

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

September 14, 2018

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

Ref. No. GL S-4786
HAWAII ISLAND

Approve Mediated Settlement of Rent Reopening Dispute in General Lease No. S-4786, Hilo Trading Company, Ltd.; Waiakea, South Hilo, Island of Hawaii, Hawaii; Tax Map Key: (3) 2-1-003-008.

APPLICANT:

Hilo Trading Company, Ltd.

LEGAL REFERENCE:

Sections 171-6, -7, and -17 Hawaii Revised Statutes, as amended.

LOCATION:

123 Lihiwai Street, Waiakea, South Hilo, Island of Hawaii, Hawaii
Portion of Government lands of Waiakea situated at Waiakea, South Hilo, Hawaii, identified by Tax Map Key: (3) 2-1-003:008, as shown on the attached map labeled Exhibit 1.

AREA:

0.970 acres, more or less.

ZONING:

State Land Use Commission:	Urban District
County Zoning:	ML-20 Limited Industrial

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act
DHHL 30% entitlement lands pursuant to the Hawaii State Constitution: No

CURRENT USE STATUS:

Commercial restaurant purposes.

TERM OF LEASE:

55 years, commencing on March 23, 1982 and expiring on March 22, 2037.

ANNUAL RENTAL UNDER LEASE:

March 23, 1982 to March 22, 2002 - \$16,000/year, plus additional rent of 10% of the gross proceeds from liquor sales and 5% of the gross proceeds from food sales

March 23, 2002 to March 22, 2017 - \$20,580/year, no additional rent

March 23, 2017 to March 22, 2027 – Proposed settlement: Effective August 1, 2018 - \$43,758/year, plus additional rent of 1.5% of the gross process of both liquor and food sales

March 23, 2027 to March 22, 2037 – Yet to Occur

RENTAL REOPENINGS:

Rental reopenings in the original term are at the end of the 20th, 35th, and 45th years of the term. The instant rental reopening occurred on March 23, 2017 and ends March 22, 2027.

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

A rental reopening is not an “action” under HRS, Chapter 343, and otherwise does not trigger the requirement of the preparation of an environmental assessment.

DCCA VERIFICATION:

Place of business registration confirmed:	YES <u> x </u>	NO <u> </u>
Registered business name confirmed:	YES <u> x </u>	NO <u> </u>
Good standing confirmed:	YES <u> x </u>	NO <u> </u>

HISTORY

On June 12, 1981, under agenda Item F-2, the Board of Land and Natural Resources (“Board”) authorized the public auction sale for lease of approximately 1.01 acres of land¹ at Waiakea, South Hilo, Hawaii. The property is located in the Banyan Drive area of Hilo, near the Suisan Fish Market at 123 Lihikai Street, Hilo, Hawaii (“Property”). Item F-2 provided for substantial construction requirement, including the construction of a new restaurant building, of not less than \$600,000 to be complied with by the successful purchaser.

The Lease was sold at the upset price of \$16,000 per annum to Hilo Trading Company, Ltd. (“HTC” or “Lessee”). On May 28, 1982, the State entered into a fifty-five (55) year auction lease with HTC (“Lease”). The restaurant was constructed in 1983 and began doing business as Nihon Restaurant and Cultural Center, now known as Hilo Bay Café. See Exhibit 2.

For the first twenty years of the Lease, commencing March 23, 1982, the base rent was \$16,000. Thereafter, the base rent was to be reopened and re-determined at the expiration of the 20th, 35th, and 45th years.

The Lease provides for the payment of “additional rent,” which is a function of the percentages of the gross proceeds from food and liquor sales. Item D of the Lease states:

D. Additional rent. Each year during the month of January, the Lessee shall submit to the Lessor a financial report showing the gross proceeds from the sale of food and liquor sold on the demised premises during the year immediately preceding. Together with the financial report, the Lessee shall pay to the Lessor the additional rent due, if any, which amount shall be determined in the manner described below:

From the financial report, determine a value representing five percent (5%) of the gross proceeds from food sales and ten percent (10%) of the gross proceeds from

¹ The language in the original lease required the lessee to maintain the State property along the coastline as a park area known as Happiness Garden Park. On August 11, 2000, under agenda item D-13, the Board consented to a partial withdrawal of the small portion of the park area that lies between the subject property and shoreline. A Partial Withdrawal from General Lease No. S-4786 of 0.04 acre occurred on April 16, 2002 resulting in approximately 0.97 acre, more or less, remaining on the Property.

liquor sales. The excess, if any, of the value so derived over the basic annual rent constitutes the additional rent.

(“Additional Rent.”) (Emphasis in original.) See Exhibit 2 at page 3.

On April 14, 1997, HTC entered into a Special Installment Agreement for retroactive Additional Rent owed in the amount of \$271,846.21. See Exhibit 3.

In a letter dated February 12, 2002 from Acting Land Division Administrator Harry M. Yada, to HTC, Mr. Yada noted that DLNR’s appraiser determined that the fair market rent for the 15-year period beginning on March 23, 2002, was \$20,580 per year. Mr. Yada further noted that the appraiser concluded that the Additional Rent should not be required. Mr. Yada stated that he concurred with the appraiser’s recommendations, but explicitly stated that “future reopenings may include the additional rent.” HTC accepted the rent as stated.

On May 24, 2013, under agenda item D-6, the Board authorized the transfer of 100% of the issued and outstanding stock of HTC to Kimberly Snuggerud. In addition, the Board also consented to the mortgage between HTC and First Hawaiian Bank, for an amount ultimately up to \$650,000, for improvements and renovations to the existing restaurant facilities. See Exhibit 4.

The Lease rent for the subject property was subject to reopening on March 23, 2017.

REMARKS:

On August 28, 2017, DLNR sent a rent reopening letter to HTC, confirming that the State’s appraiser, Jon Yamaguchi of Yamaguchi & Yamaguchi, Inc., concluded the fair market annual base rent for the reopening period to be \$43,758 per annum. DLNR also reminded HTC that pursuant to the terms of the Lease under the Additional Rent provision, HTC must submit its financial report. See Exhibit 5.

In a letter dated September 18, 2017, HTC agreed to the \$43,758 rent with the condition DLNR remove or waive its right to Additional Rent. HTC appealed that the Additional Rent would “quickly put them out of business.” In support, HTC enclosed Mr. Yada’s February 12, 2002 letter. See Exhibit 6.

In response DLNR sent a letter dated September 28, 2017 confirming that it was unable to grant HTC’s request to remove or waive the Additional Rent. DLNR argued that because this was an auction lease, it was not subject to amendments or reformations pursuant to State of Hawaii v. Kahua Ranch, 47 Haw. 28, 384 P.2d 581 (1963), affirmed on rehearing, 47 Haw. 466, 390 P.2d 737, rehearing denied, 47 Haw. 485, 391 P.2d 872 (1964). DLNR further argued that under the terms of the Lease, the applicability of the Additional Rent was not subject to determination by an appraiser, and therefore not a part of the Lease’s

reopening.² In light of this position, DLNR offered HTC an extension of time within which to accept or reject the new lease rent of \$43,758. See Exhibit 7.

