feet of the seawall. If they were get approval of this

structure they would have to go to the land division to get an easement for the portion on state land. The 2 issues that came up as violations which are before you today:

1) The applicant had placed some large boulders behind the main revetment structure where that area was determined to be in the conservation district. 2) Another thing they did was grouting of the existing seawall. Those are the 2 things staff is seeking the Board's approval today. The applicant went through an environmental review process, they did an EA and we issued a FONSI for it. The County has been involved in this case because there were a lot of improvements that occurred mauka of the shoreline in the County's jurisdiction and applicant indicated to staff that they've gotten all the necessary County permits – SMA, drainage, etc. They are now seeking approval for the portions in the conservation area where Mr. Lemmo reiterated the 2 violation issues. The main seawall has been there since the early 60s or late 50s and is essentially a non-conforming structure even though they have to get an easement for it to make it legal. The improvements were made in 1998. In 2004 violation they did something without staff's approval resulting in the violation and now it's before the Board for approval. Staff recommends approval of the improvements made subject to a number of conditions.

Mark Roy with Munekito and Hiraga, Inc. who are the planners assisting Hale Kai Association of Apartment Owners introduced David Merchant, Hale Kai area's attorney assisting with the after the fact permits and process. Also, in the audience is the president of Hale Kai AOA. Mr. Roy thanked the Board and staff for their assistance over the years. The applicant does concur with staff's analysis and recommendation. But, asked the Board to draw their attention to condition #4 which he read and explained this condition is for new construction which is not the improvements that have already occurred. He described the County requirements under the County's jurisdiction. Mr. Roy suggested the Board clarify on condition #4 any work done on state land in the future the applicant would have to come back to obtain the necessary permits through OCCL. As applicable any work done on State land shall be initiated within 1 year of the approval of such use.

Member Pacheco noted there are multiple conditions that pertain that construction is going to happen. This is all standard stuff. Mr. Lemmo agreed, but he doesn't think it's necessary to change this. It's implicit that we have jurisdiction on the State conservation area. We don't have jurisdiction on other areas. If we start to change language to cater to each specific situation it's going to get difficult to manage. Member Pacheco asked just by approving this with these conditions it doesn't give them any openings to do other construction and Mr. Lemmo answered in the negative.

Chair Thielen said in the submittal itself which everything that precedes the language does recognize that this is an after the fact because construction has been done. It maybe hard to go through and do all the edits and incorporate all the prior information

Member Goode asked in this area typically a good sized Kona storm will create damage again. This is a recurring theme here – every 5 years, every year it's going to happen. There is nothing in here to say they can repair it again? Maybe to come back in to pursue? Mr. Lemmo said anything perspective whether its general repair, new sea wall,

storm damage they have to come talk to staff and ask what kind of process they have to follow to get what they want. Member Goode said if there was rare potential property damage at risk and there is a process to seek that. Mr. Lemmo confirmed that.

Member Goode said that this is a different sea wall compared to others and asked whether this is a new more modern sea wall. The reason he was asking this is because there is a sandy beach park is next door and whether this is a new modern sea wall that has less impact on the neighboring beach. Mr. Lemmo explained that this is an old rubble mound structure, its slopping. This is an old cobbled together structure and it's got engineering challenge, but is better than a vertical sea wall. Vertical sea walls are reflective. This area of Honokowai is experiencing some serious beach erosion which is obvious and happening all along the West Maui shoreline. Some areas have beaches. Some areas beaches have been lost. I look at this structure as people can still work their way over into the area and it's not highly reflective. It's not a modern engineered structure, but it's not inconsistent with the concept of designs that are more beach friendly.

Member Pacheco asked if there is a huge swell event and some of those boulders get pulled back out is there anything that the Department requires the owners to pull those boulders back in position. Mr. Lemmo confirmed that there have been situations where people's stuff has fallen on the public beach and people have said could you please clean your stuff off the beach. We get varying levels of compliance with that obviously. Staff has had people clean hundreds of tons of material off of State beaches from sea walls failing and other types of structures and staff will react to that.

Unanimously approved as submitted (Edlao, Goode)

11:33 AM RECESS

11:42 AM RECONVENED

Item C-1 Acceptance of a Hearing Master's Report Withdrawal of approximately 1,500 Acres of a Portion of Governor's Proclamation Dated December 22, 1928 from the Kahaikinui Forest Reserve and Re-Set Aside as the Nakula Natural Area Reserve and Re-Set Aside as the Nakula Natural Area Reserve, at Nakula and Kahikinui, Hana, Maui, TMK(2) 1-8-001:por. 6 & (2) 1-8-001:009

Scott Fretz representing Division of Forestry and Wildlife (DOFAW) conveyed that Item C-1 is to set aside portions of the Kahikinui Forest Reserve as a Natural Area Reserve which is about 1500 acres taking it out of the Forest Reserve and putting it in the Natural Area Reserve. Staff held public hearings in April 2010 and received a 100 comments where a majority in support. There is a summary of the comments in the Board submittal and also detailed comments from staff. In general the comments involve process, questions about future access, questions about the ability and opportunities to hunt and most comments supporting conservation of native resources and watershed function that

will come with the new designation. Staff's recommendation is to accept the report to the Board from the hearing master from the public hearings and to withdraw subject portions of the Kahikinui Forest Reserve and set aside to the NARS system.

Member Gon commented that he was happy to see this.

Chair Thielen said that she assumed Marjorie was here to testify and to continue this item later when she returns.

Item D-4 Issuance of Direct Lease to Hawaii Oceanic Technology, Inc. for Aquaculture Purposes, Offshore Waters of Puanui, Puaiki, Kiiokalani, and Kaihooa, North Kohala, Hawaii, Tax Map Keys: 3rd/5-8-001: and 5-9-003: Seaward of Puanui, Puaiki, Kiiokalani, and Kaihooa.

A number of written testimonies were distributed.

