

FIRST JUDICIAL COURT

STATE OF HAWAII

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Jahn Fishman

Clerk, Ninth Division

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

GOLD COAST NEIGHBORHOOD
ASSOCIATION,

Plaintiff,

vs.

STATE OF HAWAI'I; DOE
GOVERNMENTAL ENTITIES 1-10;
DOE GOVERNMENTAL AGENCIES 1-
10,

Defendants.

) CIVIL NO. 07-1-1122-06 VLC
) (Declaratory Judgment)

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) FINDINGS OF FACT, CONCLUSIONS
) OF LAW, AND ORDER

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STATE OF HAWAI'I BY ITS
ATTORNEY GENERAL,

Plaintiff,

vs.

TROPIC SEAS, INC.; THE
ASSOCIATION OF APARTMENT
OWNERS OF DIAMOND HEAD
BEACH, INC.; OLIVIA CHEN LUM,
trustee of the Olivia Chen Lum Revocable
Living Trust; CLARENCE KWON HOU
LUM, trustee of the Clarence Kwon Hou
Lum Trust and trustee under the Will and
Estate of Chow Sin Kum Lum; JEANNE
S. J. CHAN and HOWARD N. H. CHAN,
trustees of the Jeanne S. J. Chan Trust;

DIAMOND HEAD AMBASSADOR)
HOTEL, LTD.; DIAMOND HEAD)
APARTMENTS, LTD.; C S)
APARTMENTS, LTD.; THE)
ASSOCIATION OF APARTMENT)
OWNERS OF 2987 KALAKAUA)
CONDOMINIUM; TAHITIENNE,)
INCORPORATED; THE ASSOCIATION)
OF APARTMENT OWNERS OF 3003)
KALAKAUA, INC.; OCEANSIDE)
MANOR ASSOCIATION; THE)
ASSOCIATION OF APARTMENT)
OWNERS OF 3019 KALAKAUA, INC.;)
JOHN DOES 1-20, DOE)
CORPORATIONS 1-20, DOE)
PARTNERSHIPS 1-20, DOE)
ASSOCIATIONS 1-20, DOE)
GOVERNMENTAL AGENCIES 1-20,)
AND DOE ENTITIES 1-20,)
)
Defendants.)
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FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This Court, after having received evidence by way of stipulated facts, written and live testimony with documentary exhibits during the trial, the site visit on March 31, 2011, and having reviewed the pleadings, the trial briefs, post-trial briefs and other submissions made in the course of these proceedings, makes the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT¹

I. INTRODUCTION

1. The “Gold Coast” of Waikiki is an area of high end condominiums and cooperative apartments located on ocean front lots near the Diamond Head end of Kalakaua Avenue. All the

¹ Any finding of fact that may be interpreted as a conclusion of law and any conclusion of law that may be interpreted as a finding of fact shall be so interpreted.

lots are protected by seawalls.

2. These consolidated lawsuits concern the Seawall fronting the Gold Coast properties. Gold Coast Neighborhood Association (“GCNA”), the plaintiff in Civil No. 07-1-1122-06, asks this court to issue a declaratory judgment “declaring that the State has the responsibility to maintain the Seawall and keep it in good and safe condition.” Second Amended Complaint, Prayer for Relief ¶ 1.

II. THE PARTIES

3. GCNA is a non-profit incorporated organization doing business in the City and County of Honolulu, and is comprised of individuals and organizations that own, live in, or have an interest in real property along Kalakaua Avenue on the Waikiki coastline in the City and County of Honolulu, State of Hawai’i. Stipulated Facts No. 1.

4. The following organizations and/or incorporated entities are members of GCNA:

- a. Tropic Seas, Inc., the governing organization for a cooperative identified by Tax Map Key (“TMK”) No. 3-1-032:030;
- b. The Association of Apartment Owners of Diamond Head Beach Hotel, Inc., the governing organization for a leasehold identified by TMK No. 3-1-032:029;
- c. Diamond Head Ambassador Hotel, Ltd., the governing organization for the cooperative identified by TMK Nos. 3-1-032:028, 027 and 026;
- d. Diamond Head Apartments, Ltd., the governing organization for a cooperative identified by TMK No. 3-1-032:004;
- e. C S Apartments, Ltd., the governing organization for a cooperative identified by TMK No. 3-1-032:003;
- f. The Association of Apartment Owners of 2987 Kalakaua Condominium, the governing organization for the condominium identified by TMK No. 3-1-032:002;

- g. Tahitienne, Incorporated, the governing organization for the cooperative identified by TMK No. 3-1-032:001;
- h. The Association of Apartment Owners of 3003 Kalakaua, Inc., the governing organization for the condominium identified by TMK No. 3-1-033:011;
- i. The Association of Apartment Owners of 3019 Kalakaua, Inc., the governing organization for the condominium identified by TMK No. 3-1-033:009.

Stipulated Facts No. 2.

5. The State of Hawai‘i is the sovereign. Through its Department of Land and Natural Resources, the State manages, administers, and exercises control over all of the State’s public lands, including submerged land and beaches and coastal areas. Haw. Rev. Stat. § 26-15(b) (Cum. Supp. 2010); Haw. Rev. Stat. § 171-3 (Cum. Supp. 2010).

III. THE PROPERTIES AT ISSUE

A. List of the properties

6. The relevant seawall or seawalls in this matter are on, at, or near the seaward boundary of TMK Nos. 3-1-032:030, :029, :028, :027, :026, :004, :003, :002, :001 and 3-1-033:011 and :009. The parties disagree as to whether it is more appropriate to refer to them as one seawall or multiple seawalls. They are referred to herein as the “Seawall.” Stipulated Facts No. 3.

7. The following table identifies the properties involved in these lawsuits by tax map key number (TMK), street address, type of development on the lot, and lot owner.

	TMK	ADDRESS	OWNER TYPE OF DEVELOPMENT
1	3-1-032-030	2943 Kalakaua Ave.	Tropic Seas, Inc. Cooperative

2	3-1-032-029	2947 Kalakaua Ave.	Diamond Head Beach Hotel ² 61 unit Condominium
3	3-1-032-028	2953 Kalakaua Ave.	Diamond Head Ambassador Hotel, Ltd. Cooperative
4	3-1-032-027	2957 Kalakaua Ave.	Diamond Head Ambassador Hotel, Ltd. Cooperative
5	3-1-032-026	2963 Kalakaua Ave.	Diamond Head Ambassador Hotel, Ltd. Cooperative
6	3-1-032-004	2969 Kalakaua Ave.	Diamond Head Apts. Ltd. Cooperative
7	3-1-032-003	2979 Kalakaua Ave.	C S Apts Ltd. Cooperative
8	3-1-032-002	2987 Kalakaua Ave.	2987 Kalakaua Condominium 41 unit Condominium
9	3-1-032-001	2999 Kalakaua Ave.	Tahitienne, Incorporated Cooperative
10	3-1-033-011	3003 Kalakaua Ave.	3003 Kalakaua 25 unit Condominium
11	3-1-033-009	3019 Kalakaua Ave.	3019 Kalakaua Avenue 12 unit Condominium

These properties are all located on Kalakaua Avenue. Stipulated Facts Nos. 3 and 4.

B. General history of the properties from the Great Mahele

8. All of the properties involved in these lawsuits are part of a larger parcel first awarded to “Pehu” during the Great Mahele in 1848. This larger parcel is one of four apana or parcels delineated by the Commissioner of Boundaries under Boundary Certificate No. 1, dated December 4, 1865. The relevant parcel in these lawsuits is Apana 3, identified and described in the boundary certificate as “Lele of Kekio, called Kapua, situate in Waikiki kai.” The property is

² Olivia Cheng Lum, Trustee of the Olivia Cheng Lum Revocable Living Trust; Clarence Kwon Hou Lum, Trustee of the Clarence Kwon Hou Lum Trust; Clarence Kwon Hou Lum, Trustee under the Will and Estate of Chow Sin Kum Lum; and Jeanne S.J. Chan and Howard N.H. Chan, Trustees of the Jeanne S.J. Chan Trust own the leased fee interest in the real property underlying the Diamond Head Beach Hotel. Exhibit J-230.

shown on Registered Map 118 (Exhibit J-226) where it is labeled “Kapua, Ap. [Apana] 3.”

Registered Map 118 shows that the property borders “kai,” that is, the sea. There is no seawall shown on Registered Map 118. Report of the State Abstractor, Ernest Collins, Exhibit J-19, Exhibit J-226.

9. After the boundaries of Apana 3 were determined and commutation paid, the Kingdom of Hawai‘i issued Royal Patent No. 5667 dated February 20, 1872, in confirmation of the original land commission award to Pehu. Consistent with Registered Map 118, Royal Patent No. 5667 indicates that the original makai boundary was “ma ke kai” - literally “along the sea.” State by Kobayashi v. Zimring, 58 Haw. 106, 152, 566 P.2d 725, 751 n. 18 (1977). Report of the State Abstractor, Ernest Collins, Exhibit J-19.

10. For purposes of their history after the Great Mahele and more particularly for considering the dates at which seawalls were first constructed, the 11 properties in this suit can be usefully divided into three groups.

11. First, the four lots that are now TMK Nos. 3-1-032:030 (Tropic Seas), :029 (Diamond Head Beach Hotel), :028 and :027 (two of the three lots comprising Diamond Head Ambassador) were registered in the Land Court in 1904 pursuant to Land Court Application No. 13 of Ida Tenney Castle. Exhibit J-227. As of 1904, the seaward boundary of these lots was shown (courses 5 through 8) as being “along stone wall along sea shore.” Exhibit J-227. The “stone wall” is also depicted on the map accompanying the application. See also Exhibit J-252 showing a stone seawall in the area in the early 1900s. Report of the State Abstractor, Ernest Collins, Exhibit J-19, Exhibit J-227, Exhibit J-252.

12. TMK No. 3-1-032:005 (Castle Surf) was also covered by Land Court Application

No. 13 of Ida Tenney Castle. The Castle Surf property is no longer part of this suit. Exhibit J-227.