HTC then hired counsel, Katherine A. Garson, Esq. of Carlsmith Ball LLP, who argued that the Additional Rent was subject to reopening. HTC's hired appraiser, R.J. Kirchner, of Paradise Appraisals, subsequently concluded that the fair market rent for the property was \$26,500, and added that Additional Rent should not be collected since it would essentially be a lease on HTC's improvements and, therefore, would exceed the fair market rent of the ground lease. See Exhibit 8.

MEDIATION:

Disputes in rent reopenings for leases for public lands are governed by Hawaii Revised Statutes (HRS), section 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 section 171-17, effective as of July 1, 2014, to require non-binding mediation by a single mediator prior to undergoing binding arbitration.

Section 171-17(d), HRS, states in part: "If the board's and 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." The appraisers did attempt to, but did not, agree on a lease rent. This resolution is in effect a settlement of the dispute because the mediation is nonbinding and both parties, DLNR and HTC, have to agree on the rent, as opposed to an arbitration of rent determined by a third party that is final and binding on the parties. In mediation, the parties take many considerations into account, including the cost of an arbitration with one arbitrator if mediation fails.

The parties agreed to have real estate attorney Andrew Wilson, Esq., serve as the mediator. The mediation between the parties was conducted on August 1, 2018, in Hilo, Hawaii, at the law offices of Carlsmith Ball. HTC was represented by Owner and General Manager, Kimberly Snuggerud, and counsel, Katherine A. Garson, Esq. Participants from DLNR were Russell Tsuji, Land Administrator, Blue Kaanehe, Appraisal and Real Estate Specialist, and David Day, Deputy Attorney General.

Although DLNR reserved its right to assert that Additional Rent was not subject to the rent reopening, the fact that HTC would take a sizeable loss if the Additional Rent were to be applied³, and the Department's need to use good and flexible land management practices and standards when analyzing rent propositions, weighed heavily on the final outcome of the mediated settlement.

² DLNR reserves its right to assert this legal position at arbitration should a settlement not be approved.

³ Applying the Additional Rent provision to HTC's 2017 gross food and alcohol sales resulted in a total annual rent of \$181,797.87.

Ultimately, the parties agreed that the ground rent commencing March 23, 2017 through July 31, 2018 would be at the previous rent of \$20,580 per annum with no Additional Rent owed. The rent as of the date of mediation, August 1, 2018, up to and including March 22, 2027, the date prior to the next reopening, would be \$43,758 per annum plus 1.5% percentage rent⁴ of the combined gross food and liquor sales in excess over the basic annual rent, in accordance with the terms of the Lease⁵.

DLNR notes that by the time this matter comes before the Board, two invoices for HTC's quarterly installment due September 22, 2018 and December 22, 2018, will have been disseminated without having captured the increased rent beginning August 1, 2018. Although the Lease does not provide for a late fee, the State's SLIMS system may automatically generate an erroneous late fee for the difference between the old and new rent due from August 1, 2018 to September 22, 2018 and September 23, 2018 to December 22, 2018. In an abundance of caution, DLNR seeks rescission of any late fee or interest generated due to SLIMS' automated late fee application.

RECOMMENDATIONS:

That the Board approve the mediated settlement for the rent reopening in General Lease No. S-4786 according to the following terms:

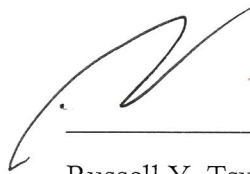
1. For the period of March 23, 2017 through July 31, 2018, the annual rent is \$20,580 per annum with no Additional Rent;
2. Beginning August 1, 2018, through the period up to and including March 22, 2027, the annual rent is \$43,758 per annum. The additional rent is 1.5% percentage rent of the combined gross food and liquor sales in accordance with the terms of the Lease;
3. Any generated late fees or interest reflected on the invoice for the quarterly installment due March 2019 for the period of August 1, 2018 to December 22, 2018, be rescinded;
4. The deficiency in annual rent owed between the period beginning August 1, 2018, through December 22, 2018, shall be paid within thirty (30) days upon Board approval;

⁴ Using HTC's 2017 financial figures, a 1.5% of the total gross food and liquor sales equated to approximately \$45,000; roughly the per annum rent of \$43,758.

⁵ Pursuant to the terms of the Lease, the deficiency between the new base rent and the old base rent for the period beginning on August 1, 2018 and ending on September 22, 2018, and for the period beginning September 23, 2018 and ending on December 22, 2018, shall be paid by the Lessee within thirty days of the Board's approval. Before January 31, 2019, HTC will pay the difference, if any, between the ground rent of \$17,262.72 and 1.5% of gross proceeds for food sales and liquor sales for the period August 1, 2018 through December 22, 2018.

5. For the period beginning on August 1, 2018, through December 22, 2018, additional rent shall be owed in accordance with the terms of the Lease to the extent that 1.5% of the gross proceeds from food and liquor sales over this period exceeds the annual rent payable over the same period; and
6. Except as noted, all remaining terms and conditions on the Lease remain unchanged.

Respectfully Submitted,



Russell Y. Tsuji
Land Division Administrator

APPROVED FOR SUBMITTAL:

