



University of Hawaii at Manoa

Environmental Center

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AUTHORIZING THE BOARD OF LAND AND NATURAL RESOURCES TO GRANT AN EASEMENT OR TO LEASE CERTAIN SUBMERGED LANDS AT SOUTH KOHALA, HAWAII TO MAUNA LANI RESORT, INC.

Senate Committee on
Planning, Land and Water Use Management

Public Hearing - April 28, 1993
10:30 A.M., Room 405 SOT

By

John T. Harrison, Environmental Coordinator
M. Casey Jarman, Richardson School of Law
Kem Lowry, Urban and Regional Planning

Our statement on this resolution does not constitute an institutional position of the University of Hawaii.

Our reviewers are in accord with the inclusion in the present draft of this resolution of the stipulation that all appropriate permits and approvals required for the project must be in place prior to implementation. This amendment addresses our concerns that the proper process for submerged lands leasing not be abridged by seeking legislative approval prematurely.

However, we remained concerned over two related issues. First, it is not clear to us that a submerged lands lease is required in this instance, and secondly, the issue of management of Public Trust holdings may not have been given appropriate consideration in this process.

With regard to the need for a lease, both Sections 171-53(c) and 190D-2, HRS, are concerned with leasing of submerged lands. This resolution includes provision for granting an easement over submerged lands, which we perceive as qualitatively different from a lease, and which we note is addressed in the Statutes primarily in the context of installation of moorings, cables, or pipelines. Section 171-53(c) otherwise is concerned with provision for reclamation of submerged lands, and Section 190-D addresses the guarantee of property rights and protection for "activities approved under these procedures" (Section 190D-2, HRS). Most of the provisions under Chapter 190D are directed towards the granting of exclusive use (ref. Sections 190D-11(b), 190D-23(a)(1)). However, having extensively reviewed the environmental documentation for this project, we fail to see the applicability of an exclusive use provision to the area proposed for leasing. We note that submerged lands will be altered, subject to permit approvals designed to ensure environmental and engineering acceptability, but we do not see where property rights concerns should enter into consideration. If the Mauna Lani Corporation intends to exclude public access to these waters, we are unaware of such plans, and we suggest that such an exclusion would require close examination in the context of the State's responsibility to manage Public Trust holdings.

The Public Trust Doctrine in this instance covers navigable waters and shorelines intended to be managed by the State so as to preserve public access to and use of these resources. Any abridgment or exclusion of the public from these areas must be examined in the light of ultimate benefit to the public through designation of the highest and best use of public resources. Normally, exclusion of the public would be justified on the basis of public health or safety concerns, none of which appear to be raised in this instance.

The State's responsibility is to ensure that Public Trust holdings are managed judiciously. Before approving this resolution, it would be appropriate for the Legislature to clarify that it is indeed necessary.