13. Second, the five properties that are now TMK Nos. 3-1-032:026 (the third of the three lots comprising Diamond Head Ambassador), :004 (Diamond Head Apartments), :003 (C S Apartments), :002 (2987 Kalakaua Condominium), and :001 (The Tahitienne) are each a portion of property that was subdivided in 1910 into the W. G. Irwin Lots. The 1910 deed (for what is now TMK No. 3-1-032:001, The Tahitienne) from Irwin to Susan Speed Harrison describes the seaward boundary as “along wall along seashore.” Each of the 1912 deeds, when Irwin sold the other four properties, describes the seaward boundary as “along retaining wall along [or by the] seashore.” Exhibits J-233, J-235, J-237, J-239, and J-241. Report of the State Abstractor, Ernest Collins, Exhibit J-19.

14. Third, the two properties that are now TMK No. 3-1-033:011 (3003 Kalakaua Condominium) and TMK No. 3-1-033:009 (3019 Kalakaua Condominium) are part of the “Diamond Head Terrace” subdivision created in 1921. See Exhibit J-228 which is a map of that subdivision filed in the Bureau of Conveyances as File Plan 214 and dated April 2, 1921. As shown on that map, TMK No. 3-1-033:009 (3019 Kalakaua Condominium) is Lot 71 of the subdivision. TMK No. 3-1-033:0011 (3003 Kalakaua Condominium) is Lot 73 of the subdivision. As of the 1921 subdivision, the seaward boundary of those properties was “along high water mark at seashore on the following azimuths and distances.” This listing of azimuths and distances ends at “a ‘+’ cut in the South face of seawall.” Exhibit J-228. Report of the State Abstractor, Ernest Collins, Exhibit J-19.

15. The Seawall along the properties in the Diamond Head Terrace subdivision was constructed sometime between 1921 and 1930. Exhibit J-2.

16. TMK No. 3-1-033:010 (Oceanside Manor) is Lot 72 of the Diamond Head Terrace subdivision. This property lies between TMK No. 3-1-033:011 (3003 Kalakaua Condominium) and TMK No. 3-1-033:009 (3019 Kalakaua Condominium). Exhibit J-24. Oceanside Manor used to be, but is no longer, part of this suit.

17. The Seawall involved in this suit was built by unknown private parties at least 80 years ago for the primary purpose of protecting private property from erosion.³

C. The seawall on specific properties

1. TMK No. 3-1-032:030 (Tropic Seas)

18. At all times, waves crash directly onto the Diamond Head portion of this seawall.

At low tide, there is a patch of wet sand in front of the Ewa portion of this seawall. At high tide, the waves crash directly on the entire length of this seawall. Testimony of Russell Tsuji; Site visit; Exhibits J-26, J-27, and J-253, photos 1, 2, 5, and 6.

³ The Stipulation of Facts filed March 18, 2011 does not contain a stipulated fact regarding the construction of the seawalls by private parties. Plaintiff GCNA's proposed findings submitted May 31, 2011 do not contain a proposed finding regarding the construction of the seawall by private parties. In Plaintiff GCNA's trial brief, on page 2 and 3, they state that the "seawall was originally built by unknown private parties 80 to 100 years ago" and cite to paragraph 22 of the Stipulated Facts. (However, paragraph 22 of the Stipulated Facts relates to repair work on the wall and does not relate to the original construction of the seawall.) Similar language is also in GCNA's original complaint, ¶ 7, its first amended complaint (filed 8/19/08, ¶ 7), its pretrial statement (filed 8/8/08 at page 2), its settlement conference statement (filed 11/2/09 at page 2), and its second amended complaint (filed 9/13/10 ¶ 7). The State does not dispute the fact that the seawalls were built by unknown private parties. The State alleged in paragraph 16 of its complaint filed in Civil No. 10-1-0888-04 that:

Each of the parcels of real property mentioned in paragraphs 2 through 12 has a seawall at its makai boundary. The seawalls were built at various times by defendants or their predecessors. None of the seawalls were built by the Kingdom, Territory, or State of Hawai'i.

GCNA admitted this allegation in its answer filed May 12, 2010. The State contends that the seawalls were built to protect the private property from erosion and references GCNA's memorandum in support of motion for summary judgment (filed 7/18/07 at page 2) in which GCNA states:

'[T]he primary purpose for a seawall is to protect land and upland property from damages by waves in areas of high wave action, with incidental functions as a retaining wall or bulkhead.' Federal Emergency Management Agency, Preparing for Hurricanes and Coastal Flooding: A Handbook for Local Officials (October 1983).

19. At the Diamond Head side of the Tropic Seas property, mauka of the seawall walkway, there is a sign that says: "Private Property of Tropic Seas. No Loitering. Neighborhood Watch." At the Ewa side of the Tropic Seas property, there are stairs leading down from the seawall to the wet, intermittent sand. At the top of the stairs, there is an open deck area with a wooden trellis next to the seawall. There is a sign at the top of the stairs that says: "Private property, no loitering." Testimony of Russell Tsuji; Site visit; Exhibits J-26, J-246 and J-253, photos 2 and 5.

20. The State has never repaired this seawall. Stipulated Facts Nos. 14 to 24.

21. This property is registered in land court. The makai boundary in azimuths and distances (metes) of the property is as shown on Land Court Application 13. Exhibits J-227 and J-229.

22. Both the metes line shown on Land Court Application 13 and the chapter 205A shoreline on this property are close to the makai edge of the "bottom edge of splash guard on the seawall." The lines can be seen to diverge slightly near the eastern boundary of this property. Exhibit J-224. That means nearly this entire seawall is on the registered land.

23. Specifically as shown by the top set of numbers on Exhibit J-24, 19 square feet of the seawall or concrete on top of the seawall is makai of the metes line. 111 square feet of the seawall or concrete on top of the seawall is makai of the chapter 205A shoreline.

2. TMK No. 3-1-032:029 (Diamond Head Beach Hotel)

24. At all times, waves crash directly onto the entire length of this seawall. Testimony of Russell Tsuji; Site visit; Exhibits J-29 to J-36, and J-253, photos 7 and 8.

25. Although there is no evidence that the State has repaired this seawall, the State⁴ applied for and received a permit to repair the seawall in 1992 and in 1993 included the seawall in the list of rehabilitation work to be done in the future. Stipulated Facts Nos. 14 to 24.

26. This property is registered in land court. The makai boundary in azimuths and distances (metes) of the property is as shown on Land Court Application 13. Exhibits J-227 and J-230.

27. On the gate leading into the Diamond Head Beach Hotel property from the Seawall, there is a sign which reads "Private Property, No Trespassing." Exhibit J-28.

28. As shown by Exhibit J-24, 31 square feet of the seawall or concrete on top of the seawall is makai of the metes line. 90 square feet of the seawall or concrete on top of the seawall is makai of the chapter 205A shoreline.

3, 4, and 5. TMK Nos. 3-1-032:028, :027, and :026 (Diamond Head Ambassador)

29. At all times, waves crash directly onto the walls of these properties. The top of the wall is 6 to 8 feet above the ocean. Testimony of Russell Tsuji; Site visit; Exhibits J-37 to J-49, and J-253, photo 8.

30. In 1984, the State repaired the walkway of the seawall at :026 and :027. The State removed loose concrete and replaced with 2" thick cement mortar. Stipulated Facts Nos. 16 to 18.

31. In 1993, after Hurricane Iniki, the State built the concrete wall over what was left of the old wall on state land makai of the then shoreline. Stipulated Facts No. 21.

32. As shown by Exhibit J-24, on Lot 28, 185 square feet of the seawall or concrete on top of the seawall is makai of the metes line; 99 square feet of the seawall or concrete on top of

⁴ All repair work performed, or planned, referred to in this action was done by the State, by and through the Department of Land and Natural Resources.

the seawall is makai of the Chapter 205A shoreline. On Lot 27, 240 square feet of the seawall or concrete on top of the seawall is makai of the metes line; 113 square feet of the seawall or concrete on top of the seawall is makai of the Chapter 205A shoreline. On Lot 26, 140 square feet of the seawall or concrete on top of the seawall is makai of the metes line; 100 square feet of the seawall or concrete on top of the seawall is makai of the Chapter 205A shoreline.

6. TMK No. 3-1-032:004 (Diamond Head Apartments)

33. At low tide, this seawall is fronted by wet rock or wet sand. At high tide, waves splash onto this seawall. Testimony of Russell Tsuji; Site visit; Exhibits J-50 to J-80, and J-253, photo 11.

34. In June of 1982, the State performed emergency repair work to shore up approximately 40 feet of this seawall. Stipulated Facts No. 14.

35. Sometime after May 1984, the State performed crack repair on the concrete slab that tops this seawall. Specifically, the work was to “chip off loose material and epoxy the crack[s].” Stipulated Facts No. 18.

36. As shown by Exhibit J-24, 16 square feet of the seawall or concrete on top of the seawall is makai of the metes line; 738 square feet of the seawall or concrete on top of the seawall is makai of the Chapter 205A shoreline.

7. TMK No. 3-1-032:003 (C S Apartments)

37. At low tide, this seawall is fronted by wet sand or wet rock. At high tide, waves splash onto this seawall. Testimony of Russell Tsuji; Site visit; Exhibits J-81, J-82, and J-253, photo 15.

38. Sometime after May 1984, the State performed crack repair on the concrete slab that tops this seawall. Specifically, the work was to “chip off loose material and epoxy the crack[s].”

Stipulated Facts No. 18.

39. As shown by Exhibit J-24, 78 square feet of the seawall or concrete on top of the seawall is makai of the metes line; 247 square feet of the seawall or concrete on top of the seawall is makai of the Chapter 205A shoreline.

8. TMK No. 3-1-032:002 (2987 Kalakaua Condominium)

40. At low tide, this seawall is fronted by wet sand or wet rock. At high tide, waves splash onto this seawall. Testimony of Russell Tsuji; Site visit; Exhibits J-83 to J-107, and J-253, photo 15.

41. Sometime after May 1984, the State performed crack repair on the concrete slab that tops this seawall. Specifically, the work was to “chip off loose material and epoxy the crack[s].”

Stipulated Facts No. 18.

