

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

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

GL S-5844  
  
Hawai'i

Authorize Chairperson to Execute "Landlord Waiver and Consent; Exhibit A" Regarding Lessee's Security Agreement with Access Point Financial, Inc. to Facilitate Financing of Furniture, Fixtures and Equipment at Grand Nanihoa Hotel Hilo; General Lease No. S-5844, WHR LLC, Lessee; Waiakea, South Hilo, Hawaii, Tax Map Keys: 3<sup>rd</sup>/ 2-1-01:12 and 2-1-05:13, 16, 17, 27, 32, 46

LEGAL REFERENCE:

Chapter 171, HRS, including but not limited to sections 171-6, and -22; terms and conditions of the subject Lease.

LOCATION:

Portion of Government lands situated at Waiakea, South Hilo, Hawaii, identified by Tax Map Key: (3) 2-1-01:12 and 2-1-05:13, 16, 17, 27, 32, 46, as shown on the attached map labeled Exhibit 1.

AREA:

68.926 acres (net area after exclusions), more or less.

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act

DHHL 30% entitlement lands pursuant to the Hawaii State Constitution: NO

CHARACTER OF USE:

Hotel and golf course purposes.

TERM OF LEASE:

65 years, commencing on February 1, 2006 and expiring on January 31, 2071.

ANNUAL RENTAL:

\$580,270.44 minimum base rent, or 2% of gross revenues, whichever is greater, due in semi-annual payments.

REASON FOR REQUEST:

To facilitate financing of WHR LLC's purchase or leasing of furniture, fixtures and equipment for the Grand Naniloa Hotel Hilo.

BACKGROUND:

At its meeting of May 22, 2015, under agenda Item D-6, as amended, the Board of Land and Natural Resources consented to Lessee WHR LLC's mortgage of the leasehold interest in the subject property in the amount of up to \$20,000,000 to finance the renovation of the hotel. Lessee reports that it has drawn down approximately \$11,000,000 of that amount, and expects to borrow at least another \$4,000,000 for the project.

According to Lessee, the total contract value of the hotel renovations is \$19,977,629, paid for in part by the loan proceeds referenced above and in part by Lessee's own funds. Based on review by staff of Land Division and Engineering Division and the Department's engineering consultants, Lessee has invested at least \$10,000,000 of hard construction costs (excluding planning, design, furniture, fixtures and equipment) in the renovation of the property.

To date, Lessee has received certificates of occupancy for the hotel lobby, lower level lobby, Crown Room, guest rooms in the Mauna Kea and Mauna Loa Towers, and a number of commercial spaces in the hotel. The restaurant and Kilauea Tower room renovations are not complete. Lessee had previously targeted December 31, 2016 for completion of those areas, but is now anticipating substantial completion in January or February 2017.<sup>1</sup> On November 10, 2016, the hotel had a soft opening as the Grand Naniloa Hotel Hilo - a Double Tree by Hilton. Attached as Exhibit 2 are photographs taken in October and November 2016 showing the condition of various parts of the hotel.

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<sup>1</sup> Additionally, two areas of the hotel are currently not planned to be renovated. These are the Kilohana Room on the top floor of the Mauna Kea Tower and the standalone Poly Room. Lessee reports that it has an oversupply of event space at the hotel and cannot justify expending funds to renovate the Kilohana Room and Poly Room at this time. Similarly, no renovations have been made to the golf course facilities.

REMARKS:

Lessee now intends to enter into a security agreement with Access Point Financial, Inc. (APF) to facilitate the financing of furniture, fixtures and equipment (FF&E) for the hotel. Attached as Exhibit 3 is the "Landlord Waiver and Consent; Exhibit A" relating to this transaction that Lessee has presented to staff. According to this document, Lessee may grant a security interest to APF in Lessee's now owned or hereafter acquired FF&E and proceeds thereof. APF and Lessee may also enter into financing leases under which APF will finance Lessee's purchase of FF&E initially titled in APF's name. As part of the Landlord Waiver and Consent, Lessee and APF are requesting that the Board subordinate and waive any rights, interest or liens which it may have in the FF&E.

General Lease No. S-5844 provides in relevant part as follows:

19. Lessor's lien. The Lessor shall have a lien on all the buildings and improvements placed on the premises by the Lessee, on all property kept or used on the premises, whether the same is exempt from execution or not and on the rents of all improvements and buildings located on the premises for all Lessor's costs, attorney's fees, rent reserved, for all taxes and assessments paid by the Lessor on behalf of the Lessee, and for the payment of all money provided in this lease to be paid by the Lessee, and this lien shall continue until the amounts due are paid.