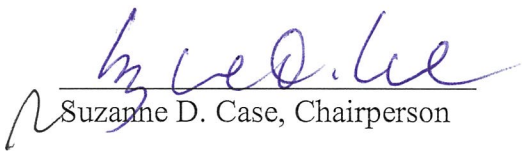
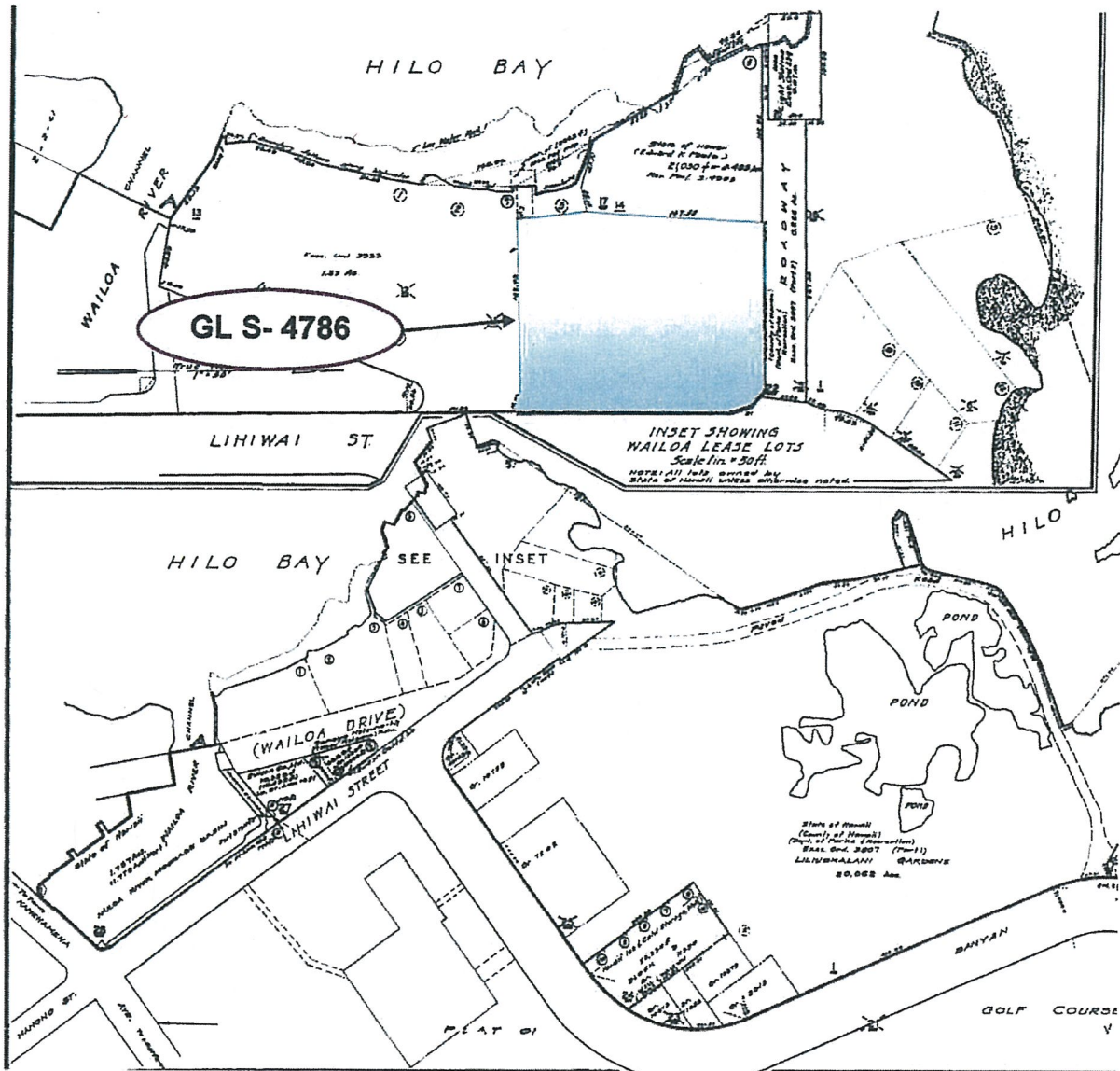
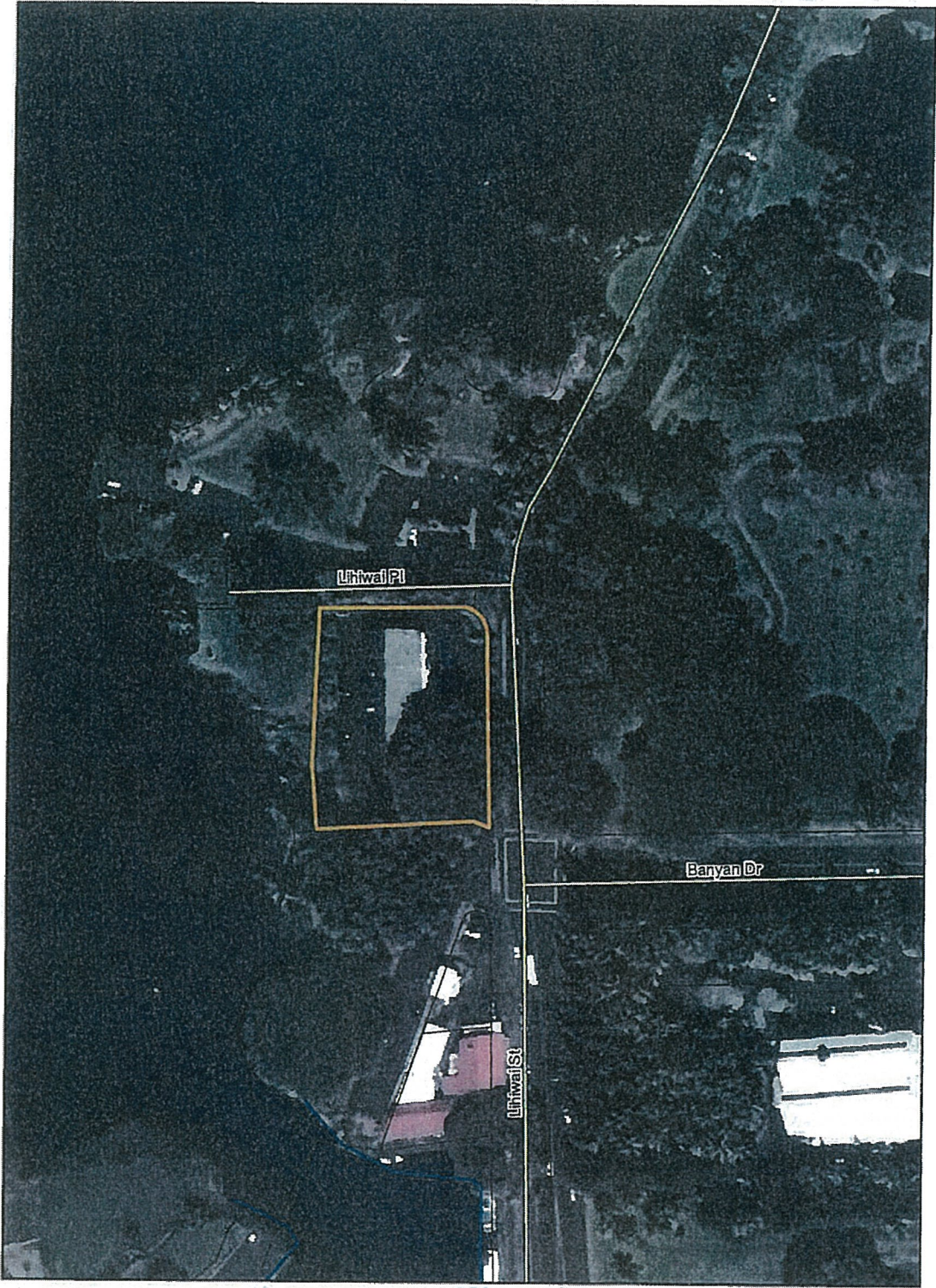

Suzanne D. Case, Chairperson

EXHIBIT 1

TMK: 3rd/2-1-03:08



GL S-4786



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Feet



EXHIBIT 2

ORIGINAL

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

GENERAL LEASE NO. S-4786

between

STATE OF HAWAII

and

HILO TRADING COMPANY, LTD.

covering

PORTION OF GOVERNMENT (CROWN) LAND OF WAIAKEA
WAIAKEA, SOUTH HILO, ISLAND OF HAWAII, HAWAII

CERTIFICATE FILED

4 4 1 7 3 0



EXHIBIT "2"

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GENERAL LEASE NO. S-4786

WITNESSETH:

TO HAVE AND TO HOLD the demised premises unto the Lessee for the term of fifty-five (55) years, commencing on the 23rd day of March, 1982, up to and including the 22nd day of March, 2037, unless sooner terminated as hereinafter provided, the Lessor reserving and the Lessee yielding and paying to the Lessor at the Office of the Department of Land and Natural Resources, Honolulu, Oahu, State of Hawaii, a net annual rental as provided hereinbelow, payable in advance, without notice or

demand, in quarterly installments on the 22nd of March, June, Sept., & Dec. of each and every year during said term as follows:

A. For the first twenty (20) years, the sum of SIXTEEN THOUSAND AND NO/100 DOLLARS

(\$16,000.00) per annum; PROVIDED, HOWEVER, that in lieu of rental waiver, the Lessee shall be credited in an amount not to exceed one year's rent for improvements performed and approved by the Chairman during the first year of the lease term.