42. As shown by Exhibit J-24, 91 square feet of the seawall or concrete on top of the seawall is makai of the metes line; 259 square feet of the seawall or concrete on top of the seawall is makai of the Chapter 205A shoreline.

9. TMK No. 3-1-032:001 (The Tahitienne)

43. At low tide, this seawall is fronted by wet sand or wet rock. At high tide, waves splash onto this seawall. Testimony of Russell Tsuji; Site visit; Exhibits J-108 to J-124, and J-253, photo 15.

44. Sometime after May 1984, the State performed crack repair on the concrete slab that tops this seawall. Specifically, the work was to “chip off loose material and epoxy the crack[s].”

Stipulated Facts No. 18.

45. As shown by Exhibit J-24, 47 square feet of the seawall or concrete on top of the seawall is makai of the metes line; 259 square feet of the seawall or concrete on top of the

seawall is makai of the Chapter 205A shoreline.

10. TMK No. 3-1-033:011 (3003 Kalakaua Condominium)

46. As shown on Exhibit J-24, the 3003 Kalakaua Condominium property also includes a small sliver of TMK No. 3-1-032:001. This makes no difference for purposes of this case.

47. At low tide, there is a strip of wet rock in front of this seawall. The top of the seawall is 6 to 10 feet above the wet rock. At high tide, waves crash directly onto this seawall. Testimony of Russell Tsuji; Site visit; Exhibits J-125 to J-162, and J-253, photo 16.

48. Sometime after May 1984, the State performed crack repair on the concrete slab that tops this seawall. Specifically, the work was to “chip off loose material and epoxy the crack[s].” At the same time, the State “repair[ed] nosing at edge of walkway” on five feet of this property. At the same time, the State “remove[d] loose concrete topping and replace[d] with 2” thick cement mortar.” Stipulated Facts No. 18.

49. As shown by Exhibit J-24, 41 square feet of the seawall or concrete on top of the seawall is makai of the metes line; 59 square feet of the seawall or concrete on top of the seawall is makai of the Chapter 205A shoreline.

11. TMK No. 3-1-033:009 (3019 Kalakaua Condominium)

50. At low tide, there is a strip of wet sand in front of this seawall. The top of the seawall is 6 to 10 feet above the wet sand. At high tide, waves crash directly onto this seawall. Testimony of Russell Tsuji; Site visit; Exhibits J-163 to J-185, and J-253, photo 16.

51. Sometime after May 1984, the State performed crack repair on the concrete slab that tops this seawall. Specifically, the work was to “chip off loose material and epoxy the crack[s].” At the same time, the State “repair[ed] nosing at edge of walkway” on five feet of this property.

At the same time, the State “remove[d] loose concrete topping and replace[d] with 2” thick cement mortar.” Stipulated Facts No. 18.

52. This property is registered in the Land Court. The metes line is as shown on the map and description with Land Court Application 1623. Exhibit J-249.

53. The seawall extends makai of both the metes line and the shoreline. As shown on Exhibit J-24, 18 square feet of the seawall is makai of the metes line. 34 square feet of the seawall is makai of the chapter 205A shoreline.

IV. ACCESS

54. There is no record access from Kalakaua Avenue to any portion of the Seawall for the members of the public to use.

55. The original complaint filed by GCNA included all 21 parcels which make up the Seawall along the Gold Coast extending from TMK No. 3-1-032:030 (Tropic Seas) to TMK No. 3-1-033:002 (Sea Breeze/Kainalu). See Exhibit J-8 below. Twelve of the 21 parcels are part of the Diamond Head Terrace Subdivision and only two of the 12 Diamond Head Terrace Subdivision parcels are now included as part of this action. Four of the 21 parcels have a record easement in favor of the general public, and those four parcels are part of the Diamond Head Terrace Subdivision. However, only one of the four parcels is included in this action. The four parcels that have a record easement in favor of the general public are: TMK Nos. 3-1-033:009 (3019 Kalakaua), 006, 053 and 002. These four parcels are not contiguous with each other. There is no evidence to explain why these parcels contain an easement in favor of the general public and other parcels in the subdivision do not.

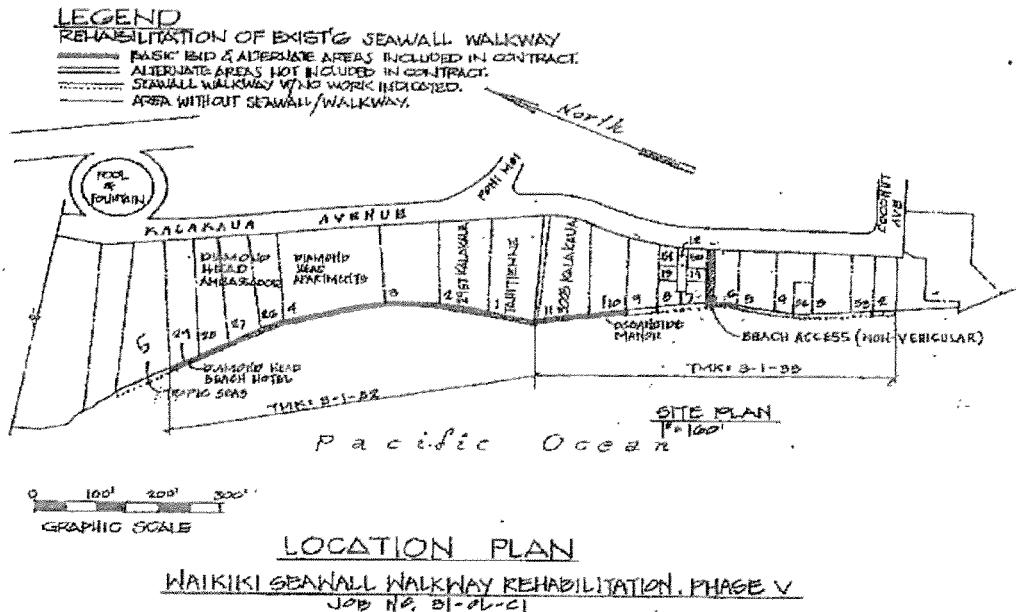


Exhibit J-8. (Above figure is incorrect where it states TMK No. 3-1-32:005 for Tropic Seas. It should state 30 for Tropic Seas.)

56. Parcel TMK No. 3-1-033:006, included in the original complaint, but dropped in the first amended complaint, is important because the right-of-way that crosses this property is the only way to get from Kalakaua Avenue to the ocean and Seawall (absent permission from a shoreline owner). There are stairs leading down to the ocean at the makai end of the right-of-way. Exhibits J-208 to J-223, J-245, Site visit.

57. Parcel TMK No. 3-1-033:006 has a street address of 3037 Kalakaua Avenue and an area of 5353 square feet. It is Land Court property, covered by Land Court Application 1243 and is divided into Lots, A, B and C. It is presently owned by Kozan Company. Exhibits J-19, J-24, J-245, J-250 and J-251.

58. Lots A and C are narrow parcels on the Ewa side of TMK No. 3-1-033:006 that together run from Kalakaua Avenue to the ocean. Lot A has an area of 748 square feet and abuts

Kalakaua Avenue. Lot C has an area of 254 square feet and is makai of Lot A. Lot C lies between Lot A and the ocean. Lot B has an area of 4,351 square feet and is east of Lots A and C.

59. As indicated on the Warranty Deed conveying TMK No. 3-1-33:006, recorded June 3, 1997, there is a “[p]erpetual easement of right of way in favor of the owners and occupants of Lots in the Diamond Head Terrace tract from and after July 1, 1941, over, across and along Lots A and C, as shown on Map 1, filed with Land Court Application No. 1243 (amended) as a means of access to the sea.” There is also a “[p]erpetual easement of right of way in favor of the general public over, across and along Lot C, as shown on said Map 1.” There is no record access over Lot A in favor of the general public. Exhibit J-250.

60. TMK Nos. 3-1-033:007 and 008 lie between TMK No. 3-1-033:006 (Lots A and C) and TMK No. 3-1-033:009. TMK Nos. 3-1-033:006 (Lot B), 005, 004, 056, and 003 lie between TMK No. 3-1-033:006 (Lots A and C) and TMK Nos. 3-1-033:053 and 002. There are recorded easements in favor of the general public over TMK Nos. 3-1-033:009, 053 and 002.

61. A person is physically able to access the seawall as follows:

- a. The public uses Lot A, which is a right of way easement in favor of the owners and occupants of lots in the Diamond Head Terrace Tract, to access Lot C. Once on Lot C, members of the public generally enter the ocean via the steps down to the ocean from Lot C. In addition, a person can walk in an easterly direction on the Seawall on Lot B, or in the ewa direction on the Seawall on TMK No. 0-1-33:007.
- b. At the Diamond Head end of the Seawall, there is lateral public access from the beach in front of the Seabreeze Apartments and Kainalu Apartment (2801 Coconut Avenue), which are part of the Diamond Head Terrace Tract.

Although the Quitclaim Deed was not submitted into evidence, there is reference to the Quitclaim Deed reserving an easement in favor of use by the general public in the record. See Exhibit J-2. Members of the public can use the easement for lateral access to the Seawall from this beach area. There is no evidence of any recorded means for a member of the public to access this beach area from Kalakaua Avenue.

- c. At the Waikiki end of the Seawall, there is lateral public access from the beach area in front of Castle Surf Apartments and Tropic Seas. To access the Seawall, a member of the public must walk up steps past a sign which reads “Private Property No Loitering.” There is no access to this beach area from Kalakaua Avenue. A member of the public could access this beach area by walking along the shore and in the ocean from Sans Souci Beach and past the Elks Club.
- d. A person can use the metal steps at the Diamond Head Ambassador to get onto the Seawall from the ocean.
- e. A person can climb onto the Seawall from the ocean. Some sections of the Seawall are low enough for a person to step from the reef or sand onto the wall. Other sections of the Seawall are 6 to 8 feet above the water and it is extremely difficult to climb up the wall.
- f. Each one of the condominium and apartment complexes bordering the Seawall has access to the Seawall.