Accordingly, by executing the Landlord Waiver and Consent, the Board would be subordinating and waiving any rights, interest or liens it may have in the FF&E and their proceeds, replacements and accessions, including any rights it has under paragraph 19 of the lease. Staff views Lessee's and APF's request as commercially reasonable and has no objection to it. APF needs to ensure that its security interest in the FF&E has priority in order for it to finance FF&E to be used in the hotel.


The Lessee is compliant with all lease terms and conditions. The Lessee is current with the lease rent, insurance and performance bond. However, there are several outstanding violations with the County of Hawaii Department of Public Works from the previous Lessee that have been either corrected or are currently being resolved to the satisfaction of the County building inspectors and the State.

RECOMMENDATION: That the Board:

1. Authorize the Chairperson to execute the "Landlord Waiver and Consent; Exhibit A" substantially in the form of Exhibit 3 attached hereto, under the terms and conditions cited above, which are by this reference incorporated herein, and further subject to the following:
  - a. Review and approval by the Department of the Attorney General; and

- b. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

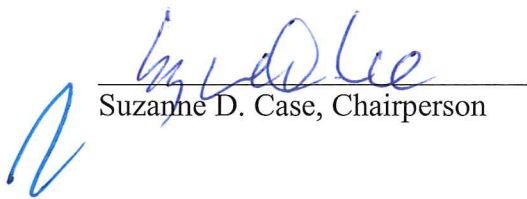
Respectfully Submitted,



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Kevin E. Moore  
Assistant Administrator

APPROVED FOR SUBMITTAL:



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Suzanne D. Case, Chairperson