Mr. Tsuji reported that this is a request to issue a direct lease for aquaculture purposes for Hawaii Oceanic Technology, Inc. (HOT) and to refresh the Board's memory this is the second part. The first part was for the conservation district use permit which was granted and now they are here for the issuance of a direct lease for the fish farm. As Mr. Tsuji had explained to the applicant, the CDUP was under a different chapter of HRS and this Board has multiple roles in discretionary authority granting or denying various things such as a CDUP or a lease and this is separate from the CDUP in the Board's discretionary authority to grant or deny the lease, but they are connected because they are from the same project where the applicants go for the CDUP first and then complete the EIS then later request that the lease be issued. A letter from Planning stated that the CCM Program which was conducting a Federal consistency review has stopped its work because it has learned the applicant had withdrawn its application for the Army Corp permit which is required if you are going to put anything of this magnitude in the ocean for the fish farm. The applicant did send to staff the publication of the notice of the Army Corp permit for the new permit for the application. It appears after reviewing the new application and to Mr. Tsuji's understanding that the new permit application for the Army Corp was filed last month for a demonstration project permitting 2 spheres. After speaking to the applicant, the Army Corp wants certain answers to questions before the leap to a full project. When Mr. Tsuji heard of this he does know that in order for the Board to grant any lease Chapter 343 has to be fully complied with. During the CDUP process the applicant did complete a 343 EIS and is valid. Mr. Tsuji discussed with Sam Lemmo and Michael Cain (OCCL) that the original EIS was for the full project and the amendment before the Army Corp is within the scope of the completed EIS where they are ok on those grounds should the Board decide to grant the long term lease which is currently being asked for 35 years. Bill Spencer and his counsel are here to give general background on the project. Mr. Tsuji had various amendments to the recommendation section, two of which were suggested by the Deputy Attorney General. To add a new recommendation #1 that the Board determines that the proposed lease encourages competition within the aquaculture industry, add a new condition #2 to read the lease

shall contain a provision that neither the Lessee nor anyone acting on its behalf will be allowed to exclude any coast guard licensed vessels from the lease area. Third, add that the applicant/Lessee shall submit an annual report to staff...Mr. Tsuji gave some background saying that because the applicant is asking the Army Corp to grant for only a 5 year period for the demonstration project. He thought it would be wise for the applicant to report the status of his attempts for him to secure the full Army Corp permit for the entire project rather than the short term demonstration project where Mr. Tsuji suggested reporting annually to staff who will then report to the Board on the progress of the applicant to secure the permitting for the project. For condition #3, the applicant shall submit an annual report to staff which shall report to the Board on the progress of the applicant/Lessee on its attempts to secure an ACOE permit for the full build out of the project as described in this Submittal and the existing CDUA; it being specifically understood that any termination, revocation or violation of any governmental permit required for the project as described in this Submittal will trigger a default under the Lease. The project described is for the full build out and you're being asked to grant a long term 35 year lease.

Member Gon pointed out this is a way to deal with the current Army Corp of Engineer's permit is shorter now. Mr. Tsuji said that was his attempt to address this to the Board to review and update the applicant's progress. Member Gon said in a sense after the pilot demonstration the Army Corp does not issue the applicant a longer term permit that this would void the lease. Mr. Tsuji said staff would become aware of it and bring that to the attention of the Board and then... it would trigger a default the Chair said. Mr. Tsuji said you are going to have to have an Army Corp permit to implement the project as planned.

Member Gon asked that Mr. Tsuji pointed out that our first role was the CDUP and the second was the lease. What are the next steps that would involve the Board? Mr. Tsuji said he believes that would be all. As for the CDUP, he doesn't think there is anything else permitting specifically, but he does know under the CDUA the applicant has to submit certain information to DLNR staff like the Aquatics Division and with other State agencies which works in line with this Army Corp permit. Member Morgan said so the next time the Board hears about it will be in the first annual report that he is adding as an amendment. Mr. Tsuji said unless earlier there is some kind of default or situation. Member Edlao asked what are the conditions that staff will inform the Board as soon as a default occurs. We will be seeing this again.

Mr. Tsuji said Mr. Spencer is here to give the history and asked about condition C whether it's limited because the performance bond is limited to the initial \$100,000 the first year?

Bill Spencer, CEO and President of the Hawaii Oceanic Technology (HOT) answered Member Edlao's question and said this initial request requires a performance bond for 1 ocean sphere. The Army Corp permit allows them to do all the engineering steps to take them to the deployment of 1 ocean sphere. There are 33 conditions of the CDU permit, that one of which requests they come back to the Board after they've deployed 3 to you a report on the status of how things are going. There will be opportunities in addition to

the request to provide an annual report to engage with the Board again. Also, on the CDU permit, item 5 it says before proceeding with any work authorized by the Department or the Board the applicant shall submit copies of construction plans or specifications for the Board's review and approval. Every step of the way there will be opportunities to assess the status or approve plans related specific things they are doing. We look forward to keeping you apprised on our projects.

Member Gon asked for clarification on the packet that they received and whether the amount of approximately 247 or 250 ocean acres was that sufficient for all 12 of the total build out? Mr. Spencer acknowledged that was the amount the Board requested as part of the permit.

Mr. Tsuji pointed out the question of the bond being limited to a \$100,000. When staff issues a lease when proposing construction or improvements, such as a cage, the bond here is in case the cage gets loose and they can recover the cage which is limited. Typically, you do it for the whole build out, all 12 because you're phasing the project in. Member Edlao confirmed that and he was going by what Member Gon asked whether we are going to see this again. And, we will in addition to the conditions that were imposed.

Member Pacheco asked what triggers are there in the lease outside of the standard terms and conditions that would allow the Board to terminate the lease for example if there were environmental issues. Mr. Tsuji said that if there are environmental issues that rises to the level of a violation which we as the landlord which we receive notice on and cited the example of the City and County issued Notice of Violation for some environmental issue or Department of Health violation. Almost always the landlord would write to staff that your tenant is violating this provision and you need to rectify that. If staff doesn't do that they can hit staff as the landlord, the fee owner from there they get Notice of Violations from government agencies the staff will automatically issue a notice of default which is a statutory notice to the tenant which is required by the lease giving the tenant so many days to remedy this violation. The Board never sees it, but if the violation continues and passed an amount of time staff would bring that before the Board because any termination of the lease would require Board action.

Member Morgan asked the applicant if there was anything new since the last time they were here. Mr. Spencer said they are making progress. A big project like this takes a lot of interim steps. They have been in intensive planning to get to the first ocean sphere determined in the Army Corp permit application.

Member Agor asked whether HOT has determined what motor to use to stabilize the sphere? Mr. Spencer said they are doing research on that as well as other environmentally sound alternatives.

It was questioned by Member Edlao whether there were any public meetings? Mr. Spencer acknowledged that they held 4 public meetings with the community since April 2010 by a County Council person, May 7, 2010 with Hilo Rotary that had 80 people in attendance, June 8th they met with a group from Kamehameha Schools and in September

he attended the Big Island New and Food Product Show where he met with a number food producers and others. In November 4th they will be having a meeting in Kapa'au and they have attended every major fishing tournament to meet and greet with fishermen throughout the State.

Member Edlao wondered whether there were any concerns that have not been resolved. Mr. Spencer said as you know the Army Corp consults with the Office of Hawaiian Affairs, State Historic Preservation Division, many offices in NOAA and a variety of organizations. Their initial application to the Army Corp brought up some questions that they couldn't answer until they took some engineering steps by putting some material out there. Even in the DLNR permit as far as the marine management plan that was based on DLNR's site to attract turtles and that is why they decided to revise the permit where they were specific about these tests to better answer all these questions.