V. REPAIR WORK

62. By memorandum dated February 27, 1975, in response to a question from the Harbors Division, Department of Transportation as to whether the State has the responsibility to maintain the Seawall located on TMK 3-1-33-2, 53, and if yes, which State agency is responsible, Deputy Attorney General Wallace W. Weatherwax opined to the then Director of the Department of Land and Natural Resources that “the State has the responsibility to maintain the public right of way over the seawall” and that DLNR is the agency responsible to maintain the Seawall. The memorandum references a Quitclaim Deed dated December 9, 1930 which reserved a pedestrian public right of way over, along and across the Seawall. The February 27, 1975 memorandum further notes that “[n]either the Department of Land and Natural Resources nor the Department of Transportation have any records of maintenance or repair” of the Seawall. Exhibit J-2.

63. The DLNR, Land Division, performed emergency repair work, completed in June 1982, to shore approximately 40 feet of the Seawall along the boundary of Diamond Head Apartments, TMK No. 3-1-032:004. The contract price for this repair work was \$25,000, and it was authorized by Act 1 SLH 1981, Item K-2. See Exhibit J-13. Stipulated Facts No. 14.

64. Sometime around 1982, the DLNR, Land Division, repaired and rehabilitated broken sections of the Seawall from the Elks Club property (TMK No. 3-1-032:005 to TMK No. 3-1-033:002), near the Diamond Head end of Kalakaua Avenue. Funds for this work were authorized by Act 1, SLH 1981, Item K-2 and Act 264, Item K-2. Stipulated Facts No. 15. There is no evidence as to which portions of the Seawall were worked on in 1982. See Exhibit J-13. (“Construction contract information was not found.”)

65. Sometime after May 1984, the State did additional work on one or more portions of the Seawall pursuant to work identified as Job No. 1-OL-31, Waikiki Seawall Walkway Rehabilitation, Phase III. See Exhibit J-6. Stipulated Facts No. 16.

66. The scope of work originally planned for Job No. 1-OL-31 of Phase III construction consisted “of rehabilitating seawalls, constructing hand railing and other incidental and appurtenant work necessary to complete this project.” See Exhibit J-6. The work as actually completed did not conform to this original scope. See Exhibit J-25. Stipulated Facts No. 17.

67. The scope of work actually performed for Job No. 1-OL-31 of Phase III construction is described in the as built plans, Exhibit J-25, and summarized, in part, in the following table.⁵

Designation on plans	Properties affected	Nature of repair
A-2	Portion of 33:009 to 32:004 (33:009, :010, :011, 32:001, :002, :003, :004)	Crack repair on walkway—chip off loose material and epoxy the crack
B-2	Approx. 35 linear feet at 32:002 Approx. 5 linear feet at 33:011	Repair nosing at edge of walkway
C-2	Deleted—work not done 32:029 Portion of 32:028	Remove loose concrete topping and pour 4” thick x 3’6” wide concrete layer
D-2	32:026 and :027 33:010 and :011	Repair walkway--remove loose concrete topping and replace with 2” thick cement mortar.(Taper new concrete left to right, see G-2)

See Exhibit J-25. Stipulated Facts No. 18.

68. The State named Phase III of the work “Waikiki Seawall, Walkway Rehabilitation” and photographed the condition of the Seawall prior to its construction and rehabilitation, on or about January 25, 1983. These photographs included images of TMK Nos. 3-1-032:004, 026,

⁵ Work was also performed on parcels TMK Nos. 3-1-33:008, 007, 006, 005, 003, 053, and 002.

027, and 028. On or about December 16, 1982, an unidentified state employee also photographed images of the Seawall and what was called the “access easement Diamond Head to Ocean” located at TMK 3-1-033:006. See Exhibit J-22. Stipulated Facts No. 19.

69. On December 8, 1992, via a Resolution, the Council of the City and County of Honolulu granted a Special Management Area Use Permit and Shoreline Setback Variance to the DLNR to rehabilitate the existing Seawall walkway located in Diamond Head, Oahu and identified by TMK Nos. 3-1-032:001, 002, 003, 004, 026, 027, 028 and 029, and 3-1-033:002, 003, 004, 005, 006, 007, 008, 009, 010, 011, 053, and 056. See Exhibit J-10. However, the only work done on this project was in front of Diamond Head Ambassador Hotel, Ltd. Stipulated Facts No. 20.

70. Phase V construction (the same work covered by the previous paragraph) was a G.O. Bond-funded CIP project authorized by Act 316, SLH 1989, Item K-11, following Hurricane Iniki (Job No. 31-OL-C1). Construction was completed by Sea Engineering in September 1993 at a contract price of \$609,605. The only portion of the Phase V project that was completed was for the Diamond Head Ambassador Hotel, Ltd. (TMK Nos. 3-1-032:026, 027 and 028). See Exhibits J-8, J-9 and J-13. At this time, the State built or rebuilt essentially the entire wall in front of these three properties. At the time the State built this wall, the shoreline and the metes and bounds line were essentially the same. Therefore, to the extent the State built the wall makai of the then shoreline, the wall is on State property. Stipulated Facts No. 21. As shown on the DAGS survey admitted into evidence as Exhibit J-24, virtually all of the wall in front of the Diamond Head Ambassador Hotel, Ltd.’s three properties (TMK Nos. 3-1-032:026, 027 and 028) is on State property.

71. In the Contract Specifications and Plans for Job No. 31-OL-C1 of Phase V construction, approved by the DLNR, the scope of work consisted “of rehabilitating seawalls and walkways, constructing hand railings and other appurtenant work necessary to complete this project.” See Exhibit J-9. This particular scope of work was ultimately not implemented. Stipulated Facts No. 22.

72. An April 30, 1993, Phase V Change Order issued by the DLNR states: “6. Replacing of the 8” pipe with PVC pipe at Section D/4 is necessary as the existing pipe may spall and explode the new concrete wall. Reconstructing a splash block is necessary to prevent drainage water from eroding the seawall.” “7. Replacing the drain pipe with stainless steel pipe and ABS pipe at Section B/4 and C/4, respectively is necessary to prevent ultra-violet light, salty air and sea water from deteriorating and corroding the pipes and spalling and explode the surrounding concrete.” See Exhibit J-11. Stipulated Facts No. 23.

73. In an October 13, 1993 letter from Manabu Tagomori, Manager-Chief Engineer of the DLNR, to Mason Young, Administrator of the Division of Land Management, DLNR, Mr. Tagomori explains that the rehabilitation work in Phase V construction has been completed for the Diamond Head Ambassador Hotel, Ltd. (TMK Nos. 3-1-032:026, 027, and 028), and that rehabilitation work will be scheduled for future phases for TMK Nos. 3-1-32:029, 004, 003, 002, 001, 3-1-033:011 and 009. See Exhibit J-12. Stipulated Facts No. 24.

74. In 2006, H.B. No. 1900, LNR101, Section 7.01, in a section titled Waikiki Seawall Improvements, Oahu, the State appropriated \$2 million for “plans, design and construction for the resurfacing of the seawall and installation of railings along Waikiki’s Gold Coast. This project [was] deemed necessary to qualify for federal aid financing and/or reimbursement.” See Exhibits J-17, J-18 and J-23. Stipulated Facts No. 25. By letter dated March 15, 2007, the State

informed GCNA, through counsel, that the State disputed that it had an easement over the Seawall and disputed that the State had a duty to maintain the Seawall. Exhibit J-247.

VI. THE LAWSUITS

75. GCNA filed its lawsuit in Civil No. 07-1-1122-06 on July 12, 2007. The original complaint covered 21 parcels along the Gold Coast. TMK Nos. 3-1-032:005, 029, 028, 027, 026, 004, 003, 002, 001; TMK Nos. 3-1-033:011, 010, 009, 008, 007, 006, 005, 004, 056, 003, 053, 002. Complaint ¶ 6.

76. GCNA filed a first amended complaint in Civil No. 07-1-1122-06 on August 19, 2008. This first amended complaint dropped 10 of the original 21 properties from the lawsuit and added one new property. The 10 properties dropped are: TMK No. 3-1-33:006 (the property on which the path is located), TMK Nos. 3-1-33:007, and :008 (the properties between the path and the seawalls at issue), TMK No. 3-1-32:005 (Castle Surf), and all the properties on the Diamondhead side of the path, TMK Nos. 3-1-33: 005, 004, 056, 003, 053, and 002. TMK No. 3-1-32:030 (Tropic Seas) was added. Cf. Complaint ¶ 6 with First Amended Complaint ¶ 6.

77. The State filed its complaint in Civil No. 10-1-0888-04 on April 26, 2010. The State alleged that because of GCNA's pending lawsuit there was an actual controversy between the State and the named defendants. The named defendants in Civil No. 10-1-0888-04 are the owners of and /or entities that manage or represent owners of condominiums or cooperatives located on the properties included in Civil No. 07-1-1122. The two cases were consolidated by order filed August 10, 2010.

78. GCNA filed its second amended complaint on September 13, 2010. The only change in the complaint was to remove TMK No. 3-1-033:010 (Oceanside Manor) from the complaint and withdraw GCNA's request for declaratory judgment as to that property. On

September 29, 2010, the State similarly filed a partial dismissal as to defendant Oceanside Manor Association. Thus, the remaining properties are the eleven identified and discussed above.

VII. PUBLIC USE OF SEAWALL

79. In 1982, in the Environmental Assessment for the repair of the portion of the Seawall near the Diamond Head Apartments, the DLNR said:

The top of the seawall serves as a public walkway for residents and beachgoers to traverse along the shores of Waikiki Beach.

...
The existing seawall extending along the shoreline of Waikiki Beach serves as a protection to properties against wave action and also as a public walkway for residents and beachgoers.

...
Residents, surfers, beachgoers and fishermen use the top of the seawall to traverse between the Diamond Head end of Waikiki Beach and Sans Souci Beach.

Exhibit J-5.

80. The Contract Specifications and Plans for Job No. 1-OL-31, Waikiki Seawall Walkway Rehabilitation, Phase III project dated May 1984 state: "The State has a right-of-way over the seawall and has obtained a right-of-entry onto the property of those listed below for the rehabilitation of the seawall walkway." Properties listed include Diamond Head Ambassador Hotel, Diamond Head Apartments and 3019 Kalakaua Avenue. Exhibit J-6.

