

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

August 26, 2016

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

Hawaii

Approve Mediated Settlement of Rent Dispute of General Lease No. H-82-4 to GKM, Inc., Lessee, Located at Honokohau Boat Harbor, in Kailua-Kona, Hawaii, Tax Map Key (3) 7-4-008:042

REQUEST

Approve mediated settlement of rent dispute of General Lease No. H-82-4, to GKM, Inc., Lessee, dated April 8, 1983 (the "**Lease**"), for the five (5) year lease term beginning retrospectively on April 1, 2014 and ending March 31, 2019.

LEGAL AUTHORITY

Section 171-17, Hawaii Revised Statutes, as amended.

HRS §171-17 (d). "If a reopening of the rental to be paid on a lease occurs, the rental for any ensuing period shall be the fair market rental at the time of reopening. At least six months prior to the time of reopening, the fair market rental shall be determined by: (1) An employee of the department qualified to appraise lands; or (2) A disinterested appraiser whose services shall be contracted for by the board; and the lessee shall be promptly notified of the determination and provided with the complete appraisal prepared by the board or the board's appraiser; provided that if the lessee does not agree upon the fair market rental, the lessee may appoint the lessee's own appraiser and the lessee shall provide the board with the complete appraisal prepared by the lessee's appraiser. Each party shall pay for its own appraiser. If the board's and the lessee's appraisers do not agree upon the lease rental, the lessee and the board shall in good faith attempt to resolve the dispute by nonbinding mediation by a single mediator mutually agreed upon by the parties. If the dispute is not resolved by the mediation, the fair market rental shall be determined by arbitration as provided in chapter 658A, which shall be final and binding.

Any language in present leases to the contrary notwithstanding, the provisions of this subsection, when possible and notwithstanding the six-month notice required, shall apply to leases with original lease rental reopening dates effective before and after July 1, 1996."

SUBJECT PROPERTY

Location. The subject property is located in the Honokohau Boat Harbor situated at Kealakehe, North Kona, Island of Hawaii, State of Hawaii. It is comprised of fast lands (175,373 square feet) and submerged lands (2,487 square feet) having a total area of approximately 177,860

square feet, or 4.083 acres, more or less, and is further identified as tax map key (3) 7-4-008:042.

State Land Use. The State Land Use classifications establish the basic legal framework of land uses within the state. The SLU classifies land into four broad use districts including Conservation, Agricultural, Rural, and Urban. The counties are required to confine their land use designations within the broad intent of the SLU district designations. The SLUC designation of the subject property is “Urban”

County General Plan. The County of Hawaii General Plan designation of the subject property is “Open District”.

County Zoning. The Hawaii County Code 1983 (2005 Edition, as amended) is designed to standardize the land use and other proposed uses of parcels in terms of density, height, location, etc. The subject property is zoned “Open”. This district applies to areas that contribute to the general welfare, the full enjoyment, or the economic well-being of open land type use which has been established, or is proposed. This district is intended to encourage development around it such as a golf course and park, and to protect investments which have been or shall be made in reliance upon the retention of such open type use, to buffer an otherwise incompatible land use or district, to preserve a valuable scenic vista or an area of special historical significance, or to protect and preserve submerged land, fishing ponds, and lakes (natural or artificial tide lands).

Flood Plain Designation. Established by the National Flood Insurance Program of the Department of Housing and Urban Development, flood elevations and boundaries are designated to protect the life and property of the public and to control the development of flood hazard areas. According to the National Flood Insurance Boundary Maps, the subject property is within the non-special flood hazard area designated “Unshaded Zone X” which is areas determined to be outside the 500-year floodplain.

TRUST LAND STATUS

Section 5(b) lands of the Hawaii Admission Act – Yes

CHARACTER OF USE

Marine and marine-related activities, including haul-out and boat repair facilities.

DCCA VERIFICATION

Lessee’s registered business name, place of business registration, and good standing have been confirmed.

LEASE TERM

Original lease term of thirty-five (35) years, beginning April 1, 1984 and ending on March 31, 2019. At its meeting on March 24, 2006, under agenda item J-1, the Board of Land and Natural Resources (the “Board”) approved a twenty (20) year lease extension beginning April 1, 2019 and ending on March 31, 2039. A total of twenty-three (23) years remain on the lease term.