Member Edlao said he can understand that, but what about the community's concerns? Mr. Spencer said whenever they had interaction with community groups and expressed clearly their plans the community was surprised by our approach encouraged them (HOT) and looked forward to the job creation. Some would like to see the price of tuna drop which he couldn't promise. The community has been in support and is surprised by the negative rumors.

Member Goode asked whether the Army permit includes some kind of tie down to the ocean floor. Mr. Spencer answered in the negative. Their whole principle all along is an un-tethered system. HOT has a grant with the National Science Foundation to develop their commanding control software and they will have to put some sort of buoy out there to give data to react to currents. He did not know yet whether the buoy will have to touch the bottom or not. They haven't started that process yet. Those kinds of measurement buoys are put out all the time.

Member Gon asked what Army Corp thought of HOT moving out of the OTEC system to a diesel one and what HOT's anticipation is about that? Mr. Spencer explained it's very expensive to develop a power system. In order to do these tests they plan to use a bio-diesel generator until they have success with their OTEC system. They won't know whether they will come back to the Board to request an amendment to shift to some other form of renewable, environmentally appropriate energy.

Chair Thielen said that Marjorie Ziegler is here and representatives for Item D-4 agreed to give her an opportunity to testify on Item C-1.

Item C-1 Acceptance of a Hearing Master's Report Withdrawal of approximately 1,500 Acres of a Portion of Governor's Proclamation Dated December 22, 1928 from the Kahaikinui Forest Reserve and Re-Set Aside as the Nakula Natural Area Reserve and Re-Set Aside as the Nakula Natural Area Reserve, at Nakula and Kahikinui, Hana, Maui, TMK(2) 1-8-001:por. 6 & (2) 1-8-001:009

Marjorie Ziegler, Executive Director for Conservation Council of Hawaii apologized for not following the rules. She testified that they are a wildlife organization and they strongly support adding the koa forest, parts of Kahikinui to the NARS. They are excited with this opportunity to expand the NARS noting that the last time a NARS was established was in 1991 – Naio on Maui. And, they believe putting this area in the NARS is the highest and best use for this parcel because they heard some concerns about hunting, but there is limited access anyway. Hoofed animals are a sin to these natural areas. She thanked the Board.

Unanimously approved as submitted (Morgan, Gon)

The Board went back to Item D-4.

Item D-4 Issuance of Direct Lease to Hawaii Oceanic Technology, Inc. for Aquaculture Purposes, Offshore Waters of Puanui, Puaiki, Kiiokalani, and Kaihooa, North Kohala, Hawaii, Tax Map Keys: 3rd/5-8-001: and 5-9-003: Seaward of Puanui, Puaiki, Kiiokalani, and Kaihooa.

Michael Kumukauoha Lee, a Native Hawaiian practitioner related his background, who his relations are and who he is descended from. He testified that he is not against technology because we need business and he had suggestions to improve the system so it's not a negative hatch job. He is a capitalist and a citizen of the United States and believes in our constitutional process. The bond for the recovery of spheres doesn't go far enough citing that the U.S. Navy crashed into the reef at the Reef Runway which cost \$26 million dollars to glue back. Our State is in an economic crunch and don't have the funds to repair any damage of that size. The bond addresses that you have the right to put conditions on the bond which you have and he commended you for that. There are some important things on Article 12.7 addressing Hawaiian traditional customary practices for public trust and part of that are our fisheries. Also, there is no condition on monitoring disease levels. Wild fishes will get the ax because of diseased population and that is because they (aqua farms) don't follow the local practitioner standards which he offers free. Mr. Lee explained the 3 safe guards in our fish ponds - the barracuda, the eel and the turtle and they decrease sick populations. Also add the cleaner wrasse, shrimp and o'opu that also clean the fishes. When you have a densely populated area you put safeguards in that has worked for over 2 thousand years feeding a million people and there is no science fair project there. The problem we have here is we have no monitoring system for the disease that can impact the fisheries which is a public trust and equivalent to future income for the State. Kona Blue uses an oil based feed. The Native Hawaiian cultural practice is to use taro, aweoweo, manaweo, manini, pumpkins, squash, sweet potatoes, rotten fruits - local vendors could incorporate as the feeding system which is natural and non-toxic. The guess factor is eliminated and the local economy can benefit which addresses taxes and jobs benefitting our ag business which is not considered in this plan. Mr. Spencer says he talked to these people, but he never bothered to talk to the Hawaiian cultural practitioner experts who have been doing this (aquaculture) for years where this is free and who wants this project to succeed, but Mr.

Spencer doesn't want to listen. The effects on the economy would be tremendous on the State's fishery reserve. Ellis wrote in his 1826 journals describing the importance of the Kohala fisheries and the natural springs there. The Sandwich Islands Gazette at that time described the importance of these fisheries on the whole island. Mr. Lee wants Mr. Spencer to succeed with jobs for the local population and not to tear down the situation, but to build it and he is afraid there are major gaps in Mr. Spencer's planning system. Article 12.7 addresses the State's constitutional needs of traditional Hawaiian cultural and customary practices which are not addressed by Mr. Spencer. Mr. Lee gave Army Corp of Engineers an essay on this whole thing. Mr. Spence has not brought this up in his tutorial to the Board and has not even bothered with Hawaiian practitioners who are giving this away to him for free because they want Mr. Spencer to be successful because we need fish here. He doesn't mention that the majority of the fishes are being exported and that doesn't address our local needs here. That is unfortunate because they want to see a win-win for everybody because this is the public trust lands for everybody to benefit, but that is Mr. Spencer's choice. Part of the social fabric is not being addressed and Mr. Lee is here to do that. The disease part is unfortunate because that is your fishes and your grandchildren's fishers and Mr. Lee wants to make sure they are protected in way that will not cost the State money which has been proven for the past 2000 years.

Member Gon asked with regard to this as the lease goes forward to pay more attention to the details. Mr. Lee said that you have the power to address some of the disease part which is not even stressed here. That is your purvey to do that and to add another recommendation to say talk to Native Hawaiian practitioners. He asked they are offering it to you why are you turning your back to it to not being totally successful when you are doing this project why no incorporate some of these ideas to better it. Who is it going to hurt and what is there to lose when it is not going to cost you anything? Also, Mr. Lee asked what happens to a sphere if by tidal wave, hurricane, a northeaster, etc. takes out a large section of reef. Who is going to pay for that? LLCs let the Board of Directors off the hook, but it doesn't put the State off the hook for public trust lands for the coastal water system. That is not addressed and is not on the scope, but the Board has the authority to bring it up and that is why Mr. Lee is pushing it.