B. The annual rental hereinabove reserved shall be reopened and redetermined at the expiration of the 20th, 35th and 45th years of said term.

C. Determination of rental upon reopening of the annual rental. The rental for any ensuing period shall be the rental for the immediately preceding period or the fair market rental at the time of 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 his own appraiser who shall prepare an independent 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 differences still exist 14 days after the exchange, the two appraisers shall then appoint a third appraiser who shall also prepare an independent 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, subject to

vacation, modification or correction in accordance with the provisions of Sections 658-8 and 658-9, Hawaii Revised Statutes. The Lessee shall pay for his own appraiser and the cost of the services of the third appraiser shall be borne equally by the Lessor and the Lessee. All appraisal reports shall become part of the public record of the Lessor.

If the rental for any ensuing period has not been determined prior to the expiration of the preceding rental period, the Lessee shall continue to pay the rent effective for the previous rental period, but the Lessee shall, within thirty (30) days after the new rental has been so determined, make up the deficiency, if any.

D. Additional rent. Each year during the month of January, the Lessee shall submit to the Lessor a financial report showing the gross proceeds from the sale of food and liquor sold on the demised premises during the year immediately preceding. Together with the financial report, the Lessee shall pay to the Lessor the additional rent due, if any, which amount shall be determined in the manner described below:

From the financial report, determine a value representing five percent (5%) of the gross proceeds from food sales and ten percent (10%) of the gross proceeds from liquor sales. The excess, if any, of the value so derived over the basic annual rent constitutes the additional rent.

RESERVING UNTO THE LESSOR THE FOLLOWING:

1. Minerals and waters. (a) All minerals as hereinafter defined, in, on or under the demised premises and the right, on its own behalf or through persons authorized

by it, to prospect for, mine and remove such minerals and to occupy and use so much of the surface of the ground as may be required for all purposes reasonably extending to the mining and removal of such minerals by any means whatsoever, including strip mining. "Minerals", as used herein, shall mean any or all oil, gas, coal, phosphate, sodium, sulphur, iron, titanium, gold, silver, bauxite, bauxitic clay, diaspore, boehmite, laterite, gibbsite, alumina, all ores of aluminum and, without limitation thereon, all other mineral substances and ore deposits, whether solid, gaseous or liquid, including all geothermal resources in, on, or under the land, fast or submerged; provided, that "minerals" shall not include sand, gravel, rock or other material suitable for use and used in general construction in furtherance of the Lessee's permitted activities on the demised premises and not for sale to others. (b) All surface and ground waters appurtenant to the demised land and the right on its own behalf or through persons authorized by it, to capture, divert or impound the same and to occupy and use so much of the demised premises as may be required in the exercise of this right reserved; provided, however, that as a condition precedent to the exercise by the Lessor of the rights reserved in this paragraph just compensation shall be paid to the Lessee for any of Lessee's improvements taken.

2. Prehistoric and historic remains. All prehistoric and historic remains found on said demised premises.

3. Ownership of fixed improvements. The ownership of all improvements of whatever kind or nature, including but not limited to fences and stockwater system(s) located on the land prior to or on the commencement date of this lease, excluding those improvements constructed during the term of this lease unless provided otherwise.

THE LESSEE COVENANTS AND AGREES WITH THE LESSOR
AS FOLLOWS:

1. Payment of rent. That the Lessee shall pay said rent to the Lessor at the times, in the manner and form aforesaid and at the place specified above, or at such other place as the Lessor may from time to time designate, in legal tender of the United States of America.

2. Taxes, assessments, etc. That the Lessee shall pay or cause to be paid, when due, the amount of all taxes, rates, assessments and other outgoings of every description as to which said demised premises or any part thereof, or any improvements thereon, or the Lessor or Lessee in respect thereof, are now or may be assessed or become liable by authority of law during the term of this lease; provided, however, that with respect to any assessment made under any betterment or improvement law which may be payable in installments, Lessee shall be required to pay only such installments, together with interest, as shall become due and payable during said term.

3. Utility services. That the Lessee shall pay when due all charges, duties and rates of every description, including water, sewer, gas, refuse collection or any other charges, as to which said demised premises, or any part thereof, or any improvements thereon or the Lessor or Lessee in respect thereof may during said term become liable, whether assessed to or payable by the Lessor or Lessee.

4. Covenant against discrimination. That the use and enjoyment of the premises shall not be in support of any policy which discriminates against anyone based upon race, creed, sex, color, national origin or physical handicap.

5. Sanitation, etc. That the Lessee shall keep the demised premises and improvements in a strictly clean, sanitary and orderly condition.

6. Waste and unlawful, improper or offensive use of premises. That the Lessee shall not commit, suffer or permit to be committed any waste, nuisance, strip or unlawful, improper or offensive use of the demised premises, or any part thereof, nor, without the prior written consent of the Lessor, cut down, remove or destroy, or suffer to be cut down, removed or destroyed, any trees now growing on said premises.

7. Compliance with laws. That the Lessee shall comply with all of the requirements of all municipal, state, and federal authorities and observe all municipal, state and federal laws pertaining to the said premises, now in force or which may hereinafter be in force.

8. Inspection of premises. That the Lessee will permit the Lessor and its agents, at all reasonable times during the said term, to enter the demised premises and examine the state of repair and condition thereof.

9. Improvements. That the Lessee shall not at any time during said term construct, place, maintain and install on said premises any building, structure or improvement of any kind and description whatsoever except with the prior approval of the Board and upon such conditions as the Board may impose, including any adjustment of rent, unless otherwise provided herein. The ownership thereof shall be in the Lessee until the expiration or termination pursuant to a breach of the lease, at which time the ownership thereof shall vest in the Lessor.

10. Repairs to improvements. That the Lessee shall, at its own expense, keep, repair and maintain all buildings and improvements now existing or hereafter constructed or installed on the demised premises in good order, condition and repair, reasonable wear and tear excepted.

11. Liens. That the Lessee will not commit or suffer any act or neglect whereby the demised premises or any improvement thereon or the estate of the Lessee in the same shall become subject to any attachment, lien, charge or encumbrance whatsoever, except as hereinafter provided, and shall indemnify and hold harmless the Lessor from and against all attachments, liens, charges and encumbrances and all expenses resulting therefrom.

12. Character of use. That the Lessee shall use or allow the premises hereby demised to be used solely for
restaurant
purpose(s).