ANNUAL RENT

The Lease provides, "For the first five (5) years, the annual rental shall be \$25,000.00 The rental for the six ensuing five-year periods shall be the rental for the immediately preceding period or 100% of the fair market rental at the time of the reopening, whichever is higher. At the time of reopening, the fair market rental shall be determined by an appraiser whose services shall be contracted for by the LESSOR; provided, that should the LESSEE fail to agree upon the fair market rental as determined by the LESSOR's appraiser, the LESSEE may appoint its own appraiser who shall prepare an appraisal report and the two appraisers shall then exchange their reports for review. The two appraisers shall make every effort to resolve whatever differences they may have. However, should difference still exist fourteen days after the exchange, the appraisers shall then appoint a third appraiser who shall also prepare an appraisal report and furnish copies thereof to the first two appraisers. After review, all three shall meet to determine the fair market rental in issue. The fair market rental as determined by a majority of the appraisers shall be final and binding upon both LESSOR and LESSEE."

The historical annual rent and rental re-openings are summarized below.

Original Lease Term (35 Years)

• 04/01/84 – 03/31/89	Five (5) Years	\$ 25,000.00
• 04/01/89 – 03/31/94	Five (5) Years	\$ 60,000.00
• 04/01/94 – 03/31/99	Five (5) Years	\$ 60,000.00
• 04/01/99 – 03/31/04	Five (5) Years	\$ 60,000.00
• 04/01/04 – 03/31/09	Five (5) Years	\$ 70,500.00
• 04/01/09 – 03/31/14	Five (5) Years	\$133,000.00
• 04/01/14 – 03/31/19	Five (5) Years	Renegotiate

Extended Lease Term (20 Years)

• 04/01/19 – 03/31/24	Five (5) Years	Renegotiate
• 04/01/24 – 03/31/29	Five (5) Years	Renegotiate
• 04/01/29 – 03/31/34	Five (5) Years	Renegotiate
• 04/01/34 – 03/31/39	Five (5) Years	Renegotiate

BACKGROUND

On November 23, 1982, a public auction was conducted resulting in the issuance of the Lease between the State of Hawaii, by its Director of Transportation as lessor, and Gentry-Pacific, Ltd., as lessee.

On October 15, 2002, by mesne assignment, the Lease was assigned to GKM, Inc., by that certain unrecorded Assignment of Lease, consent thereto given by the Board, by unrecorded instrument executed March 19, 2003.

At its meeting on March 24, 2006, under agenda item J-1, the Board consented to a \$1 million mortgage from First Hawaiian Bank, and approved a twenty (20) year lease extension beginning April 1, 2019 and ending March 31, 2039. The purpose of the lease extension was for the lessee to qualify for a mortgage not to exceed \$1 million to be used for leasehold improvements.

On May 12, 2006, the Lease was extended for an additional twenty (20) years through March 31, 2039.

REMARKS

As stated above, disputes in rent reopenings for leases of public lands are governed by HRS §171-17, as amended. Prior to July 1, 2014, rent disputes were generally arbitrated by a three-member arbitration panel. However, the legislature amended HRS §171-17 effective July 1, 2014 to require nonbinding mediation by a single mediator prior to binding arbitration. Furthermore, under the amended law, arbitrations are now submitted to a single arbitrator for determination, rather than to a three-member panel. The amending act is Act 168, Session Laws of Hawaii 2014.

Nonbinding Mediation

The current rent reopening period is April 1, 2014 through March 31, 2019. On July 27, 2015, DOBOR procured the services of Alan Conboy, MAI, ("**Conboy**") to determine the fair market rent of the subject property for the five (5) year rent reopening period beginning April 1, 2014, retrospectively. Conboy concluded an annual rent of \$139,380.00. The lessee did not accept this rental amount and procured the services of James E Hallstrom, Jr., MAI, ("**Hallstrom**") to determine the fair market rent of the subject property. Hallstrom concluded an annual rent range of \$96,740.00 to \$110,560.00, or a difference of 21% to 31% less than Conboy's rent amount. DOBOR agreed to the mediated amount as a compromise between the two appraisal amounts and in recognition of utility improvements installed by the lessee. The mediated rent subject to Board approval is effective retroactively effective April 1, 2014 through March 31, 2019. The mediated rent is \$120,184.00 (ONE HUNDRED TWENTY THOUSAND ONE HUNDRED EIGHTY FOUR DOLLARS AND 00/100) per year, payable in advance, in equal quarterly installments.

RECOMMENDATION

That the Board:

1. Approve the mediated settlement of rent dispute of General Lease No. H-82-4, to GKM, Inc., Lessee, dated April 8, 1983 (the "**Lease**"), for the five (5) year lease term beginning retrospectively on April 1, 2014 and ending March 31, 2019 as set forth hereinabove; and
2. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

Approved for Submittal


Suzanne D. Case Chairperson

Respectfully Submitted,


Edward R. Underwood
Administrator