Marti Townsend representing KAHEA testified that they are concerned with the entire project and have testified throughout the process. KAHEA did participate in testifying during the Army Corp of Engineering's public testimony opportunity and during the CDUP application process and asked to defer or deny this request for an ocean lease because it's to issue a long term lease for a large piece of ocean for an unknown project. It's clear that Mr. Spencer is trying to innovate which includes some mystery and not sure what is going to happen yet. Ms. Townsend's suggestion is not to issue the lease which is the foundational document authority for Mr. Spencer to act and not to issue that until all permits have been gotten. The project is evolving with each permit application HOT fills out. The Board should wait until the Department of Army Corp of Engineers permit, until they have their consistency determination in the coastal zone management program and based on that trigger copy requirement for a modified conservation district use permit and a supplemental EIS. Ms. Townsend disagrees with staff that what is currently being proposed in their new application to the Army Corp is within the scope of the EIS

completed. She referred to the Food and Water Watch written testimony and others that outline some specifics that HOT committed that their innovation will address the public's concerns about open ocean aquaculture - entanglement, disease threats and harm to the ocean floor, but in the new application to the Army Corp HOT is reverting to some old styles. There is an auto-feeding tube coming out of the spheres, there isn't the same amount of space in net pens which are not as large as the ocean spheres proposed where the risk of disease and escapes are greater than what were assessed in the EIS. Because there is so much unknown they should take more precautionary principles. These are public trust resources where all of the benefits of this project will go to the HOT corporation, but all of the harm will suffer in the public's resources. Because the Board is the body meant to protect the public's interest Ms. Townsend asked to proceed cautiously and wait until all the permits are issued before issuing the actual lease. She finds it interesting that staff have expressed some hesitancy in issuing this lease. This idea of setting up a system triggered by a default by the HOT project where she didn't think you would want to do that because it puts the burden on DLNR staff to wait for a default like revoking an ocean lease if HOT violates something referring to the Haena vacation rentals in the conservation district that taking something away is harder than giving it. The burden should be on the applicant to pursue permits and leases and not burden staff to chase permittees to see if they are complying and to take it away if they aren't. She suggested deferring or denying this request on the condition that all outstanding permits are gotten and if the Board does issue a lease, require additional studies, additional triggers for follow-up as the application process proceeds and the project concept evolves the Board needs to be addressed of what is actually being proposed. Also charge reasonable rent because Ms. Townsend is concerned that you are not charging HOT enough. HRS 171-17 and 18 requires fair market value be charged for the use of public lands where she would like this parcel be assessed by an independent land appraiser which should be a condition before issuing the ocean lease.

Rob Parsons from Maui representing Maui Sierra Club as Conservation Chair testified that they have tracked this project for some time. His concern was that at every stage of the environmental review and permitting process there are questions, concerns and omissions and they are getting close to something, but he doesn't think we are crossing the T's and dotting the I's and he hoped they can do that today. Mr. Parson's is also a liaison for Food and Water Watch which is a consumer advocate non-profit based in Washington, D.C. They have been involved in outreach and education on open ocean aquaculture in the State of Hawaii for a few years now and they share concerns. He knows that both the Sierra Club testimony and Food and Water Watch testimony were submitted in the last 24 hours where Mr. Parsons encouraged the Board carefully review the Food and Water Watch written testimony that it may take deferring this item to do that. This project can be characterized by its significant changes in its representation as it moves along in the process. When Mr. Parson's came to the Board a year ago for the Board's consideration of the CDUA he pointed out a lot of questions having reviewed the draft EIS and received partial answers where there were discrepancies and new information in OCCL's submittal that they were concerned. There were good faith attempts to engage the public. Mr. Parson summarized his written testimony from Maui Sierra Club to defer. An aquaculture alliance was formed this past year to address

aquaculture issues. New net pens were detailed and a supplemental EIS needs to be done and some conditions in the CDUP need to be amended because of that. OTEC is not going to be used and instead it will be bio-diesel. When OCCL's CDUA was approved last year there was unusual language in the cover letter which Mr. Parson's read where staff had concerns and a year later these are still unresolved issues. He related that he is here because he has studied open ocean aquaculture across the world and as Dr. Neil Fraser of the University of Hawaii said last year in every place where these have been implemented people have suffered. Mr. Parson's suggested using more caution urging the Board to not to issue this lease prematurely. There is precedent for supplemental EIS and cited 2009 OCCL's submittal for Kona Blue. There are eight conditions not being followed that condition 32 states not following any of these conditions will render the permit void. A letter was sent to OCCL's administrator regarding these concerns and Mr. Parson's doesn't know whether that was communicated to Land Division. There was a public meeting in Kawaihae last April which was very contentious. It is a misrepresentation for Mr. Spencer to report that everyone who comes up to talk to him likes the project. The other meetings Mr. Spencer describes was under the radar and must have been inadequately advertised because there are a lot of people on the Big Island who are interested and concerned with this issue and would've attended those meetings. Those meetings Mr. Spencer mentioned were news to Mr. Parsons.

Member Gon asked with regard to the testimony to deferring this item. He would like clarity in a proposed use of resources and he is not getting that. He agreed that the system that is being proposed today has nothing to do directly with the lease decision although the system proposed today is quite different from the ocean spheres that were proposed before. He appreciated the testimonies today particularly those pointing out the discrepancies on the compliance of conditions placed on the CDUP and he understands that it's hard to comply when you don't have a physical system there yet. As we nudge forward Member Gon questioned what is the consequence of a deferral of this? Mr. Tsuji said that he had a discussion with the applicant on this and he doesn't think terminate this project. He had a discussion with the applicant that the Army Corp permit is 5 years and the lease is 35 years for the full build out Mr. Tsuji was wondering whether to have a term of 5 years with the ability to extend when HOT gets the full Army Corp permit to build out, but Mr. Spencer said in order to get financing it would be detrimental. The demonstration project HOT is doing now some is for research. Mr. Tsuji understands this since he sat on NELHA when he was representing the Chair as Deputy where they may have a research project that may not be ready for a commercial venture tend to have shorter dispositions, but when they are ready to go commercial to go long term staff will commit to providing available lands. Staff's recommendation #3 is a compromise to address the situation because the Army Corp permit is for a 5 year temporary demonstration project. The applicant could speak on the deferral.

Member Edlao asked how does this change the CDUA. The Chair suggested addressing the deferral issue first because there will be a series of questions on the CDUP and permitting process as well.