13. Assignments, etc. That the Lessee shall not transfer, assign or permit any other person to occupy or use the said premises or any portion thereof, or transfer or assign this lease or any interest therein, either voluntarily or by operation of law, except by way of devise, bequest or intestate succession, and any transfer or assignment so made shall be null and void; provided, that with the prior written approval of the Board the assignment and transfer of this lease or unit thereof may be made if
(1) it contains the personal residence of the Lessee;
(2) in the case of commercial, industrial, hotel, resort,

apartment and other business uses, the Lessee was required to put in substantial building improvements; (3) the Lessee becomes mentally or physically disabled; (4) extreme economic hardship is demonstrated to the satisfaction of the Lessor or (5) it is to the corporate successor of the Lessee.

14. Subletting. That the Lessee shall not rent or sublet the whole or any portion of the demised premises, without the prior written approval of the Board; provided, however, that prior to such approval, the Board shall have the right to review and approve the rent to be charged to the proposed sublessee and, if necessary, revise the rent of the demised premises based upon the rental rate charged to the said sublessee; provided, further, that the rent may not be revised downward.

15. Indemnity. That the Lessee will indemnify, defend and hold the Lessor harmless from and against any claim or demand for loss, liability or damage, including claims for property damage, personal injury or death, arising out of any accident on the demised premises and sidewalks and roadways adjacent thereto or occasioned by any act or nuisance made or suffered on the premises, or by any fire thereon, or growing out of or caused by any failure on the part of the Lessee to maintain the premises in a safe condition, or by any act or omission of the Lessee, from and against all actions, suits, damages and claims by whomsoever brought or made by reason of the non-observance or non-performance of any of the terms, covenants and conditions herein or the rules, regulations, ordinances and laws of the federal, state, municipal or county governments.

16. Costs of litigation. That in case the Lessor shall, without any fault on its part, be made a party to any litigation commenced by or against the Lessee (other than condemnation proceedings), the Lessee shall and will pay all costs and expenses incurred by or imposed on the Lessor; furthermore, the Lessee shall and will pay all costs and expenses which may be incurred by or paid by the Lessor in enforcing the covenants and agreements of this lease, in recovering possession of the demised premises or in the collection of delinquent rental, taxes and any and all other charges.

17. Liability insurance. That the Lessee shall procure, at its own cost and expense, and maintain during the entire period of this lease, a policy or policies of comprehensive public liability insurance, in an amount acceptable to the Chairman, insuring the Lessor and Lessee against all claims for personal injury, death and property damage; that said policy or policies shall cover the entire premises; including all buildings, improvements and grounds and all roadways or sidewalks on or adjacent to the demised premises in the control or use of the Lessee. The Lessee shall furnish the Lessor with a certificate showing such policy to be initially in force and shall furnish a like certificate upon each renewal of such policy, each such certificate to contain or be accompanied by an assurance of the insurer to notify the Lessor of any intention to cancel any such policy prior to actual cancellation. The procuring of this policy shall not release or relieve the Lessee of its responsibility under this lease as set forth herein or limit the amount of its liability under this lease. The notice to cancel shall be sent to the Lessor sixty (60) days prior to the date of cancellation.

18. Bond, performance. That the Lessee shall, at its own cost and expense, within thirty (30) days after the date of receipt of this lease document, procure and deposit with the Lessor and thereafter keep in full force and effect during the term of this lease a good and sufficient surety bond, conditioned upon the full and faithful observance and performance by said Lessee of all of the terms, conditions and covenants of this lease, in an amount equal to two times the annual rental then payable. Said bond shall provide that in case of a breach or default of any of the terms, covenants, conditions and agreements contained herein, the full amount of the bond shall be paid to the Lessor as liquidated and ascertained damages and not as a penalty.

19. Lessor's lien. That the Lessor shall have a lien on all the buildings and improvements placed on the said premises by the Lessee, on all property kept or used on the demised premises, whether the same is exempt from execution or not and on the rents of all improvements and buildings situated on said premises for all such 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 as provided in this lease to be paid by the Lessee, and such lien shall continue until the amounts due are paid.

20. Mortgage. That, except as provided herein, the Lessee shall not mortgage, hypothecate or pledge the said premises or any portion thereof of this lease or any interest therein without the prior written approval of the Board and any such mortgage, hypothecation or pledge without such approval shall be null and void.

That upon due application and with the written consent of the Lessor, the Lessee may mortgage this lease or any interest therein or create a security interest in the leasehold of the public land hereby demised. If the mortgage or security interest is to a recognized lending institution in either the State of Hawaii or elsewhere in the United States, such consent may extend to foreclosure and sale of Lessee's interest at such foreclosure to any purchaser, including the mortgagee, without regard to whether or not the purchaser is qualified to lease, own or otherwise acquire and hold the land or any interest therein. The interest of the mortgagee or holder shall be freely assignable. The term "holder" shall include an insurer or guarantor of the obligation or condition of such mortgage, including the Department of Housing and Urban Development through the Federal Housing Administration, the Federal National Mortgage Association, the Veterans Administration, the Small Business Administration, Farmers Home Administration, or any other Federal agency and their respective successors and assigns or any lending institution authorized to do business in the State of Hawaii or elsewhere in the United States; provided, that the consent to mortgage to a non-governmental

holder shall not confer any greater rights or powers in the holder than those which would be required by any of the aforementioned Federal agencies.

21. Breach. That time is of the essence of this agreement and if the Lessee shall fail to yield to pay such rent or any part thereof at the times and in the manner aforesaid within thirty (30) days after delivery by the Lessor of a written notice of such breach or default, or if the Lessee shall become bankrupt, or shall abandon the said premises, or if this lease and said premises shall be attached or otherwise be taken by operation of law, or if any assignment be made of the Lessee's property for the benefit of creditors, or shall fail to observe and perform any of the covenants, terms and conditions herein contained and on its part to be observed and performed, and such failure shall continue for a period of more than sixty (60) days after delivery by the Lessor of a written notice of such breach or default, by personal service, registered mail or certified mail to the Lessee at its last known address and to each mortgagee or holder of record having a security interest in the demised premises, the Lessor may, subject to the provisions of Section 171-21, Hawaii Revised Statutes, at once re-enter such premises or any part thereof, and upon or without such entry, at its option, terminate this lease without prejudice to any other remedy or right of action for arrears of rent or for any preceding or other breach of contract; and in the event of such termination, all buildings and improvements thereon shall remain and become the property of the Lessor; furthermore, Lessor shall retain all rent paid in advance as damages.

22. Right of holder of record of a security interest. In the event the Lessor seeks to forfeit the interest created by this lease, each recorded holder of a security interest may, at its option, cure or remedy the default or breach of rent payment within thirty (30) days or any other default or breach within sixty (60) days, from the date of receipt of the notice hereinabove set forth, or within such additional period as the Lessor may allow for good cause, and add the cost thereof to the mortgage debt and the lien of the mortgage. Upon failure of the holder to exercise its option, the Lessor may: (a) pay to the holder from any monies at its disposal, including the special land and development fund, the amount of the mortgage debt, together with interest and penalties, and secure an assignment of said debt and mortgage from said holder or if ownership of such interest or estate shall have vested in such holder by way of foreclosure, or action in lieu thereof, the Lessor shall be entitled to the conveyance of said interest or estate upon payment to said holder of the amount of the mortgage debt, including interest and penalties, and all reasonable expenses incurred by the holder in connection with such foreclosure and preservation of its security interest, less appropriate credits, including income received from said interest or estate subsequent to such foreclosure; or (b) terminate the outstanding interest or estate subject to the lien of such mortgage, without prejudice to any other right or remedy for arrears of rent or for any preceding or other breach or default and thereupon use its best efforts to redispense of the land affected thereby to a qualified and responsible person who will assume the obligation of the mortgage and the debt thereby secured;

provided, that a reasonable delay by the Lessor in instituting or prosecuting any right or remedy it may have hereunder shall not operate as a waiver of such right or to deprive it of such remedy when it may still hope otherwise to resolve the problems created by the breach or default. The proceeds of any disposition effected hereunder shall be applied first, to reimburse the Lessor for costs and expenses in connection with such disposition; second, to discharge in full any unpaid purchase price or other indebtedness owing the Lessor in connection with such interest or estate terminated as aforesaid; and the balance, if any, shall be paid to the owner of such interest or estate.