81. In 1992, the DLNR released a "Notice of Determination (Negative Declaration) for the Waikiki Seawall Walkway Rehabilitation, Phase V" which stated:

The seawalls and walkways are, in general, inside the affected properties, along the shoreline boundaries. The State of Hawaii has a right-of-way over all the seawalls and walkways and is responsible to keep them in good and safe condition. The walkways are used by the public. The State of Hawaii is obtaining right-of-entry onto the properties and to construct in the lots.

Exhibit J-8.

82. June Anderson has lived in her home along the Gold Coast for over 37 years, and has used the Seawall as a pathway for over 55 years. See Anderson Decl. ¶¶ 3, 4.

83. Ms. Anderson's apartment is within the Diamond Head Apartments complex located at 2969 Kalakaua Avenue. See Anderson Decl. ¶ 1.

84. The view from Ms. Anderson's apartment permits her an unfettered view of the Seawall.

85. Ms. Anderson is a member of the Gold Coast Neighborhood Association. See Anderson Decl. ¶ 1.

86. Throughout this entire period, Ms. Anderson has observed the public using the Seawall as a walkway and thoroughfare, as well as for access to the ocean for fishing, surfing, and swimming. See id. ¶¶ 3, 4, 5, 7.

87. To the best of Ms. Anderson's knowledge, no owner of the property along the Seawall has ever attempted to block access to the wall or exert any other similar acts of control or ownership over the Seawall during that time. See id. ¶ 6.

88. Ms. Anderson has no knowledge of any of the private property owners along the Gold Coast exercising any control over the Seawall or blocking any member of the public from use of the Seawall.

89. Mr. Robert Gentry resides at 2999 Kalakaua Avenue, #201, which is located adjacent to the Diamond Head Seawall on the Gold Coast. See Gentry Decl. ¶ 2.

90. Mr. Gentry moved into his home bordering the Diamond Head Seawall in 1982. From that time forward, he has observed members of the public use the Diamond Head Seawall as a walkway and for recreational purposes on a continuous basis. See Gentry Decl. ¶ 9.

91. Mr. Gentry is the President of the Gold Coast Neighborhood Association (“GCNA”). See Gentry Decl. ¶ 1.

92. The GCNA is a non-profit corporation comprised of residents and owners of real property bordering the Diamond Head Seawall. Membership in the GCNA is open to all those who live in the area along the Diamond Head Seawall and, at this time, no dues are paid. See Gentry Decl. ¶¶ 3, 4.

93. The GCNA assumes that owners of property bordering the Diamond Head Seawall do not have the right to block the public from using the Seawall. See Gentry Decl. ¶ 11.

94. Private property owners and residents living along the Diamond Head Seawall do not generally use the Diamond Head Seawall for primary daily access to their property. See Gentry Decl. ¶ 6.

95. The properties have access to the Seawall via gates and owners and residents of the properties use the Seawall for access to the shoreline and ocean.

96. To the best of Mr. Gentry’s knowledge, no owner of property along the Diamond Head Seawall has ever blocked the public from using the Diamond Head Seawall. See Gentry Decl. ¶ 10.

97. To the best of Mr. Gentry’s knowledge, owners along the Diamond Head Seawall have acquiesced in the public’s use of the Diamond Head Seawall as a walkway and for access to ocean activities. See Gentry Decl. ¶ 12.

98. Mr. Guy Bishaw was raised in Waikiki and is currently 58 years old. Bishaw Decl. ¶ 2 and 3.

99. Mr. Bishaw is an avid swimmer and surfer and has used the Seawall to access offshore surfing spots since he was 10 years old. Bishaw Decl. ¶ 5.

100. Mr. Bishaw identified for the Court the locations of three well known surf spots which lie offshore the Gold Coast - "Old Man's," "Rice Bowls," and "Tonggs." Bishaw Testimony.

101. Mr. Bishaw has used the Seawall to access these surf spots along with his friends and other family members and has seen other members of the public do the same. Bishaw Decl. ¶¶ 5,6 and Bishaw Testimony.

102. Mr. Bishaw currently lives in Waikiki and is not a resident of the Gold Coast.

103. The public has used the Seawall for both shoreline and ocean access for decades and has done so without any apparent interference from any private landowners along the Gold Coast.

VIII. MICELLANEOUS FACTS

104. The property involved in the lawsuit Levy v. Kimball, 50 Haw. 497, 443 P.2d 142 (1968) was submitted to the land court system in 1942 by Bertha Ruth Young in Land Court Application 1316. The property is presently owned by Kyo-Ya Hotels & Resorts, LP. See T.C.T. No. 729064. It is part of the Sheraton Waikiki property and is identified as TMK No. (1) 2-6-002:006. The property is now and has been since at least issuance of the original certificate of title in 1942 subject to "an easement in favor of the [State] of Hawaii for a right-of-way for the general public over and along the top of the sea wall." Stipulated Facts No. 26.

105. Since at least 1960 the property designated as TMK No. 3-1-033:009 (3019 Kalakaua Avenue) has been subject to "[a] perpetual easement of right of way for pedestrians only over, across and along the seawall along the highwater mark at seashore as designated in and by the third course of the description of the premises." Exhibit J-1. Stipulated Facts No. 27.

106. Other than as stated in Finding of Fact No. 105, the State does not hold an express easement over any portion of the Seawall that is the subject of these lawsuits. Stipulated Facts No. 28.

107. The seawall on TMK 3-1-033:009 has recently been worked on. There is a PVC pipe running under the seawall and emptying directly into the ocean. There is a relatively fresh area of concrete covering the pipe. Someone wrote in the concrete the following: "Kawewehi Kahemakani 2006." Stipulated Facts No. 6.

108. On or about March 15, 2002, a letter from the State of Hawaii, Department of Land and Natural Resources ("DLNR") to a "Concerned Resident" living in the area around the Seawall discusses that no permits were ever obtained to attach a sea ladder to the Seawall adjacent to the Diamond Head Ambassador Hotel. Exhibit J-14. Stipulated Facts No. 7.

109. On July 25, 2003, for the sum of \$2,406, the State granted GCNA a 37 square-foot Non-Exclusive Easement for a term of 55 years for the right, privilege, and authority to construct, use, maintain and repair a ladder "in, over, under, and across that certain parcel of land" described as follows:

Waikiki, Honolulu, Oahu, Hawaii

Being a portion of the submerged land fronting Royal Patent 5667, Apana 3, Land Commission Award 5931, Part 1 to Pehu.

Being at the north corner of this easement, the true azimuth and distance to the south corner of Lot 5 as shown on Map 3 of Land Court Application 13 being: 249° 32' 4.95 feet, the coordinates of said point of beginning referred to Government Survey Triangulation Station "LEAHI" being 312.88 feet North and 2931.86 feet West, thence running by azimuths measured clockwise from True South: -

1. 304° 43' 45" 5.00 feet along the top edge of concrete wall;
2. 32° 04' 7.5 feet;
3. 124° 43' 45" 5.00 feet to rock groin;
4. 212° 04' 7.50 feet along rock groin to the point of beginning

and containing an AREA OF 37 SQUARE FEET.

The preceding survey description was prepared by the Survey Division, Department of Accounting and General Services, State of Hawaii, based in part on information provided by GCNA. The survey description is designated by C.S.F. No. 23,559 and dated June 25, 2003. Stipulated Facts No. 8. Exhibit J-16. Lot 5 on Map 3 of Land Court Application 13 is TMK No. 3-1-32:027.

110. The Non-Exclusive Easement includes a grant to GCNA of “the right of ingress and egress to and from the easement area for all purposes in connection with the rights hereby granted.” Exhibit J-16. Stipulated Facts No. 9.

111. Pursuant to the Non-Exclusive Easement, GCNA bolted a sea ladder to the Seawall fronting TMK 3-1-032:027. The sea ladder descends into the ocean. The following is inscribed on a plate bolted to the Seawall and securing the sea ladder:

On this date, August 12, 2003, this sea-ladder was reinstalled by the “Gold Coast Neighborhood Association”. This was made possible through the generous donations and hard work of those willing to take a stand for the present and future generations.

Stipulated Facts No. 13.

112. The GCNA was required by the State, pursuant to terms of the Non-Exclusive Ladder Easement, to procure and maintain, at its own cost and expense, commercial general liability insurance, or its equivalent, in an amount of at least \$300,000 for each occurrence and \$500,000 aggregate, with an insurance company or companies licensed to do business in the State of Hawaii. Stipulated Facts No. 10.

113. The GCNA procured commercial general liability insurance with John H. Connors Insurance as per the terms of the Non-Exclusive Easement, effective July 30, 2003, and has renewed such insurance every year since that date. See Exhibit J-21. Stipulated Facts No. 11.

114. The State reserved the right to withdraw the Non-Exclusive Easement for public use or purposes, at any time during the term of the easement upon the giving of reasonable notice to the GCNA. See Exhibit J-16. Stipulated Facts No. 12.

115. The DAGS survey admitted into evidence as Exhibit J-24 accurately depicts the properties subject of this suit (and other properties), including: 1) an outline of structures in the shoreline area including the Seawall; 2) a line showing the shoreline as defined under HRS Ch. 205A; 3) a line showing the walls/walkways; 4) a line reflecting the metes and bounds description of the seaward boundary of the property; and 5) information as to the square footage that is makai of various lines. Stipulated Facts No. 30.

116. On this survey map, the spotted or speckled background between the ocean and the land signifies concrete walls or structures. On many (but not all) of the properties there is a concrete masonry wall just mauka of concrete walls and structures. These walls are shown as lines of blocks on Exhibit J-24 and labeled “CRM wall” on the exhibit. The mauka and makai edges of these walls are shown on Exhibit J-24 with a thin solid line. Stipulated Facts No. 31.

117. The shoreline as defined under HRS Ch. 205A (basically the high wash of the waves) is shown on Exhibit J-24 as a heavy dashed line. This line is not necessarily the dividing line between public and private ownership of property. Stipulated Facts No. 32.