Mr. Spencer said that Member Morgan mentioned not having a copy of the permit that there are 33 comprehensive conditions as to what Mr. Spencer can or cannot do and what needs to be done with Board approval which is everything – it's the CDUP. There are 5 measures that have to do with mitigation practices, plans, disease, testing and water quality. The revised Army Corp application was designed to allow HOT to test net systems, test the feeder buoy which is the same that they will use with the ocean sphere, test dynamic positioning and answer questions that can't be answered to put something in the water and they can't put anything in the water without the Board's approval. For us to have the resources, to under take the test, to answer the questions and to raise the money to produce progress we need a lease. It's like going to the Bank and saying I would like to build an office building on this property and Kamehameha Schools gave him a 5 year lease to make sure they like our architectural plans. It's impossible for HOT to finance this project without a lease that gives them a right to proceed with all aspects of the project knowing full well that the permit has checks and balances every step of the way and the Board has to approve every one of those steps. A deferral makes it harder for HOT to stay in business and to raise funds to start answering the questions everyone is asking.

Member Gon asked whether or not this project is a submersible pen. Mr. Spencer explained that this is a submersible pen that can be submerged 20 feet or greater. The test system was bought at 1/10th the cost of an ocean sphere. The first ocean sphere will cost millions of dollars. This is a system that they can put their netting on; put some tuna in, test the feeder buoy, test the dynamic positioning and it will not cost much. It is buoyant; it will not sink and is a test system that allows HOT to answer some questions.

Member Gon asked what is HOT's procedural stage for the engineering permit. Mr. Spencer said that they applied for the Army Corp permit along with all the other permits back in February 2009. After discussions with Army Corp it was their procedures. They now knew the questions NOAA was asking and HOT asked whether they could amend their existing permit then provide further details of their engineering path leading up to the first deployment. It's our procedure that we will have to withdraw the first permit and re-submit a new one on September 24th. It so happens that the Office of Planning under DBEDT that does the consistency review that determines compliance, it's by law that they have to pull their application and re-submit it because one of their other permits was withdrawn. It's a procedural issue that allows them to keep things rolling.

Member Gon asked what is Mr. Spencer's anticipation of the Army Corps final decision. Mr. Spencer said that he doesn't know what to expect that there is no time limit and Mr. Lemmo confirmed that. Member Gon asked how many times will the Board see this come back because there seems to be a bunch of compliance issues as this goes on. The first time he had made it clear they are getting a proposal with no oversight and there is no way to assess what the impacts are and at the same time he finds the open ocean aquaculture an important route for sustainable use of ocean resources rather than a harvest annual replenishment system. He fully expected there would be prototypes and the like, but on the other hand the longer they go without answers to questions it remains troubling for him.

Member Pacheco asked what the requirements are from NOAA and other agencies for the waters like the benthic monitoring that he is required to add to be in compliance. Mr. Spencer said there is no benthic monitoring. NOAA has expressed satisfaction with Dr. Grieg's report on the status of the bottom that was presented here. It has not been formalized into a request, but if it does they will comply with that. The concerns are about monitoring marine life, how to mitigate and testing for disease which have been anticipated by the permit. Member Pacheco asked then disease level monitoring is a part of his permit which Mr. Spencer confirmed referring to condition #18.

Member Gon asked in regards to the comment on fair rent. Mr. Tsuji said that it will be based on other aquaculture farms on the ocean where he gave the example of the Kapolei site which has roughly \$1,500, 2,000 or 3,000 annual rent. The standard form lease that goes before the AGs typically has a performance bond of 2 times the annual rent. The rent is low and would not be sufficient to cover the lost of a sphere which is the reason for the special condition. Member Pacheco asked whether those lease rents are influenced by the Legislative mandate to support aquaculture. Mr. Tsuji said if there is Legislative mandate to adjust the lease rents lower he was not aware of it where he explained what happens with land lease rents for agriculture by doing an appraisal and with Kona Blue.

Member Edlao asked that reading about the performance bond it's in case whether the sphere specifically goes adrift or if something else happens. Mr. Tsuji explained that typical provision allows for the language of what you can use the bond for guarding any default under the terms of the lease granted to up to \$100,000 which is not adequate to recover damage. Mr. Tsuji said referring to staff's submittal #1C staff was articulating the performance bond could be used for any default under the lease, rent. Member Goode said it's for the lease area to bring it back where he asked whether there was another standard condition for insurance. Mr. Tsuji acknowledged that. Our standard provision for this use is a commercial general liability policy which he believes is between \$1 to \$2 million. Other types of insurance which may not be applicable here is construction for improvements like a wind farm.

Member Pacheco asked whether the AG weighed in on the current EIS fits the revised plan. Mr. Tsuji answered in the negative that they haven't. Staff consulted with OCCL because they are more familiar with the EIS/CDUP process. He thinks that OCCL believes it to be within the scope of the EIS, but Mr. Lemmo could answer that.

Chair Thielen asked about the insurance and performance bond and what was the insurance that we have for commercial standard conditions coverage? Mr. Tsuji said he thinks it's between \$1 to \$2 million. She asked whether that would cover in the event there were damage by either one of these spheres moving outside...that this estimate was for chasing down a sphere out in the ocean, but what happens if it goes into land to recover there might be a different cost. Or if there were significant resource damage caused would insurance standard provisions cover? Mr. Tsuji said commercial general liability is mainly a liability policy personal injury occurring within the lease premises. If the spheres causes damage within the premises or outside Mr. Tsuji didn't know what

kind of coverage would be provided for. The lawyers would have to address since it's a whole different legal realm called insurance coverage litigation which is mitigated by an insurance lawyer on both sides. Chair Thielen said it maybe because of our standard terms and conditions of our aquaculture lease insurance that there maybe some issues that amount to a performance bond. Looking at how much it would cost to chase one of these spheres in the open ocean may not be the amount they looked at. Staff may need some time to think things over and the Board may have some questions for OCCL. She asked whether putting the performance bond at a higher level will be an issue for staff and direct staff to take a look at the insurance conditions that are in our standard provision to maybe customize them more for an ocean operation as oppose to a land operation. Mr. Spencer referred to item #2 of the conditions on their permit requires them to indemnify and hold the State harmless and it's in their interest to get the insurance to do that. As to the specific issue of an ocean sphere getting lose is the power stops. The sphere or cage system and the feeder buoy are neutral or positively buoyant. They would rise to the surface and wouldn't sink. They researched to help Land Division come up with a number and cited figures regarding ship drifts, satellite track buoys and current measurements which move westerly at an average of .2 knots. If the power stops the sphere will travel very little. Hawaiian Tug and Barge will intersect with the lose sphere. HOT has to have a lease and financing before the insurance company will quote them insurance.