23. Condemnation. That, if at any time, during the term of this lease, or any portion of the demised premises should be condemned, or required for public purposes by any county or city and county, the rental shall be reduced in proportion to the value of the portion of the premises condemned. The Lessee shall be entitled to receive from the condemning authority (a) the value of growing crops, if any, which he is not permitted to harvest and (b) the proportionate value of the Lessee's permanent improvements so taken in the proportion that it bears to the unexpired term of the lease; provided, that the Lessee may, in the alternative, remove and relocate its improvements to the remainder of the lands occupied by the Lessee. The Lessee shall not by reason of such condemnation be entitled to any claim against the Lessor for condemnation or indemnity for leasehold interest and all compensation payable or to be paid for or on account of said leasehold interest by reason of such condemnation shall be payable to and be the sole property of the Lessor. The foregoing rights of the Lessee

shall not be exclusive of any other to which Lessee may be entitled by law. Where the portion so taken renders the remainder unsuitable for the use or uses for which the land was demised, the Lessee shall have the option to surrender this lease and be discharged and relieved from any further liability therefor; provided, that Lessee may remove the permanent improvements constructed, erected and placed by it within such reasonable period as may be allowed by the Lessor.

24. Right to enter. The Lessor or the County and the agents or representatives thereof shall have the right to enter and cross any portion of said demised land for the purpose of performing any public or official duties; provided, however, in the exercise of such rights, the Lessor or the County shall not interfere unreasonably with the Lessee or Lessee's use and enjoyment of the premises.

25. Inspection by prospective bidders. The Lessor shall have the right to authorize any person or persons to enter upon and inspect the demised premises at all reasonable times following a published notice for the proposed disposition of the same for purposes of informing and apprising such person or persons of the condition of said lands preparatory to such proposed disposition; provided, however, that any such entry and inspection shall be conducted during reasonable hours after notice to enter is first given to the Lessee, and shall, if the Lessee so requires, be made in the company of the Lessee or designated agents of the Lessee; provided, further, that no such authorization shall be given more than two years before the expiration of the term of this lease.

26. Acceptance of rent not a waiver. That the acceptance of rent by the Lessor shall not be deemed a waiver of any breach by the Lessee of any term, covenant or condition of this lease, nor of the Lessor's right to re-entry for breach of covenant, nor of the Lessor's right to declare and enforce a forfeiture for any such breach, and the failure of the Lessor to insist upon strict performance of any such term, covenant or condition, or to exercise any option herein conferred, in any one or more instances, shall not be construed as a waiver or relinquishment of any such term, covenant, condition or option.

27. Extension of time. That notwithstanding any provision contained herein to the contrary, wherever applicable, the Board may for good cause shown, allow additional time beyond the time or times specified herein to the Lessee, in which to comply, observe and perform any of the terms, conditions and covenants contained herein.

28. Justification of sureties. Such bonds as may be required herein shall be supported by the obligation of a corporate surety organized for the purpose of being a surety and qualified to do business as such in the State of Hawaii, or by not less than two personal sureties, corporate or individual, for which justifications shall be filed as provided in Section 78-20, Hawaii Revised Statutes; provided, however, the Lessee may furnish a bond in like amount, conditioned as aforesaid, executed by it alone as obligor, if, in lieu of any surety or sureties, it shall also furnish -- and at all times thereafter keep and maintain on deposit with the Lessor security in certified checks, certificates

of deposit (payable on demand or after such period as the Lessor may stipulate), bonds, stocks or other negotiable securities properly endorsed, or execute and deliver to said Lessor a deed or deeds of trust of real property, all of such character as shall be satisfactory to said Lessor and valued in the aggregate at not less than the principal amount of said bond. It is agreed that the value at which any securities may be accepted and at any time thereafter held by the Lessor under the foregoing proviso shall be determined by the Lessor, and that the Lessee may, with the approval of the Lessor, exchange other securities or money for any of the deposited securities if in the judgment of the Lessor the substitute securities or money shall be at least equal in value to those withdrawn. It is further agreed that substitution of sureties or the substitution of a deposit of security for the obligation of a surety or sureties may be made by the Lessee, but only upon the written consent of the Lessor and that until such consent be granted, which shall be discretionary with the Lessor, no surety shall be released or relieved from any obligation hereunder.

29. Waiver, modification, reimposition of bond provision. Upon substantial compliance by the Lessee of the terms, covenants, and conditions herein contained on its part to be observed or performed, the Lessor at its discretion may waive or suspend the performance bond and/or improvement bond requirements or modify the same by reducing the amount thereof; provided, however, that the Lessor reserves the right to reactivate or reimpose said bond and/or bonds in and to their original tenor and form at any time throughout the term of this lease.

30. Quiet enjoyment. The Lessor hereby covenants and agrees with the Lessee that upon payment of said rent at the times and in the manner aforesaid and the observance and performance of the covenants, terms and conditions hereof on the part of the Lessee to be observed and performed, the Lessee shall and may have, hold, possess and enjoy the demised premises for the term hereby demised, without hindrance or interruption by the Lessor or any other person or persons lawfully claiming by, through or under it.

31. Surrender. That the Lessee shall, at the end of said term or other sooner termination of this lease, peaceably deliver unto the Lessor possession of the demised premises, together with all improvements existing or constructed thereon unless provided otherwise.

32. Non-warranty. The Lessor does not warrant the conditions of the leased premises, as the same is being leased as is.

33. Incorporation by reference. References to various parcels of land herein are in accordance with those designated in the Notice of Sale and the Conduct of Sale which, together with the Special Notice to Bidders are incorporated herein and made a part hereof. The terms of this lease shall govern where there is any inconsistency between the terms thereof and the terms contained in the Special Notice to Bidders.

34. Improvements. That the Lessee shall, at its own cost and expense, within two (2) years after the date of sale, complete the construction of a restaurant building of masonry or new materials, together with all necessary paving of parking areas, at a cost of not less than SIX HUNDRED THOUSAND DOLLARS (\$ 600,000.00), in accordance with such plans and specifications submitted by the Lessee to and approved by the Chairman of the Board of Land and Natural Resources and in full compliance with all laws, ordinances, rules and regulations applicable thereto. All final construction drawings and corresponding specifications shall be submitted, in triplicate, for review and approval prior to the start of construction. No quonset hut or similar type structure shall be permitted upon the leased premises.