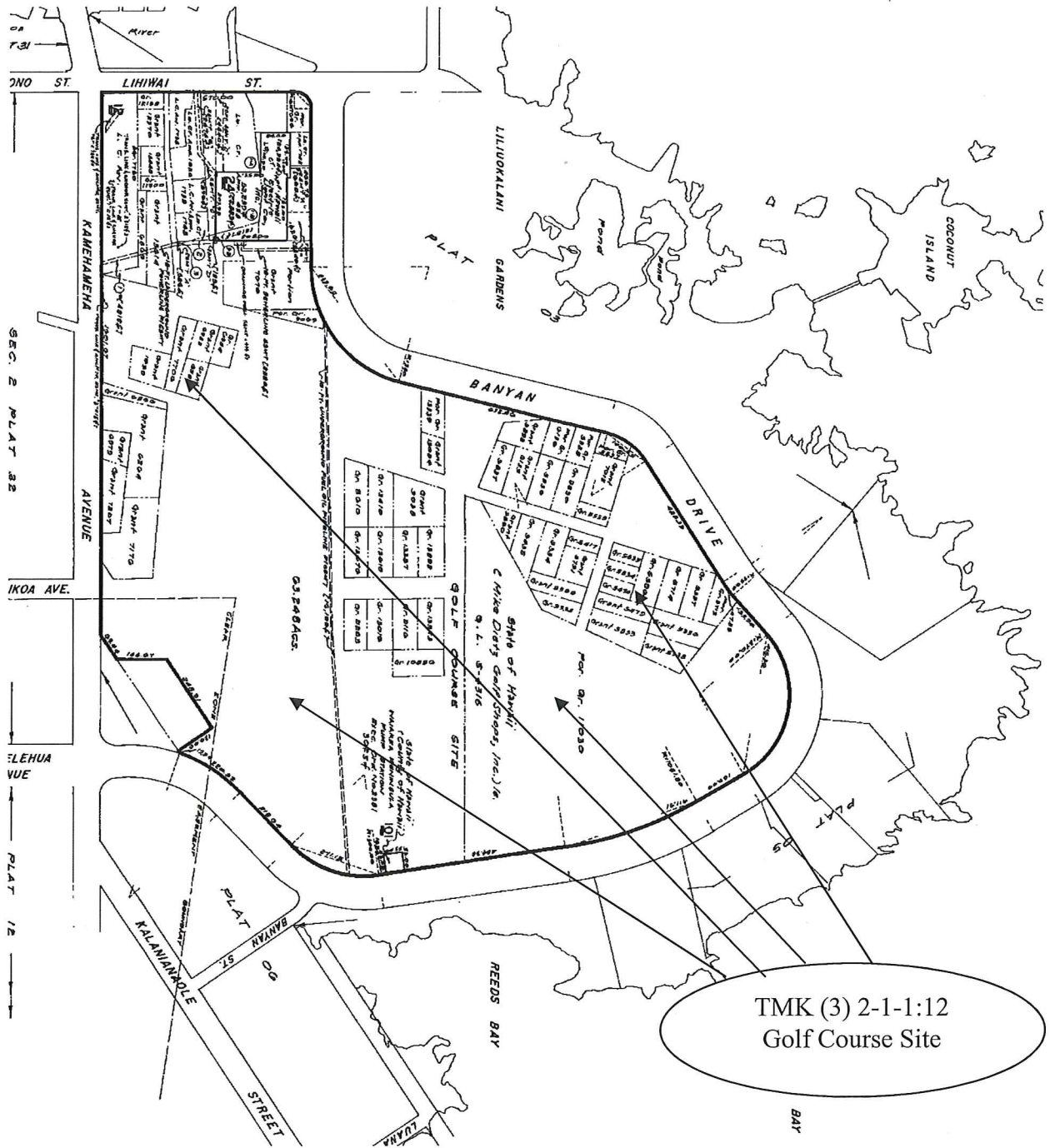
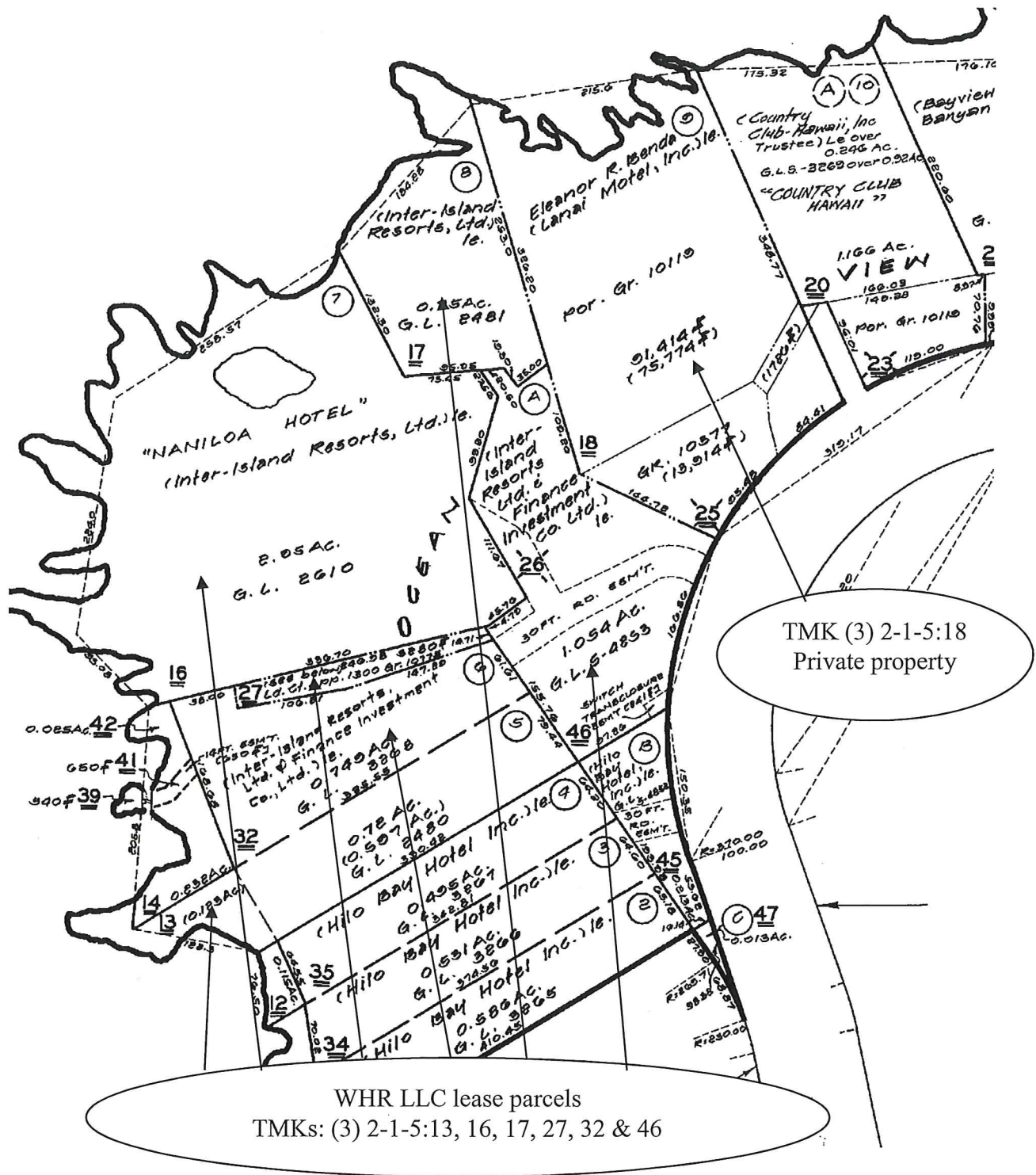


EXHIBIT 1





Street View of the Hilo Naniloa Hotel



Entrance to Lobby Area



Entrance Showing Porte-Cochere



Newly Renovated Mauna Loa Tower





View of Mauna Kea Tower



Outside Entrance to Guest Activities Business (Sublease)