Member Goode asked Mr. Spencer heard the Native Hawaiian practitioners on the value of this project and whether he has engaged those practitioners with aquatic knowledge. Mr. Spencer acknowledged that as part of their EIS they had to do a cultural impact assessment and they reviewed the historical record for North Kohala and spoke to Native Hawaiians who made their living catching fish along the coastline. There is a 121 page document specific to the people who lived in that area who have the long term historical knowledge to advise HOT and allow them to consider. He is more than happy to learn more and to continue the dialogue. Its his understand that Mr. Lee is in Ewa and isn't currently living at North Kohala, but if he would like to contribute they would be happy to hear what he has to say.

Member Pacheco asked towards the current EIS referring to Kona Blue and whether he could speak between the two changes.

Sam Lemmo said that Kona Blue Water was expanding their operations and staff said that they wanted to see a supplemental EA done and another Board action. There are some similarities between projects, but there are differences and HOT isn't coming before the Board asking for a larger easement. Member Morgan asked what the scope difference for Kona Blue. Mr. Lemmo and Member Pacheco said Kona Blue added some cages and increased square footage. The Chair said hypothetically if HOT did R and D and determined after going through a series of testing to come up with something different at that point they would have to come back and have you make an evaluation on whether to amend the permit or the variance would require an EA or EIS or revision at that time. Is that correct? Mr. Lemmo said expansion isn't necessary to determine having to do something else. It would behoove the permittee to come to us later on some

changes to consult with staff so they can determine whether or not we have to do a supplemental document or come back to the Board for further action. The Chair said under the permit conditions if they change the project they would have to. Mr. Lemmo explained often times people don't come to staff and wait to the last minute to submit their plans, people are in shock and staff have to scramble that HOT should see staff as soon as possible to talk about any changes. He received the letter yesterday and saw the Army Corp application. Chair Thielen said she imagines in going through an experimental project that you'll be testing things. It maybe that there's some variation which will be a challenge for the applicant to figure out and at what point do they have enough information to make the change to use something different versus testing whether or not something is good or not. She asked whether to do an EA or EIS for each test or at what point do you come in and say this is what we are going to change? That is what we are all wrestling with here, but under the CDUP HOT has a permit to do something specific rather than doing something different. Member Goode asked whether it was discussed in the EIS to test different size or different materials. Mr. Lemmo said they talked about deploying the sea cages and phasing them in. He does not remember HOT discussing this particular design and going with a bio-diesel engine. Then again this is all very recent for Mr. Lemmo and is still absorbing everything. The cost of a full system is expensive and could deploy a less expensive system and still get the same data that they need to go to full deployment and reduce the cost in that sense. My understanding is HOT is still considering putting in the large spheres. That is the ultimate goal of the project.

Member Edlao asked whether Mr. Lemmo was comfortable with today's submittal. Mr. Lemmo said as far as the CDUA HOT may have to come back if they were doing something that wasn't identified in the CDUA. If there are specific conditions to do it one way, but they are doing it another way there is always room for interpretation of things but you get to a wall at some point and will have to come back to the Board. As far as the EIS goes it was for 12 ocean spheres, a massive project. Usually you do a supplemental project EA. The Army Corp project is not an expansion of the project. It's contained within the project area where the impasse is similar to what was proposed in the EIS. The unresolved issues that they talked about in the EIS his response is there is a section in OCCL rules that say you can have unresolved issues at the end of the environmental review process and staff raised those issues to raise them because they can be dealt with later. Like developing a marine mammal monitoring plan and that is how they treated other applicants. Mr. Lemmo is not troubled by the EIS issue, but he is more concerned with the language in the CDUP whether or not HOT will be compliant with that.

Chair Thielen noted what is before them today is the lease. Whatever is going on with the Army Corp saying that we want to look at a testing for a period to gather more data there isn't a shift saying we aren't going to do aquaculture anymore, but HOT is still pursuing what was brought under the CDUP and go through the various permitting procedures and each agency – Army Corp will have their own perspectives that may going into that process trigger them having to come back in the CDUP to get the approval of this Board. It's possible that the Federal agencies will require certain changes under

their permitting procedures and if that were to happen they would have to come back here under the CDUP. The question is the timing of the lease. Does it make sense for this Board to enter into a lease agreement with them now given these on-going permitting processes? We certainly do in other land cases. People will go out to do their permitting and due diligence and if the project changes we're one of the permitting agencies they would have to have the Board's permission. Be mindful and what Sam said that our tuna fisheries is in serious condition worldwide. If we don't find alternatives there is a resource connection there. When we shifted from hunters to farmers especially the large scale agriculture on land that is some of our biggest resource damage industries and we want to be mindful to do it properly in the ocean. It's good that we still have this public involvement going through this process and the comments coming in. She is sympathetic to the need to get financing and the Banks will want to see whether HOT has a commitment from the State for this area. The question is the recent information from the Army Corp with a condition. Is that enough of a safe guard with a 35 year lease, but there is a trigger which would throw it automatically into default if HOT didn't get this longer term approval from the Army Corp which was her understanding of what Mr. Tsuji is proposing. Mr. Tsuji said the language of the last part he had was being specifically understood any termination, revocation or violation of any governmental permit required for the project as described in the submittal triggering a default under the lease. He didn't have anything on failure to obtain permit. The applicant lessee will submit an annual report to the staff which shall report to the Board on the progress of the applicant lessee on its attempts to secure an Army Corp permit for the full build out of the project as described in the submittal and the existing conservation district use permit. It being understood any termination, revocation or violation of any governmental permit barred from this project as described in the submittal would trigger a default in the lease. It was Mr. Tsuji's understanding that if the Army Corp permit application is granted and it goes for 5 years at that time unless Mr. Spencer has another Army Corp permit for the project Mr. Spencer won't have one then it triggers various defaults of governmental permits including the CDUP because a violation or termination of the CDUP would trigger a default of the lease. Member Pacheco asked that effectively ties in with the 5 year Army Corp permit with the term of the lease if HOT isn't able to secure a longer Army Corp permit. Mr. Tsuji asked Mr. Lemmo would the fate of the Army Corp permit at any time trigger a default in the CDUP. Mr. Lemmo said all it says is the applicant shall comply with all State and Federal requirements. If they fail to get an Army Corp permit then the project doesn't happen and the permit will expire in August. Member Morgan asked whether we are granting any transferal life by this lease. Mr. Tsuji said it does have an assignment of lease provision and is subject to come back to the Land Board for consent and typically a consent cannot be unreasonably held. Anyone who takes on an assignment will have to abide by the terms and conditions of the lease which is the project.