118. Many, if not all, of the properties are described in deeds and TCTs by way of metes and bounds, including a metes and bounds description on the makai side. For example, the seawards boundary of TMK No. 3-1-032:001 is described as:

Thence along high-water mark on seawall, for the next two courses the direct azimuths and distances between points along said high-water mark being:

3. $164^{\circ} 35'$ 50.60 feet;

4. $163^{\circ} 35'$ 30.63 feet;

Exhibit J-242. Those metes and bounds descriptions are depicted on Exhibit J-24 as solid or broken lines between "balls" or filled in circles. Again, using TMK No. 3-1-032:001 as an example, there are three balls, one at each of the corners and one in between. A line (in this case, broken) is drawn between the balls and the azimuths and distances stated in the preceding paragraph are written next to the lines. Stipulated Facts No. 33.

119. The handwritten numbers in red and blue (the colors are not significant) on Exhibit J-24 depict information as to the square footage that is makai of various lines. For some properties there are two sets of numbers, four numbers in all. For example, for TMK No. 3-1-032-030 (Tropic Seas, Inc.), the top numbers say "PL: 2+17=19 sq. ft." and "S: 111 sq. ft." The bottom numbers say "PL: 32+74+17=123 sq. ft." and "S: 222 sq. ft." The top numbers signify how much of the Seawall is makai of the metes and bounds property line and the shoreline respectively. The bottom numbers signify how much of all materials, including but not limited to the Seawall plus revetments or other structures are makai of the metes and bounds property line and the shoreline respectively. This is the same for TMK Nos. 3-1-032-028, :027, :026 (Diamond Head Ambassador), and TMK No. 3-1-032-004 (Diamond Head Apartments). The rest of the properties have only one set of numbers because nothing but the Seawall is makai of the shoreline and property line. Stipulated Facts No. 34.

IX. SITE VISIT

120. A site visit involving counsel for the parties and the Court was held on March 31, 2011.

121. The site visit included a walk both along the length of the Gold Coast along

Kalakaua Avenue and along the length of the shoreline, including the Seawall, from the Elks Club to the Kainalu property.

122. During the course of the site visit, a sign was observed at the Kalakaua Avenue end of the Lot A access (hereinafter “DLNR Sign”). Exhibit J-259.

123. The DLNR sign, while defaced, contains the following language and proscriptions:

State of Hawaii
Dept. of Land and Natural Resources
Hawaii Adm. Rules Chapter 13-48

124. The DLNR sign also contains a telephone number for the “Conservation Hotline,” “... please call Conservation Hotline at 587-0077.”

125. The DLNR sign represents the State’s responsibility for the Conservation District and is not relevant to the issue of responsibility for this area of the seawall.

126. No signs or other indicia of ownership were observed along the Seawall which might have indicated any blocking of use of the Seawall by any private party.

127. The Seawall or Seawalls are uneven and crumbling in parts.

128. During its site visit, the court noted numerous pipes protruding from the Seawall.

CONCLUSIONS OF LAW

1. The court has jurisdiction over the subject matter of these lawsuits and over the parties.
2. On September 19, 2008, retired Judge Hifo filed her Order in Civil No. 07-1-1122 granting in part and denying in part motions for summary judgment filed by GCNA and the State (the “Order”). In accordance with rulings set forth in the Order, the case proceeded to trial on two alternate theories: (1) implied dedication, and (2) HRS 264-1, surrender, as to parcels not registered in Land Court.

3. The ultimate issue to be decided herein relates to whether the State has a duty to maintain and repair the Seawall for the safe use by the public. GCNA claims that the Seawall is a public thoroughfare the ownership of which was surrendered and/or impliedly dedicated to the State and which the adjoining landowners therefore do not own nor have any duty to maintain or repair. The State acknowledges that the State owns the property makai of the shoreline, contends that the portions of the Seawall that are makai of the shoreline constitute an encroachment on State property, contends that the portions of the Seawall mauka of the shoreline have not been transferred to the State by either implied dedication or surrender and, despite having acted to the contrary from 1975 through 2006, contends that the State has no duty to maintain or repair the Seawall.

4. GCNA relies on the Hawai'i Supreme Court decision in Levy v. Kimball, 50 Haw. 497 (1968) to support its position that the State has a duty to maintain and repair the Seawall and keep the Seawall in a condition safe for public use.

a. In Levy, the plaintiff,

. . . a tourist from the mainland, was walking along the beach returning to her room at the Princess Kaiulani Hotel after attending a picnic at the Hawaiian Village Hotel. In front of the Bertha Young property, the only route along the beach open to her was to travel along the top surface of a seawall. While walking on the seawall, the plaintiff tripped and fell off about eight feet upon some rocks below the seawall injuring herself. . . . The seawall was designed two feet wide at the top surface, thus creating a narrow foot path. Defendant State had acquired an easement over this seawall for the express purpose of providing a path for public travel. Id. at 497-498.

b. Regarding the existence of a duty on the part of the State to maintain the seawall, the Levy court noted that "it is a well established rule that an owner of an easement has the right and the duty to keep it in repair." Id. at 498.

c. The Levy court observed that, under HRS §264-1(c):

Although a seawall is not expressly mentioned in the above enumeration, it can be fairly implied that a seawall such as that which is in question here which is used as a public thoroughfare is included in the term “public highway.” Id. at 499.

- d. The Levy court then cited the Restatement, Second, Torts Sec. 349 (1965), with specific reference to “[T]he duty to maintain a highway in a condition safe for travel . . .” Id.

5. Unlike the situation in Levy, the State does not hold an express easement for public travel over the surface of the Seawall except for the portion of the Seawall located on TMK No. 3-1-33:009 (3019 Kalakaua). Accordingly, the issue to be decided herein is whether the State, by operation of law under a theory of “surrender” or “implied dedication,” owns or possesses an easement for public access over the Seawall so as to subject the State to the duties established by the Supreme Court in Levy.

6. The Highways Act of 1892, (precursor to HRS §264-1), declared all then existing “public” roadways to be in the ownership of the government. The Act established two methods for a private party to turn ownership of a thoroughfare over to the government: 1) by express dedication, and 2) by surrender. Express dedication requires a written document evidencing the conveyance and the acceptance thereof by the state. The second method, surrender, does not.

I. H.R.S. § 264-1(c) SURRENDER

7. HRS §264-1(a) (2008) provides, in part: “All roads, alleys, streets, ways, lanes, bikeways, bridges, and all other real property highway related interests in the State, opened, laid out, subdivided, consolidated, and acquired and built by the government are declared to be public highways.” At the time of the decision in Levy, “trails” were included in the enumeration set forth in HRS §264-1(a).

8. HRS §264-1(b) (1988) provides that:

All trails, and other nonvehicular rights-of-way in the State declared to be public rights-of-ways by the Highways Act of 1892, or opened, laid out, or built by the government or otherwise created or vested as nonvehicular public rights-of-way at any time thereafter, or in the future, are declared to be public trails. A public trail is under the jurisdiction of the state board of land and natural resources unless it was created by or dedicated to a particular county, in which case it shall be under the jurisdiction of that county.

9. HRS §264-1(c) (1988) provides, in pertinent part:

All roads, alleys, streets, ways, lanes, trails, bikeways, and bridges in the State, opened, laid out, or built by private parties and dedicated or surrendered to the public use, are declared to be public highways or public trails as follows:

- (1) Dedication of public highways or trails shall be by deed of conveyance naming the State as grantee in the case of a state highway or trail and naming the county as grantee in the case of a county highway or trail. The deed of conveyance shall be delivered to and accepted by the director of transportation in the case of a state highway or the board of land and natural resources in the case of a state trail. In the case of a county highway or county trail, the deed shall be delivered to and accepted by the legislative body of a county.
- (2) Surrender of public highways or trails shall be deemed to have taken place if no act of ownership by the owner of the road, alley, street, bikeway, way, lane, trail, or bridge has been exercised for five years and when, in the case of a county highway, in addition thereto, the legislative body of the county has, thereafter, by a resolution, adopted the same as a county highway or trail.

10. Under the terms of HRS §264-1(c), in order to prevail on its claim that the Seawall, along with any privately owned land thereunder, is a public thoroughfare that has been surrendered to the State, GCNA must prove, at the very least, the following two elements: 1) the Seawall is a thoroughfare that was opened, laid out, or built by private parties, and 2) that the owners have not exercised an act of ownership over the Seawall for five years or more.

11. Additionally, both GCNA and the State contend there is a judicially created third element arising out of In re Application of Banning, 73 Haw. 297 (1992), to the effect that the

State is the holder of an easement or right of way over the public thoroughfare at issue. While this court is not convinced that the parties' reading of Banning is correct⁶, and that this element need be proven, this court has nonetheless applied it to the facts as found.

12. As to the first element of the claim of surrender, the evidence establishes that the Seawall as it presently exists is laid out as a walkway running along the shoreline, some of which is on private property and some of which is on State property, that was originally constructed by private parties. The evidence does not establish whether the Seawall as originally constructed was built totally or partially on private property. Prior to the construction of the Seawall, the property line was "ma ke kai." The property descriptions contained in the conveyance documents written after the Seawall was constructed state that the property line is along the Seawall. The parties caused a survey of the Seawall to be completed as part of these actions. The survey map, Exhibit J-24, shows that portions of the Seawall are makai of the HRS chapter 205A shoreline as marked on the survey and are therefore on land owned by the State. County of Hawaii v. Sotomura, 55 Haw. 176 (1973) (holding that area makai of shoreline is owned by the State even if property is registered in land court). Other portions of the Seawall are makai of the metes and bounds line set forth in the property descriptions. Other portions of the Seawall are mauka of the shoreline and mauka of the metes and bounds line. Also, there are parcels where the shoreline is makai of the metes lines, and vice versa, parcels where the metes line is makai of the shoreline. Further, there is evidence of repairs to the Seawall, but there is no

⁶ The court does not read Banning to require GCNA, as a third element of proof, to demonstrate that the State already holds some form of "easement" or "right of way" over the Seawall. The court reads Banning to require that the "trail" at issue be a trail or way that was opened, laid out, or built by "private" parties for public use. In discussing the requirements for surrender as applied to access over accreted land upon which no improvements had been constructed and no right of way or easement had been created, Banning pointed out that in order for the surrender provisions of HRS §264-1 to apply, there must have been a trail "opened, laid out, or built by *private* parties." (Emphasis in original.) The Court distinguished the factual situation in Banning where there was no trail "opened, laid out, or built by private parties" from Levy where there was an express easement over the seawall for the express purpose of public travel which met the test of "opened, laid out or built by *private* parties" for public use.

evidence from which the court is able to determine whether, and to what extent, the present location of the Seawall may have been affected by repairs performed by the State. In addition, there are areas where the walkway cantilevers out past the makai side of the Seawall. The majority of the Seawall, however, is mauka of the metes line, and therefore, this conclusion of law addresses the Seawall as being built on private property. The parties do not dispute that the Seawall was constructed by private parties, and the evidence strongly suggests that the Seawall was constructed in three main segments—the Ida Tenney Castle lots, the Irwin lots, and then 20 to 30 years later, the portion included in the Diamond Head Terrace Subdivision. The Seawall as constructed forms one continuous walkway running along the shoreline from TMK No. 3-1-32:030 (Tropic Seas) to TMK No. 3-1-33:002 (Sea Breeze/Kainalu). The general public uses the seawall as a pedestrian walkway for access along the shoreline of the Gold Coast from TMK No. 3-1-32:030 to TMK No. 3-1-33:002. The court concludes that GCNA proved that the Seawall is a thoroughfare that was opened, laid out or built by private parties.