Rooftops of Kilauea Tower, Lobby and Porte-Cochere



Porte-Cochere / Lobby



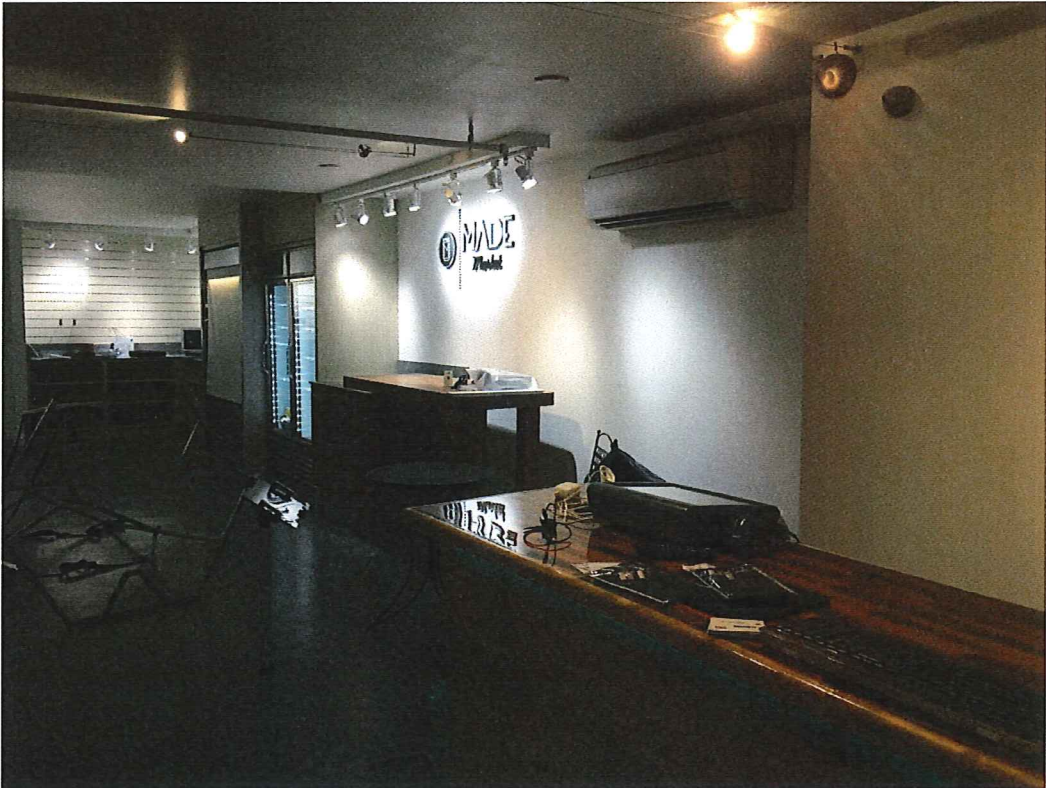
Lobby/Lower Level Lobby



Lobby – Front Desk



Interior of Guest Activities Store (Kapoho Kine Adventures-Sublessee)