35. Bond, improvement. That the Lessee shall, within thirty (30) days after the date of receipt of this lease document, procure and deposit with the Lessor a surety bond in the amount of ONE HUNDRED FIFTY THOUSAND DOLLARS (\$ 150,000.00), acceptable to the Chairman, which bond shall name the State as obligee, conditioned upon the faithful observance and performance of the said building requirement contained herein, the completion of such building and improvements on or before the specified date of completion free from all liens and claims and that the Lessee shall save and hold the State harmless from all liens, suits, actions or damages arising out of, caused from or attributable to such work performed pursuant to said building requirement.

36. Insurance. That the Lessee will, at its own expense, at all times during the term of this lease, keep insured all buildings and improvements erected on the land hereby demised in the joint names of Lessor, Lessee and Mortgagee, if any, as their interest may appear, against loss or damage by fire including perils specified in the extended coverage endorsement and in an amount equal to the maximum insurable value thereof, and will pay the premiums thereon at the time and place the same are payable; that the policy or policies of insurance shall be made payable in case of loss to the Lessor, Lessee and Mortgagee, if any, as their interests may appear, and shall be deposited with the Mortgagee; and that any proceeds derived therefrom in the event of total or partial loss shall be immediately available to, and as soon as reasonably possible, be used by the Lessee for rebuilding, repairing, or otherwise reinstating the same buildings in a good and substantial manner according to the plans and specifications approved in writing by the Board; provided, however, that with the approval of the Lessor, the Lessee may surrender this lease and pay the balance owing on any mortgage and the Lessee shall then receive that portion of said proceeds which the unexpired term of this lease at the time of said loss or damage bears to the whole of said term, the Lessor to retain the balance of said proceeds.

The Lessee shall furnish to the Lessor and Mortgagee, if any, with a certificate showing such policy or policies to be initially in force and shall furnish a like certificate upon each renewal of such policy or policies, each such certificate to contain or be accompanied by an assurance of the insurer to notify the Lessor and Mortgagee, if any, of any intention to cancel any such policy or policies, prior to actual cancellation.

37. Withdrawal. The Lessor shall have the right to withdraw the demised land, or any portion thereof, at any time during the term of this lease upon the giving of reasonable notice by the Board and without compensation, except as provided herein, for public uses or purposes, including residential, commercial, industrial or resort developments, for constructing new roads or extensions, or changes in line or grade of existing roads, for rights of way and easements of all kinds, and shall be subject to the right of the Board to remove soil, rock or gravel as may be necessary for the construction of roads and rights of way within or without the demised premises; provided, that upon such withdrawal, or upon such taking which causes any portion of the land originally demised to become unusable for the specific use or uses for which it was demised, the rent shall be reduced in proportion to the value of the land withdrawn or made unusable, and if any permanent improvement constructed upon the land by the Lessee is destroyed or made unusable in the process of such withdrawal or taking, the proportionate value thereof shall be paid based upon the unexpired term of the lease; provided, further, that no such withdrawal or taking shall be had as to those portions of the land which are then under cultivation with crops until the crops are harvested, unless the Board pays to the Lessee the value of such crops.

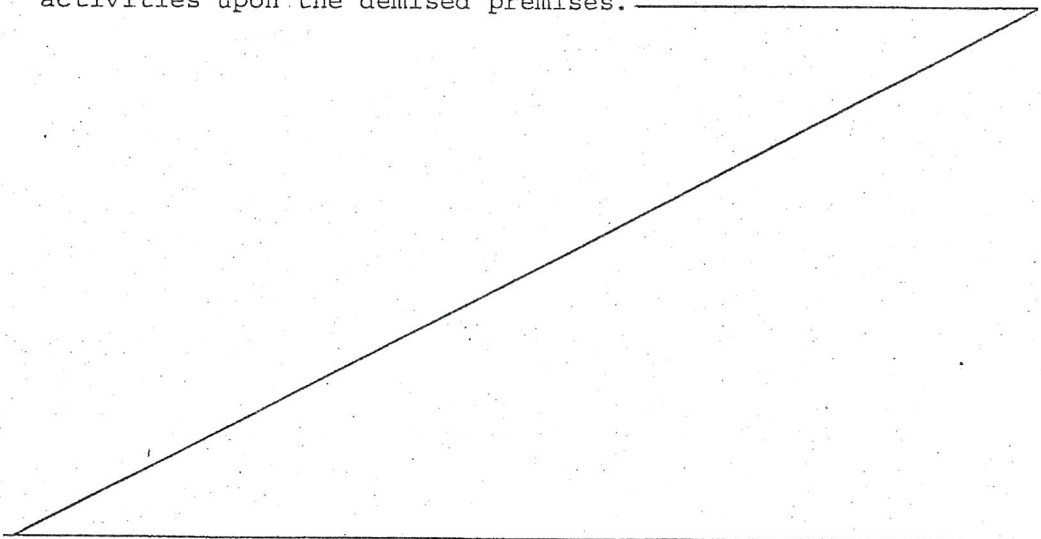
38. Landscaping. The Lessee shall at its own expense, landscape and maintain the leased premises to the satisfaction of the Lessor.

39. Setback requirements. All building setback lines and parking requirements shall be in accordance with and conform to the County of Hawaii minimum standards.

40. County of Hawaii standards; compliance.
The Lessee shall be responsible for complying with County of Hawaii ordinances and building requirements including, but not limited to, building setback lines, parking requirements, subdivision requirements, and special management area (SMA) permit requirements.

41. Maintenance agreement. The Lessee is responsible for maintaining the adjacent lot known as "Happiness Gardens" as set forth in the "Maintenance Agreement" between State Parks and Lessee, a copy of which is attached hereto as an Addendum and incorporated herein by reference.

42. Financial audit. The Lessor reserves the right, at any time, to inspect or to audit, at Lessee's expense, Lessee's financial records regarding the restaurant activities upon the demised premises.



Definitions.

As used herein, unless clearly repugnant to the context:

(a) "Chairman" shall mean the Chairman of the Board of Land and Natural Resources of the State of Hawaii or his successor;

(b) "Lessee" shall mean and include the Lessee herein, its heirs, executors, administrators, successors or permitted assigns, according to the context hereof;

(c) "Holder of a record of a security interest" is a person who is the owner or possessor of a security interest in the land demised and who has filed with the Department of Land and Natural Resources and with the Bureau of Conveyances of the State of Hawaii a copy of such interest;

(d) "Premises" shall be deemed to include the land hereby demised and all buildings and improvements now or hereinafter constructed and installed thereon;

(e) The use of any gender shall include all genders, and if there be more than one lessee, then all words used in the singular shall extend to and include the plural;

(f) The paragraph headings throughout this lease are for the convenience of the Lessor and the Lessee and are not intended to construe the intent or meaning of any of the provisions thereof.

(g) "Waste" shall be deemed to include, but not limited to, (1) permitting the premises or any portion thereof to become unduly eroded and/or failure to take proper precautions or make reasonable effort to prevent or correct same; (2) permitting any material increase in noxious weeds in uncultivated portions thereof and (3) failure to employ all of the usable portions of the demised premises.