13. As to the second element of the claim of surrender, the evidence establishes that the owners have not exercised an act of ownership over the Seawall for five years or more. GCNA presented evidence from members of GCNA that there has not been an act of ownership over the Seawall for five years or more. No private owner along the Seawall has exercised dominion or control over any portion of the Seawall for well over five years. No private owner along the Seawall has interfered with the use of the Seawall by the public. No private owner along the Seawall has blocked the public from use of the Seawall. All of the properties along the Seawall have a definite demarcation between their property and the Seawall walkway by the presence of a fence, wall or other structure or other indication of the separation between public and private such as the presence on one property of a “no trespassing” sign on the property mauka of the

Seawall walkway. The “no trespassing” sign on the gate leading to the Diamond Head Beach Hotel property does not refer to the Seawall as private property. It is clear that the sign is meant to indicate that members of the general public cannot access the Diamond Head Beach Hotel property through the gate on the mauka side of the Seawall. The sign on the Diamond Head side of the Tropic Seas property is mauka of the Seawall indicating that mauka of the Seawall is private property. As for the sign on the stairs leading up to the Seawall from the beach at the Waikiki end of the Seawall at Tropic Seas, the sign does not interfere with or block access to the Seawall. It merely directs the public not to loiter in the open area of Tropic Seas at the top of the stairs. The court concludes that GCNA proved that no act of ownership has been exercised for five years.

14. As to the third element set forth by the parties based In re Application of Banning, 73 Haw. 297, 307 (1992) that the State holds some form of easement over the seawall, the evidence establishes that the State holds an express easement over the seawall at TMK No. 3-1-33:009 (3019 Kalakaua Avenue) and, for the reasons set forth below, a prescriptive easement over all the remaining parcels, except for TMK Nos. 3-1-32:030 and 029 where the Seawall is almost wholly within property registered in land court.

15. GCNA posits that the State holds an easement by prescription over the seawall and cites the decision in Jones v. Halekulani Hotel, Inc., 557 F.2d 1308 (9th Cir. 1977) for the requirements to create a prescriptive easement. Jones involved a seawall along the Waikiki coastline by the Halekulani Hotel. A visitor dove from a seawall on Halekulani Hotel property into shallow ocean water and injured himself. He sued the Halekulani Hotel asserting that the hotel was negligent. The Halekulani argued that it was not responsible because (1) the State had acquired an easement by prescription over the top of the seawall and had the sole duty to

maintain it, and (2) that HRS Chapter 520 precluded liability on the part of the hotel. The Ninth Circuit held that the State owned a prescriptive easement over the seawall because the seawall had been used as a walkway from 1917 to 1972, the Halekulani owners never attempted to interfere with pedestrian use of the seawall for travel, and the Halekulani “assumed that the public had a right to use the wall as a public walkway.” *Id.* at 1310. The court held that “[u]se which is constant, uninterrupted and peaceful is sufficient to create an easement by prescription.” *Id.*

16. The State contends that Jones does not fully or accurately state Hawai‘i law, or the majority rule, on prescriptive easements. The State argues that the applicable law is that set forth by the ICA in Ryan v. Tanabe Corp., 97 Haw. 305, 311-312 (Haw. App. 1999):

According to the Hawai‘i Supreme Court, title to an easement by prescription may be acquired “by use and occupation for the period prescribed by law adverse to the true owner of the fee.” Lalakea, 36 Haw. at 706. The elements that must be proved to establish a prescriptive easement are the same elements “necessary for acquisition of title by adverse possession[.]” Tagami v. Meyer, 41 Haw. 484, 487 (1956). That is,

the use and enjoyment must be adverse, under a claim of right, continuous and uninterrupted, open, notorious and exclusive, with the knowledge and acquiescence of the owner of the servient tenement and must continue for the full prescriptive period.

A permissive use of a right of way will not create an easement, however long continued. *Id.* at 487-488.

The time period required to establish an easement by prescription is that of the time period required for adverse possession. Ryan, 97 Haw. at 312.

17. To be adverse or hostile, the use must be inconsistent with the right of the owner, and not subordinate thereto. Adverse use has been defined as use without license or permission, possession and use under a claim of right, or such use of the property as the owner would exercise, without permission asked or given, disregarding the rights of others. 25 Am Jur 2d

Easements and Licenses §56. There is no evidence that the public sought or received permission to use the Seawall as a walkway, or that the owners asserted that the public use of the Seawall was only by permission of the owners. To the contrary, the evidence is that the public uses the Seawall as a walkway without asking for permission and as if the public has the right to access the shoreline by way of use of the Seawall as a walkway.

18. The public has continuously and without interruption used the Seawall as a walkway since at least 1952 based on the direct evidence and since 1930 based on circumstantial evidence. The Seawall was constructed in front of the Ida Tenney Castle and Irwin lots in the early 1900s. When the Diamond Head Terrace subdivision was created and the Seawall was constructed in front of the Diamond Head Terrace subdivision parcels, there were express easements given to the State over at least 3 parcels. The State reserved an easement for pedestrian travel over the Seawall by way of its Quitclaim Deed to the two lots at the eastern most end of the Seawall, TMK Nos. 3-1-33:002 and 053. The State received an easement in favor of the general public across Lot C of TMK No. 3-1-33:006. (Exhibit J-251.) The easement across Lot C gives the public a right of way to go across Lot C and access the Seawall on either side of Lot C and continue walking along the shoreline. These express easements at the time of the creation of the Diamond Head Terrace subdivision are evidence of public use of the Seawall as a walkway in the 1930s.

19. Knowledge and “acquiescence” does not mean permission in the active sense, but means passive assent or submission, or consent by silence. It is necessary that the owner know of the act of use relied on. 25 Am Jur 2d Easements and Licenses §54. The owners herein have knowledge of and have acquiesced in the use of the Seawall by the public. The public has openly used the Seawall as a walkway and the owners, such as Mrs. Anderson, knew of the use

of the Seawall as a walkway and did not take any action to interfere with the public's use of the Seawall as a walkway.

20. "Exclusive" does not mean that the easement must be used by the claimant only. It means that the claimant's right to use the easement does not depend on a similar right in others. Generally, the use of a way in common with the public is not "exclusive" and precludes an individual user from establishing an independent prescriptive right. 25 Am Jur 2d Easements and Licenses §53. Although use of a way in common with the public defeats an individual claimant's claim to an easement by prescription, the court concludes that this requirement does not apply to this case where the prescriptive easement is in favor of use by the general public. Restatement (Third) of Property: Servitudes, §2.18 provides that "[t]he public may acquire servitudes by dedication and prescription." Comment f reads, in part: "Using either prescription or implied-dedication theory, the majority of American courts have permitted the acquisition of servitudes by long-continued public use."

21. With regard to the prescriptive period, the relevant time period for determining whether a prescriptive easement exists is prior to 1969. The legislature adopted HRS Chapter 520 in 1969. The purpose of the chapter is "to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes." HRS §520-1. To further those goals, the chapter limits the potential liability of private landowners who allow public use of land for recreational purposes.

22. HRS §520-7 states:

No person shall gain any rights to any land by prescription or otherwise, as a result of any usage thereof for recreational purposes as provided in this chapter.

23. Pursuant to HRS §520-7 any prescriptive rights arising from public use of the Seawall must have vested before 1969.

24. Until 1973, the statutory prescription time set out in HRS §657-31 was ten years. It was changed to 20 years in 1973. Therefore, the public use must have continued for a period longer than 10 years prior to 1969. The direct evidence of such use comes from June Anderson who used the Seawall as a walkway during several visits to Hawai`i beginning in 1952, and until she moved to Hawai`i in 1959, and her observation of other public users using the Seawall as a walkway and for access to the ocean for recreational activities. The evidence also demonstrates that the Seawall has been used by the public for access along the shoreline going back to the 1930s. Accordingly, the time element for creation of an easement by prescription has been established by GCNA.

25. The court concludes that GCNA presented clear and convincing evidence to prove that the State has a prescriptive easement over the Seawall for pedestrian travel as of 1969.

26. Judge Hifo in her Order stated: “Santos v. Perreira, 2 Haw. App. 387, 633 P.2d 1118 (Haw. App. 1981) was overruled *sub silentio* by the Hawai`i Supreme Court’s decision in In re Application of Banning, 73 Haw. 297, 832 P.2d 724 (1992), which is consistent with the plain language of Haw. Rev. Stat. section 264-1(c) that only the counties, and not the State, must legislatively accept surrendered roads, alleys, streets, ways, lanes, trails, bikeways, and bridges,” and, thereby ruled that GCNA does not have to prove that the State formally accepted the transfer of ownership of the Seawall in order to establish surrender.

27. The State challenges Judge Hifo’s determination that Santos has been impliedly overruled and maintains that, notwithstanding the Order, formal acceptance by the State is required in order to transfer ownership by surrender. The court concludes that the State’s position is not persuasive.