Made Market Adjacent to Tour Activities Counter



Guest Laundry Room



Secured Door to Laundry Room



Finished Guest Room – Mauna Loa Tower



Finished Guest Room – Mauna Loa Tower



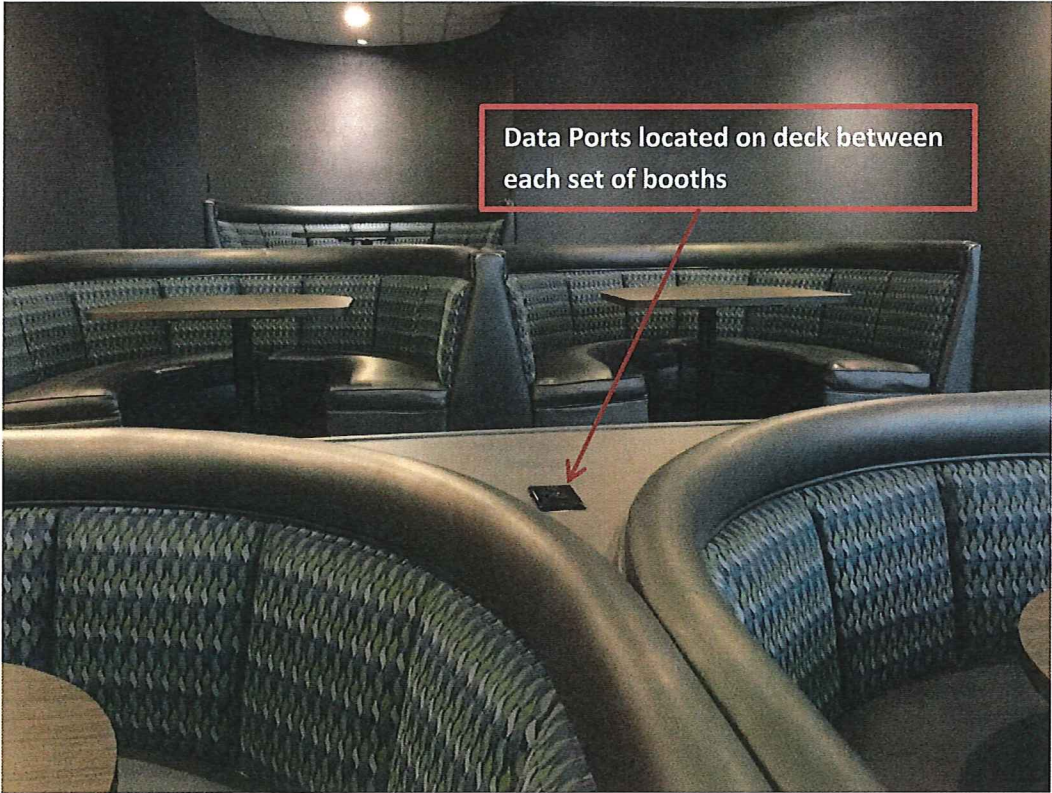
Newly Carpeted Hallway – Mauna Loa Tower



Newly Carpeted Hallway – Mauna Kea Tower



Crown Room

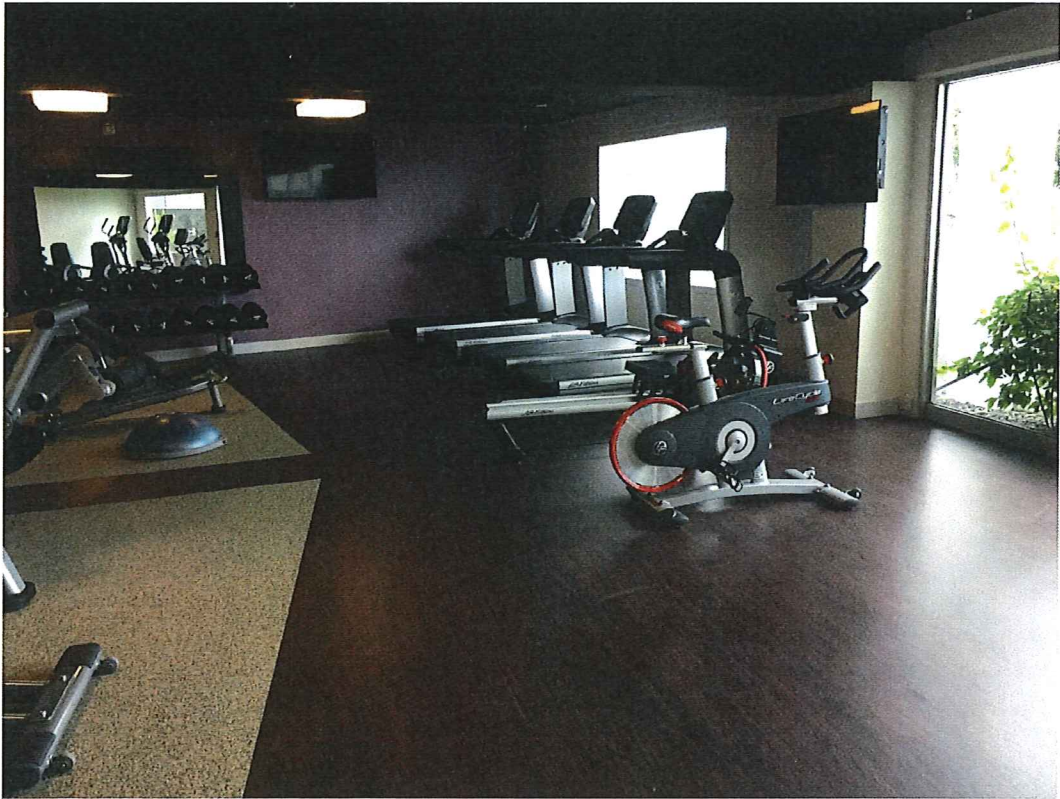


Refurbished Booths in Crown Room





Entrance to Fitness Center



Interior of Fitness Center



Restaurant Construction



Restaurant Construction



Restaurant Construction



Planned Entrance to Restaurant



Pool Area

## LANDLORD WAIVER AND CONSENT; EXHIBIT A

THIS WAIVER AND CONSENT is made as of this \_\_\_\_\_ day of \_\_\_\_\_, 2016 by the State of Hawaii by Chairperson of the Board of Land and Natural Resources ("Landlord") and WHR LLC, a Hawaii limited liability company ("Borrower") in favor of ACCESS POINT FINANCIAL, INC., a Delaware corporation ("APF").