Member Pacheco said he doesn't think this weighs in the discussion on permits. If the applicant doesn't have the permit they need to proceed whether an Army Corp or any other permit they will be in default of the lease which will come back to the Board. If they are trying to save the project by having someone taking over the lease that maybe have a better chance that door is still open. They have this project that has a CDUP and

now the Board is being asked to approve the lease and there is all these other agencies and other permits and other conditions that deal with these issues we're talking about that have to be monitored and looked at that perspective. The Board issues leases all the time and say here it is, but you got to go out and get all the permits before this is executed. Member Pacheco doesn't see anything different in this case then what the Board does all the time except this is a new thing and he agrees with Mr. Lemmo's and the Chair's comments that this is new ground and he doesn't think it's reasonable for us to think we can have all the answers for this then move forward with the lease because of the nature of this project which is the game we are in here. These questions of the permits and different conditions are all there in the statute, in the law and in the permit. The lease decision is a separate issue for him.

Member Morgan said that what he is hearing is there are enough hoops to jump through that by granting a lease doesn't disadvantage the State in any way or put any environment at risk. Member Pacheco said he doesn't believe so. No more than us pursuing this avenue of open ocean aquaculture and those bigger broader issues...there are issues that we need to be diligent about how we monitor that and follow up in making the lessees responsible and accountable for the operation and the implementation noting that there are a lot of different agencies to go through the process. Member Goode agreed with Member Pacheco about going through a lot of hoops and not all can be concurrent with prior getting the lease. There may be issues as relates to deployment of what is conflict with the Army permit and we haven't fully researched to make sure that it's fully compliant with the CDUP and EIS. He would rethink Mr. Tsuji's condition along the lines that a project status update is provided to OCCL who will find whether it's compliant to the CDUP and the EIS then if its not it comes back. Member Pacheco said it's already in the CDUP. Mr. Lemmo said that it will come back to the Board after it deploys 2 cages. Originally 3 were discussed last year. Chair Thielen said if that Army Corp permit gives HOT the authority to do something that is different then our permit, they will have to come to the Board or they will have to the Army Corp with our permit to do something along those lines, but HOT doesn't have permission from the Board to do anything different. If the Army Corp comes up with something different under that permitting process they could not put something different in their CDUP. Is that correct? Mr. Lemmo said no, we have to approve the construction specs. HOT comes to staff with a construction spec that is different than what was approved by the Board under the CDUP we are not going to sign it and tell HOT to either go back to the Board or the Chair depending on the scale of the change. Chair Thielen asked then that is there already what he is suggesting be done. Member Goode asked whether OCCL is the accommodating agency. Mr. Lemmo confirmed that they are and people send permits to OCCL and he will be looking over the Army Corp permit and will send comments to them. Member Agor said he thinks staff has done a great job at approaching this project.

Chair Thielen said she can support the performance bond for the first ocean sphere, but she thinks that staff and this Board should think through a little more when HOT comes back for the second ocean sphere deployment about determining what would be the adequate performance bond amount for 2 or more spheres. Because they will want to consider things like multiple drift and if there are drifts that go in towards land or if there

are other things that the insurance may not normally cover particularly because this is a corporation. We want a performance bond because there may be situations where this Department might need to step in fast to do some things and not need to wait for litigation and insurance. Mr. Tsuji said for clarity purposes perhaps the Board could consider a specific condition if it were to approve language with respect to any liability or insurance or performance bond requirement under the lease that it be worded to cover any removal of spheres, on or off site or any environmental injury or damage caused by equipment or spheres, on or off site. He would support how much coverage the Board wants. This kind of language he is suggesting is clear and precise on what it's expected the Board will be covered for under either a performance bond or insurance policy. Mr. Tsuji has always told tenants that it may not necessarily fall under your off the shelf general liability policies, but you can always find a party of underwriters who can provide such coverage in these kinds of circumstances. There was more discussion about possible situations. Chair Thielen said it's good to be looking at those things because in the short time she has been in this Department have added some requirements in our lessees because of experiences that has happened at the end of a lease or somebody moving during a lease and you want to be looking at that. Member Pacheco said he understood, but he wanted to make sure the language doesn't back them into a corner that is not obtainable. Maybe adding a word like reasonable in there. On environmental damages, if you are a business and you go to an underwriter and say I'm doing this and I need to be insured for possible environmental damages that are out there that is really a tough one. Looking from a business perspective how do you set the cap on that? The Chair said on the performance bond the recommendation is saying they shall return to the Board for determination for an adequate amount for 2 or more biospheres. That question will come up. Some of the Board members said they were comfortable with that. The Chair's direction is if the Board's accepts that to direct staff to come back with an analysis considering these other issues on what the recommendation would be for 2 or more. That will come before the Board when you see that down the line.

Member Morgan said staff has done a good job and would like to see this go forward being concerned with world food security and he doesn't see not allowing this to proceed. If it doesn't work financially they will not keep pouring money into it.

There were discussions about the performance bond whether to say a \$100,000 for any improvements leading to and including the first ocean sphere that it covers the prototype infrastructure. Mr. Spencer said the reason why they are 2.5 miles out from shore is to reduce the risk of non-tethered cages crashing onto shore and so long it's within that amount. Chair Thielen summarized that the amendment suggested by Board member Gon the \$100,000 performance bond applies when you start to putt improvements in the water which would include the first sphere. Mr. Tsuji suggested adding in for any improvements or equipment leading up and including the first sphere.

Member Pacheco asked whether they were clear on the Army Corp permit amendment on #3. Member Gon asked Mr. Spencer whether it was ok with him (all the recommendations). Mr. Spencer said referred to #1 and their intention is to comply with all the permits throughout and didn't know whether the new language was necessary

since it's stated in the CDUP. Chair Thielen said it makes it a requirement of the lease. Mr. Spencer said if that is what they need to do then he is fine.

Member Pacheco moved to approve Item D-4 as amended. Member Edlao seconded it. All voted in favor.

The Board:

Staff recommended and the Board approved the following amendments

Add a new Recommendation 1 to read:

- 1. The Board determines that proposed leases encourages competition within the aquaculture industry.**

Add a new condition 2 to read:

- 2. The Lease shall contain a provision that neither the Lessee nor anyone acting on its behalf will be allowed to exclude any coast guard licensed vessels from the leased area.**

Add a new condition 3 to read:

- 3. The applicant/Lessee shall submit an annual report to staff which shall report to the Board on the progress of the applicant/Lessee on its attempts to secure an ACOE permit for the full build out of the project as described in this Submittal and the existing CDUA; it being specifically understood that any termination, revocation or violation of any governmental permit required for the project as described in this Submittal will trigger a default under the Lease.**

Renumber existing recommendations 1 and 2 accordingly to be 4 and 5.