28. First, the language of HRS §264-1(c)(2) which states that surrender shall be “deemed to have taken place” if the statutory requirements are met is inconsistent with a requirement that there be formal acceptance of the property. If formal acceptance were required, the transfer would not be “deemed” to have taken place.

29. Second, Santos held that, pursuant to HRS §264-41 (1976), all “public highways” are either “state highways” or “county highways” and no “public highway” can be a “state highway” unless it is included in the “State Highway System.” Inclusion in the State Highway System, in turn, requires designation (i.e. “acceptance”) by the Director of the Department of Transportation. Santos, 2 Haw. App. at 390. Subsequent to the issuance of the decision in Santos, the legislature amended HRS §264-1 to remove “public trails” from the definition of “public highways” and to place “public trails” and “nonvehicular rights-of-way” under the jurisdiction of the board of land and natural resources.

30. Third, the actions of the DLNR, the State agency that is vested with jurisdiction over trails and nonvehicular rights-of-way, demonstrate that the State did accept the surrender of the Seawall. The DLNR clearly and continuously exercised dominion and control over the Seawall for at least twenty, and arguably thirty years. From 1975 to 2006, the DLNR acknowledged a public right-of-way over the Seawall, repaired the Seawall to keep it available to the public to use as a walkway, and proposed repairs, such as the installation of handrails, that are consistent with the acceptance of the Seawall as a public walkway. The State did not seek permission from the landowners before effecting the various repairs and rehabilitations to the Seawall. The State has impliedly accepted that it holds a nonvehicular right-of-way over the Seawall for pedestrian travel by asserting as much in the 1992 DLNR Notice of Determination

and other public documents issued in reference to the repairs and rehabilitation of the Seawall on numerous occasions.

31. GCNA proved that the seawall was surrendered to the State in accordance with HRS §264-1(c).

32. HRS §501-87 states, in relevant part, “Land registered pursuant to this chapter is not subject to surrender under section 264-1.” Therefore, the portions of the Seawall at TMK No. 3-1-032:029 (Diamond Head Beach Hotel) and TMK No. 3-1-032:030 (Tropic Seas) that are on privately owned land registered in the Land Court cannot be deemed to have been surrendered to the State under HRS §264-1(c).

II. IMPLIED DEDICATION

33. Implied dedication is a common law doctrine that requires an offer and acceptance of dedication both of which may be implied based on the circumstances.

34. In its 1992 decision of In re Application of Banning, 73 Haw. at 304-305, the Hawai‘i Supreme Court discussed the doctrine of implied dedication:

A common law dedication may be accomplished without any statement, written or spoken, for one who invites or merely permits the public to sue his or her land for a long period may be held to have made an offer of implied dedication. The rationale behind this theory is that the owner is estopped to deny permanent public access where he has admitted the public to use the land over a long time. There must be an offer and acceptance of dedication. When there is no express offer, the offer may be implied under the circumstances and the acceptance may also be implied by the nature of the public use. In other words, the duration and type of public use can raise both the presumption of the owner’s intent (or offer) to dedicate the land to public use, as well as constitute acceptance by the public. (Quotations and citations omitted.)

35. The Supreme Court, in rejecting the view that long-continued adverse public use which has continued for the prescriptive period raises a conclusive presumption of an intent to dedicate on the part of the landowner, ruled that a conclusive presumption of an intent to

dedicate would be inconsistent with the legislative purpose of HRS Chapter 520 to encourage landowners to make land and water areas available to the public for recreational uses. The Banning court held instead that “[w]hile continuous adverse public use raises a presumption of implied dedication in Hawaii under The King v. Cornwell, 3 Haw. 154 (1869), it is not a conclusive presumption.” Id. at 308.

36. Banning cited, with approval, King v. Cornwell, which held:

[A]ll that is requisite to constitute a good dedication is, that there should be an intention and an act of dedication on the part of the owner, and an acceptance on the part of the public, as soon as these concur, dedication is complete. Ordinarily, there is no other mode of showing an acceptance by the public of a dedication than by its being made use of by them, and this must be sufficiently long to evince such acceptance, depending of course upon the circumstances ... and in no case, has the time been measured by that required to create a prescription.
Id. at 308. (Emphasis and citations omitted).

37. Following Cornwell, Banning held that if regular and continuous use by the public is the only evidence of implied dedication, the time period must be “much longer” than the twenty year prescriptive period under HRS §657-31. Id. at 309.

38. The court disagrees with the State’s argument that time period of public use of the Seawall in this case for purposes of implied dedication must be measured prior to 1969 on the grounds that the 1969 enactment of HRS §520-7 prohibits the general public from acquiring “any rights by prescription or otherwise” as a result of recreational use of property.

39. First, the period of public use that the land court relied upon in Banning to support its finding of implied dedication was the twenty year period from 1968 to 1988. The Banning court agreed that the entire twenty years of public use should count, but held that a period longer than twenty years was required. There is no language in the Banning decision suggesting that the time after 1969 could not be applied in determining whether an implied dedication had occurred.

40. Second, the legislative purpose of HRS §520-7 is to protect the private landowners who allow recreational use of their property from having their property rights restricted or taken away. It is a statute enacted to provide landowners with a defense against the involuntary loss of property rights by reason of having acquiesced in recreational use of their property. In this case, it is the landowners who contend that they have voluntarily dedicated their interest in the Seawall to the State for a nonvehicular right-of-way or trail for the public to use to access the shoreline. The public use after 1969 is therefore not necessary to establish an offer of dedication on the part of the landowner, but only to establish acceptance of the offer of dedication.

41. Under the doctrine of implied dedication set forth in Banning, the long-continued public use of the Seawall as a walkway from the 1930s to the present clearly raises a rebuttable presumption that the landowners, represented herein by GCNA, intended to dedicate the Seawall as a public walkway. The landowners do not dispute that presumption and no evidence has been presented to rebut that presumption.

42. Under Banning, the duration of public use needed to prove acceptance, where the “only” evidence of acceptance is public use, is “much longer” than the prescriptive period of twenty years.

43. In this case, there is uncontested direct evidence of public use of the Seawall as a walkway from at least 1952 to when suit was filed. Thus, the period of public use from when acceptance of dedication can be implied is in excess of fifty years. The court concludes that there is more than enough time to satisfy the requirement that the period be “much more” than the prescriptive period where public use is the “only” evidence of acceptance of dedication.

44. In this case, however, the more than fifty years of continuous public use is not the only evidence of acceptance of dedication. As previously discussed, there is evidence of implied

acceptance by the State based its assertion of dominion and control over the Seawall through the State's statements that the Seawall is a public right of way and the State's actions in repairing and rehabilitating the Seawall.

45. The line of travel over the Seawall is specific and definite enough such that there is no issue regarding vagueness of the location of the easement.

46. In her Order, Judge Hifo ruled that HRS §501-87 “precludes any implied or prescriptive easement, implied dedication and/or [HRS §264-1(c)] surrender if the seawall or seawalls are included within land registered pursuant to [HRS] chapter 501.” HRS §501-87 provides, in part, that “[n]o title, right, or interest in, to, or across registered land in derogation of that of the registered owner shall be acquired by prescription or adverse possession.” This statute protects owners of registered land from encumbrances to which they do not consent; it does not preclude implied dedication where it is the owner’s intent to create an easement. Henmi Apartments, Inc. v. Sawyer, 3 Haw. App. 555 (Hawai‘i App. 1982). Notwithstanding the Order, the court concludes that where the landowners, as here, consent to the acquisition of rights, implied dedication is not precluded by HRS §501-87.

47. In Banning, the Court, citing Hawaii County v. Sotomura, supra, held that the public policy that “favors extending to public use and ownership as much of Hawai‘i’s shoreline as is reasonably possible” “must be balanced against the littoral landowner’s right to the enjoyment of his land.” Id. at 309-310. (Citation and emphasis omitted). In performing this balancing analysis, the Court held that an easement over the accreted land was “not critical for public access to the beach.” Id. at 310.

48. In this case, unlike the facts of Banning, an easement over the Seawall is critical to public access to the shoreline along the Gold Coast. Since the landowners consent, and the State

has recognized the public use of the Seawall and acted in the past to preserve and protect it, the balancing of the public policy of extending as much of the shoreline to public use as possible against the public policy of protecting littoral landowners' rights weighs in favor of the implied dedication of an easement over the Seawall for pedestrian use.

III. SPECIFIC PARCELS

49. As to TMK No. 3-1-32:009, the State holds an express easement over that portion of the Seawall and therefore has the right and duty to maintain as set forth in Levy.

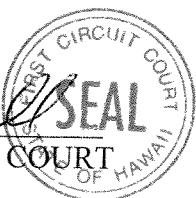
50. As to Diamond Head Ambassador, TMK Nos. 3-1-32:028, 027, and 026, the State substantially rebuilt the Seawall on State land and therefore owns and is responsible for that section of the Seawall.

ORDER

For the reasons set forth above, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. GCNA is entitled to a declaratory ruling that the State owns the Seawall and the real property under the Seawall by surrender and/or has an easement over and across the Seawall by implied dedication and to judgment in its favor in Civil No. 07-1-1122.
2. The State's claim for declaratory judgment in Civil No. 10-1-0888 is dismissed.
3. Each party will bear its own fees and costs associated with this legal action.

DATED: Honolulu, Hawai'i NOV 29 2013

Virginia Aka Daniels
JUDGE OF THE ABOVE-ENTITLED COURT
The seal is circular with the words "FIRST CIRCUIT COURT" at the top and "OF HAWAII" at the bottom. In the center, it says "SEAL" above "JUDGE OF THE ABOVE-ENTITLED COURT".

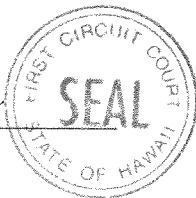
NOTICE OF ENTRY

The foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER has been entered and copies thereof served on all parties by placing the same in the First Circuit Court attorney court jackets.

DATED: Honolulu, Hawai'i, NOV 29 2013

Johnfishin

Clerk, Ninth Division



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