### RECITALS

A. Landlord is the Lessor of real property and Borrower is the Lessee and owner of physical improvements therein ("Ground Lease") located at 93 Banyan Drive, Hilo, HI 96720 ("Property"); with related improvements and fixtures known as the Grand Naniloa Hotel, a Doubletree by Hilton (collectively, "Premises").

B. APF and Borrower, a tenant at the Premises, may now or hereafter enter into a security agreement under which APF may be granted a security interest in some or all of the Borrower's now owned or hereafter acquired equipment, furniture and fixtures and all proceeds, replacements and accessions to any or all of the foregoing (collectively, "Borrower Personal Property"). APF and Borrower also may enter into financing leases under which APF will finance Borrower's purchase of equipment, furniture and fixtures initially titled in APF's name during the term of the lease (such leased property, together with all proceeds, replacements and accessions to any or all of the foregoing, is collectively referred to as "APF Personal Property").

C. Some or all of the Borrower Personal Property and the APF Personal Property (collectively, "Personal Property") will be placed, stored or otherwise located on the Premises.

D. APF has required, as a condition for APF to enter into such loans and/or leases with Borrower and extend certain financial accommodations to Borrower, that Landlord subordinate and waive any rights, interest or liens which it may have or claim to the Personal Property. Landlord, for the benefit of Borrower and Borrower's operations at the Premises, and Borrower have agreed to the foregoing in order to induce APF to enter into such transaction with Borrower and extend certain financial accommodations to Borrower.

### AGREEMENT

NOW, THEREFORE, in consideration of the foregoing recitals, which are incorporated herein, the mutual covenants and agreements herein contained, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereby agree as follows:

1. Representations, Warranties and Covenants of Landlord. Landlord hereby represents and warrants to, and covenants and agrees with, APF as follows:

(a) Except as set forth in Exhibit A attached hereto, no current default or event of default has occurred and is continuing under the lease of the Premises between Landlord and Borrower ("Ground Lease"). To Landlord's best knowledge, information and belief, no state of facts or conditions exist which, with the giving of applicable notice or the expiration of applicable grace or cure periods, or both, would constitute a current default or an event of default under the Ground Lease, except as noted in Exhibit A.

(b) Landlord is the only owner of the Property. No consent or joinder from any party is required in connection with, or as a condition to, Landlord's execution of this Agreement.

(c) The leasing of the Personal Property by Borrower from APF, and/or Borrower's grant of a security interest in the Personal Property to APF, shall not constitute a default or an event of default under the Ground Lease.

(d) Landlord has granted all necessary consents to the security interest granted by Borrower to APF and to the improvements to the Premises, if any, which are being financed by APF.

(e) The Personal Property shall not be removed from the Premises by or on behalf of Landlord without the prior written consent of APF.

(f) The insurance maintained by Borrower with respect to the Personal Property may name APF as an additional insured and as primary loss payee.

(g) Nothing contained herein shall be interpreted to obligate APF in any respect with regard to the Ground Lease.

(h) The validity and enforceability of this Agreement shall not be impaired, diminished, annulled or adversely affected by the modification, alteration, extension or renewal of any debt or finance lease obligation of Borrower to APF.

2. Representations, Warranties, Covenants and Agreements of Borrower. Borrower hereby represents and warrants to, and covenants and agrees with APF as follows:

(a) Borrower has furnished APF with a true, accurate and complete copy of the Ground Lease.

(b) Borrower shall not default under the provisions of the Ground Lease and any such default shall constitute an "Event of Default" under Borrower's lease or loan with APF.

(c) Nothing contained herein shall be interpreted to obligate APF in any respect with regard to the Ground Lease.

3. Subordination. Landlord hereby agrees that APF's right, title and interest in and to the Personal Property, and to all proceeds there from (including without limitation insurance proceeds), whether now in existence or hereafter arising, shall be prior and superior to any and all liens which Landlord may now or in the future have in the Personal Property, however and whenever arising. Landlord hereby subordinates in favor of APF any such liens which Landlord may now or in the future have. Landlord hereby, waives, relinquishes and releases any right, privilege or power which Landlord now has, or may hereafter have, under or by virtue of any law or any agreement, instrument or other document, to claim or assert any right, title or interest in or to the Personal Property, including without limitation any right, privilege or power to (i) levy or distraint upon the Personal Property for rent, in arrears, in advance or both, or (ii) claim or assert any right, title or interest in or to the Personal Property as security or collateral for any debt or obligation secured by the Premises.