Amend renewly renumbered Recommendation 4C (previously numbered Recommendation 1C on the Submittal) to read:

“~~[4]~~ 4. The amount of the performance bond under the lease shall initially be set at \$100,000.00 for any improvements or equipment constructed or placed within the leased area and including the first ocean sphere permitted by CDUP No. HA-3495...[continue with the remainder as submitted]”

Unanimously approved as amended (Pacheco, Edlao)

Member Pacheco stepped out and returned.

- Item C-2** **Authorization for the Chairperson to Negotiate and Sign a Memorandum of Understanding (MOU) with the County of Maui, for the Portion of Makena-Keoneoio Road through Ahihi-Kinau Natural Area Reserve (NAR), Makawao, Maui (TMK# 221004113, 221004073)**
- Item C-3** **Request for Approval for Selection of Competitive Sealed Proposal Process and Authorize the Chairperson to Award and Execute a Contract for Retrofitting Bog Fences in the Hono O Na Pali Natural Area Reserve and the Alakai Wilderness Preserve, TMK (4) 1-4-001:003, Waimea, Kauai**
- Item C-4** **Request Approval for Selection of Competitive Sealed Proposal Process and Authorize the Chairperson to Award and Execute a Contract for the Program Management of the Hawaii Urban and Community Forestry Program**

Scott Fretz representing Division of Forestry and Wildlife presented Items C-2, C-3 and C-4.

Member Gon commented that he is glad that staff is working on the Ahihi-Kinau Natural Area Reserve and the fences at Hono O Na Pali.

Chair Thielen said she is glad that DOFAW has been able to keep some good small programs going.

Unanimously approved as submitted (Morgan, Gon)

- Item D-1** **Issuance of Land Patent in Confirmation of Land Commission Award No. 6694 to LELEINAHOLO, situate at Peekauai, Waimea, Kona, Kauai, Tax Map Key: (4) 1-6-005:071.**
- Item D-2** **Amend Prior Board Action of May 27, 2005, Item D-1, Consent to Assign General Lease No. S-5616, Elsie May Nishi, Assignor, to Richard Corr Sr. and Elsie May Nishi, Assignee, Hanapepe, Waimea, Kauai, Tax Map Key: (4) 1-9-12: 37.**
- Item D-3** **Sale of Lease at Public Auction for Intensive Agriculture Purposes, Kaiiaakea, North Hilo, Hawaii, Tax Map Key: 3rd/3-4-03:11, 38 & 39.**
- Item D-6** **Issuance of Land Patent in Confirmation of Land Commission Award No. 8455-C, to Kuluiki, situate at Pohakea, Kanakau, Kona, Hawaii, Tax Map Key: (3) 8-1-004:052 (portion of).**
- Item D-7** **Consent to Sublease General Lease No. S-5805, Waikiki Community Center, Lessee, to United Self Help,, International Church of the Foursquare Gospel dba Hope Chapel Waikiki, Coalition of a Drug**

Free Hawaii, Waikiki Beach Chaplaincy, Inc., and Waikiki Health Center, Sublessees, Waikiki, Honolulu, Oahu, Tax Map Key: (1) 2-6-025:008.

- Item D-9** **Consent to Revocable License Agreement for Non-Federal Use of Real Property, under General Lease No. S-3748, United States of America, Department of Transportation, Federal Aviation Administration, Licensor, to Hawaiian Telcom, Inc., Licensee, Mokuleia, Waialua, Oahu, Tax Map Key: (1) 6-7-003:018.**
- Item D-10** **Amend Prior Board Action of November 14, 2008, Item D-18; Issuance of Direct Lease for Air Quality Monitoring Station and Access and Utility Easement to Hawaiian Electric Company, Inc., Nanakuli, Waianae, Oahu, Tax Map Key: (1) 8-7-006:029 and portions of 002 & 008.**
- Item D-11** **Issuance of Revocable Permit to U.S. Army for Conservation and Stabilization Efforts for Endangered Plant and Animal Species Purposes; Lualualei, Waianae and Honouliuli, Ewa, Oahu, Tax Map Key: (1) 8-8-001:010, and (1) 9-2-005:025.**
- Item D-13** **Set Aside to State of Hawaii, Department of Transportation, Airports Division for Runway Protection Zone Preservation, Waiakea, South Hilo, Hawaii, TMK: (3) 2-2-37:41.**

Member Goode asked about Items D-1 and D-6 where he asked why are they going through the process because they seem to be identical processes. Mr. Tsuji said these are a follow-up to a formal process for someone getting a deed from the State of Hawaii. Mr. Wynhoff said it goes back to the Mahele where there were different processes for ali'i and for maka'ainana grants that these were maka'ainana grants. You would have to get the Land Commission to like the idea that you were entitled to the land to get the actual patent. This is someone who didn't get around getting the patent. We will issue the land patent grant to the regional person and the successor will have to prove. It's purely a ministerial act. Member Goode was wondering whether we are not giving away lands. Mr. Wynhoff said he questioned that too because you can't give away lands without Legislative approval.

Unanimously approved as submitted (Gon, Morgan)

- Item K-3** **Request for Time Extension to Begin Construction on Conservation District Use Permit (CDUP) HA-3514 for a Native Forest and Bird Habitat Restoration and Research Facility by Henk and Akemi Rogers, Located at Pu'u Wa'awa'a, North Kona, Hawai'i, TMK: (3) 7-1-001:003**

Mr. Lemmo said he had nothing to add, but wished the applicant was here because they wanted a little more time, but he doesn't think they can do anything about it. They are only asking for an extension of only 6 months. Typically you can ask for 2 years to initiate, but they came in late and when that happens it has to come to the Board for decision. Now they are asking to initiate to June 30, but they were required to initiate by Oct. 2010. He would give them at least a year, but it's up to the Board.

The Chair said they could still start in 6 months. Mr. Wynhoff suggested or they could do less. Member Pacheco said this isn't anything pressing or needed. It's a personal project. Plus it's super dry up there. Mr. Lemmo said to give them until Oct. 23, 2011 to initiate and another year to complete, but ...keep it the way it is. He doesn't want them coming back it's a waste.

Unanimously approved as amended (Pacheco, Gon)

Adjourned (Pacheco, Gon)

There being no further business, Chairperson Thielen adjourned the meeting at 1:45 p.m. Recordings of the meeting and all written testimony submitted at the meeting are filed in the Chairperson's Office and are available for review. Certain items on the agenda were taken out of sequence to accommodate applicants or interested parties present.

Respectfully submitted,



Adaline Cummings
Land Board Secretary

Approved for submittal:



for
Laura Thielen
Chairperson
Department of Land and Natural Resources