3. APF's Right of Entry. APF hereby is authorized and directed at any time to enter the Premises for periodic inspections of the Personal Property and, after a default with respect to the Ground Lease, to remove the Personal Property from the Premises, whether or not such removal requires a physical detachment of the Personal Property from the Premises or causes injury thereto; provided, however, that, by its acceptance hereof, APF agrees to repair, or pay the reasonable cost to repair, any physical injury to the Premises caused directly by the removal of the Personal Property (but APF shall not be liable for any diminution in the value of the Premises resulting from the removal of any of the Personal Property).

4. Notice of Default. Borrower shall promptly notify APF in writing of any notice of default received from Landlord under the Ground Lease, and APF shall have the right (but is not obligated) to cure such default on behalf of Borrower within 30 days from the date it receives such notice. Borrower agrees that any sums (including reasonable legal fees) expended by APF to cure a default by Borrower under the Ground Lease shall be deemed secured by the Personal Property under the applicable transaction documents entered with APF.

5. Power to Execute Agreement. Each party hereby represents and warrants to the other that it has full power and authority to execute this Agreement, that the execution and delivery of this Agreement by the party making this representation has been fully authorized and directed, that the persons executing this Agreement on behalf of the party making this representation have been duly authorized to do so, and that this Agreement, once executed, shall be the valid and binding obligation of the party making this representation, enforceable against it in accordance with its terms.

6. Notices, Demands and Requests. All notices and other communications under this Agreement are to be in writing, addressed to the respective party to the address as set forth below such

party's signature hereto, and shall be deemed to have been duly given (a) upon delivery, if delivered in person with receipt acknowledged by the recipient thereof, (b) one business day after having been timely deposited for overnight delivery, fee prepaid, with any reputable overnight courier service, or (c) three business days after having been deposited in any post office or mail depository regularly maintained by the U.S. Postal Service and sent by certified mail, postage prepaid, return receipt requested. Each party may establish a new address from time to time by written notice to the other given in accordance with this section; provided, however, that no such change of address will be effective until written notice thereof is actually received by the party to whom such change of address is sent. Notice to additional parties designated by a party entitled to notice are for convenience only and are not required for notice to a party to be effective in accordance with this section.

7. Miscellaneous.

(a) Entire Agreement; Modification. This Agreement supersedes all prior agreements, understandings, representations and communications between the parties, whether oral or written, with respect to the transactions contemplated hereby. Neither this Agreement nor any provisions hereof will be modified, supplemented or waived, except by an instrument in writing signed by both parties hereto and then only to the extent expressly provided in such writing.

(b) Binding Effect. The Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, executors, legal representatives, successors, successors and assigns, whether by voluntary action of the parties or by operation of law. The foregoing shall not be construed to permit assignments or other transfers otherwise prohibited. If any party consists of more than one person or entity, the obligations and liabilities of each such person or entity hereunder shall be joint and several.

(c) Applicable Law. This Agreement and all the rights and obligations hereunder will be governed in accordance with the laws of the State of Hawaii (without regard to its conflict of laws principles).

(d) Enforceability. If any provision of this Agreement is found by competent judicial authority to be invalid or unenforceable, the other provisions of this Agreement that can be carried out without the invalid or unenforceable provision will not be affected, and such invalid or unenforceable provision will be ineffective only to the extent of such invalidity or unenforceability and shall be construed to the greatest extent possible to accomplish fairly the purposes and intentions of the parties hereto. All rights and remedies under this Agreement are distinct and cumulative not only as to each other but as to any rights or remedies afforded by law or equity. They may be exercised together, separately or successively. Any failure by a party to exercise any of its remedies does not constitute a waiver of that remedy in the future as to the same or any other default.

(e) Ambiguity; Headings; Gender; and Certain Terms. Neither this Agreement nor any uncertainty or ambiguity herein shall be construed or resolved against Lessor by virtue of the fact that such document has originated with Lessor as drafter. Both parties agree that this Agreement shall be construed and interpreted according to the ordinary meaning of the words used so as to fairly accomplish the purposes and intentions of the parties hereto. Section headings are for convenience only and shall not enter into interpretation of this Agreement. Words used in this Agreement may be used interchangeably in singular or plural form, and any pronoun shall be deemed to cover all genders. "Herein," "hereof" and "hereunder" and other words of similar import refer to this Agreement as a whole and not to any particular section, paragraph or other subdivision. Reference to days for performance shall mean calendar days unless business days are expressly indicated.

(f) Multiple Counterparts. This Agreement may be executed in one or more counterparts, each of which counterpart will, for all purposes, be deemed an original, but all such counterparts together will constitute one instrument.

(g) Consent to Jurisdiction. Each party hereto agrees and consents to the jurisdiction and venue of any state or federal court sitting in Hawaii with respect to any legal action, proceeding, or dispute between them and hereby expressly waives any and all rights under applicable law or in equity to object to the jurisdiction and venue of said courts. Each party further irrevocably consents to service of

process as prescribed by applicable law , to the address for such party last provided in accordance with the notice provision of this Agreement.

IN WITNESS WHEREOF, the parties have entered into this Agreement and affixed their seals hereto as of the date first above written, intending to be legally bound hereby.

**STATE OF HAWAII:**

**BORROWER:**

**BOARD OF LAND AND NATURAL RESOURCES**

**WHR LLC**

By \_\_\_\_\_

By \_\_\_\_\_

Name: \_\_\_\_\_

Name: \_\_\_\_\_

Title: **Chairperson**

Title: \_\_\_\_\_

**Address for Landlord:**

**Address for Borrower:**

**1151 Punchbowl Street  
Honolulu, Hawaii 96813**

**93 Banyan Drive  
Hilo, Hawaii 96720**

Attn: \_\_\_\_\_

Attn: **Ed Bushor**

ACCESS POINT FINANCIAL, INC.

By: \_\_\_\_\_

Name:

Title:

Address for APF:

Access Point Financial, Inc.  
1 Ravinia Drive, Suite 900  
Atlanta, GA 30346



# EXHIBIT A

William P. Kenoi  
*Mayor*

Walter K. M. Lau  
*Managing Director*



Wnrrren H. W. Lee  
*Director*

Brandon A. K. Gonzalez  
*Deputy Director*

**County of Hawai'i**  
**DEPARTMENT OF PUBLIC WORKS**  
Aupuni Center  
101 Pauahi Street, Suite 7 · Hilo, Hawai'i 96720-4224  
(808) 961-8321 · Fax (808) 961-8630  
[www.co.hawaii.hi.us](http://www.co.hawaii.hi.us)

May 11, 2015

Mr. Ed Bushor  
President & CEO  
Tower Development Inc.  
1050 Bishop Street, Suite 530  
Honolulu, Hawai'i 96813  
[ed@towerdevcon.com](mailto:ed@towerdevcon.com)

Mr. Stuart Miller  
Vice President Development  
Tower Development Inc.  
1050 Bishop Street, Suite 530  
Honolulu, Hawai'i 96813  
[stuart@towerdevcon.com](mailto:stuart@towerdevcon.com)

Dear Messrs Bushor and Miller:

Re: Naniloa Hotel, 93 Banyan Drive, TMKs 2-1-005-013, 016, 027, and 032  
Naniloa Golf Course, 1713 Kamehameha Avenue, TMK 2-1-001-012  
Notices of Violations

The County of Hawai'i appreciates your efforts to address the outstanding violations for the properties listed above.<sup>1</sup>

In support of your demonstrated efforts to address the outstanding violations, the County of Hawai'i will temporarily suspend further enforcement actions (i.e. seeking your removal from the property) related to the aforementioned code violations in order to afford Tower Development, Inc. a specified time period to cure said code violations. Final completion dates for each listed violation shall be no later than the dates specifically stated in Attachment A. If, however, the said code violations are not cured by the completion dates in Attachment A, or if upon subsequent inspections, new

<sup>1</sup> A detailed listing identifying the current outstanding building, electrical, and plumbing code violations, as stated in the County of Hawai'i Department of Public Works letter dated March 11, 2015 is included as Attachment A.

**EXHIBIT "A"**

County of Hawai'i is an Equal Opportunity Provider and Employer.



Mr. Ed Bushor  
Mr. Stuart Miller  
May 11, 2015  
Page 2

violations are identified at any time, the County will seek full enforcement for each and every violation identified.

In addition, for the time period of the temporary suspension, all additional safety measures currently in place shall remain in full effect until such a time as deemed to be no longer necessary by the County of Hawai'i.

Respectfully,

  
Brandon Gonzalez  
Deputy Director

cc: Warren H.W. Lee, P.E., Director, Department of Public Works  
David Yamamoto, Chief, Building Division  
Joy Matsumoto, Supervising Building Inspector  
Gary Kaho'ohanohano, Supervising Electrical Inspector  
Gantry Andrade, Battalion Chief, Fire Prevention  
Duane Kanuha, Director, Department of Planning  
William Brilhante, Assistant Corporation Counsel  
Renee Schoen, Deputy Corporation Counsel  
Gordon Heit, District Land Agent, Department of Land and Natural Resources



## **EXHIBIT**

Copy of Agreement with Landlord-Lease Agreement-Landlord Agreement

(a.) DLNR Lease # S-5844 Dated 1-20-06

(b.) Quitclaim Assignment & Assumption of Ground Lease Optimize