IN WITNESS WHEREOF, the parties hereto have caused
these presents to be executed this 28th day of May,
1982.

STATE OF HAWAII

By S. Ono
Chairman and Member
Board of Land and
Natural Resources

APPROVED BY THE BOARD OF
LAND AND NATURAL RESOURCES
AT ITS MEETING HELD ON

June 12, 1981

By R. Higashi
Member
Board of Land and
Natural Resources

LESSOR

HILO TRADING COMPANY, LTD.,
a Hawaii corporation.

By X Shizuo Ueda
Its PRESIDENT

By Hisasho Ueda
Its VICE PRESIDENT LESSEE

APPROVED AS TO FORM:

Donna L. Huale
Deputy Attorney General

Dated: 4/13/82

STATE OF HAWAII

COUNTY OF

)
) SS
)

On this _____ day of _____, 19____,
before me personally appeared _____
and _____ to me known to be
the person(s) described in and who executed the foregoing
instrument and acknowledged that _____ executed the same
as _____ free act and deed.

Notary Public, State of Hawaii

My commission expires: _____

STATE OF HAWAII

COUNTY OF HAWAII

)
) SS
)

On this 23rd day of April, 1982,
before me appeared Hisashi Ueda

and _____, to me personally
known, who, being by me duly sworn, did say that ^{he is} ~~they are~~ the
Vice President and _____

_____, respectively, of HILO TRADING COMPANY,
LTD., a Hawaii corporation, and that the seal affixed to

the foregoing instrument is the corporate seal of said cor-
poration, and that said instrument was signed and sealed on
behalf of said corporation by authority of its Board of
Directors, and the said Hisashi Ueda and

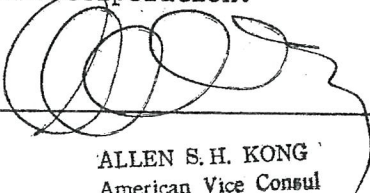
_____ acknowledged that they executed
said instrument as the free act and deed of said corporation.

Ray T. Nakamura
Notary Public, State of Hawaii

My commission expires: 10/14/84

JAPAN
PREFECTURE OF HYOGO
CITY OF KOBE
CONSULATE GENERAL OF THE
UNITED STATES OF AMERICA

On this 30th day of April, 1982, before me personally appeared SHIZUO UEDA, to me personally known, who, being by me duly sworn, did say that he is the President of HILO TRADING CO., LTD., a Hawaii corporation; and that the seal affixed to the instrument is the corporate seal of said corporation, and that the instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said SHIZUO UEDA acknowledged the instrument to be the free act and deed of said corporation.



ALLEN S. H. KONG
American Vice Consul



STATE OF HAWAII

SURVEY DIVISION

DEPT. OF ACCOUNTING AND GENERAL SERVICES

HONOLULU

C.S.F. No. 19,476

January 27, 1982

PORTION OF

GOVERNMENT (CROWN) LAND OF WAIAKEA

Waiakea, South Hilo, Island of Hawaii, Hawaii

Comprising the following:

1. Portion of Lot 3, Lots 4 to 7, inclusive and 6-foot lane of Wailoa Lease Lots.
2. Portion of Wailoa Drive conveyed to the State of Hawaii by Hawaii Redevelopment Agency by deed dated December 9, 1969 and recorded in Liber 6873, Page 72 (Land Office Deed S-25291).
3. Portion of Government Remnant.

Beginning at the southeast corner of this parcel of land and on the west side of Lihiwai Street, the coordinates of said point of beginning referred to Government Survey Triangulation Station "HALAI" being 2923.17 feet North and 9085.99 feet East, thence running by azimuths measured clockwise from True South:-

1. 111° 34' 18.89 feet along Park Site, Governor's Executive Order 2886;
2. 88° 16' 192.93 feet along Park Site, Governor's Executive Order 2886;

Thence along highwater mark at seashore for the next two (2) courses, the direct azimuths and distances between said points on highwater mark at seashore being:

3. 149° 36' 48" 83.11 feet;
4. 149° 43' 3.88 feet;
5. 284° 36' 45.51 feet along Lot 8 of Wailoa Lease Lots;
6. 257° 07' 25.10 feet along Lot 8 of Wailoa Lease Lots;
7. 183° 16' 167.58 feet along Lot 8 of Wailoa Lease Lots;
8. 270° 00' 146.34 feet along the south side of Roadway;

January 27, 1982

9. Thence along the southwest side of the intersection of Roadway and Lihiwai Street on a curve to the right with a radius of 30.00 feet, the chord azimuth and distance being:
315° 00' 42.43 feet;
10. 360° 00' 207.58 feet along the west side of Lihiwai Street to the point of beginning and containing an AREA OF 1.01 ACRES, MORE OR LESS.

Subject, however, to an easement for storm drain purposes over and across the above-described parcel of land, as shown on plan attached hereto and made a part hereof and more particularly described as follows:

Being a strip of land fifteen (15.00) feet wide and extending seven and one-half (7.50) feet on each side of following-described centerline.

Beginning at the east end of this centerline and on the west side of Lihiwai Street, the true azimuth and distance from the point of beginning of the above-described parcel of land being: 180° 00' 8.06 feet, thence running by azimuths measured clockwise from True South:-

1. 111° 34' 17.47 feet;
2. 88° 16' 194.47 feet to the west end of this centerline and containing an AREA OF 3,179 SQUARE FEET, MORE OR LESS.

SURVEY DIVISION
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
STATE OF HAWAII

By: Raymond S. Nakamura
Raymond S. Nakamura
Land Surveyor

cv

Compiled from map by
Imata & Assoc., Inc.,
CSF 18,156 and Govt.
Survey Records.

MAINTENANCE AGREEMENT

THIS AGREEMENT, entered into this 28th day of May, 1982, between the STATE OF HAWAII, by its Board of Land and Natural Resources for its Division of State Parks, Outdoor Recreation Resources for its Division of State Parks, Outdoor Recreation and Historic Sites, hereinafter referred to as "STATE PARKS," and HILO TRADING COMPANY, LTD., a Hawaii corporation, whose mailing and business address is 500 Ka'anini Circle, Hilo, Hawaii 96720, hereinafter referred to as the "LESSEE";

WITNESSETH THAT:

WHEREAS, by General Lease No. S-4786, dated May 28, 1982, the STATE OF HAWAII as "LESSOR" did demise and lease unto HILO TRADING COMPANY, LTD., hereinafter called the "LESSEE," that certain parcel of land at Waiakea, South Hilo, Island and State of Hawaii, (a portion of Tax Map Key 2-1-03:8), described in said General Lease for the term and use provided therein;

WHEREAS, pursuant to the Conduct of Sale governing the public auction sale of said lease, a requirement was made that the successful bidder would enter into a maintenance agreement with State Parks covering the adjoining land area known as "Happiness Garden"; and

WHEREAS, it is the intent of the parties that maintenance of that parcel of land known as the "Happiness Gardens" be assumed by the Lessee of General Lease No. S-4786; and

WHEREAS, it is the intent of the parties that this Maintenance Agreement of the "Happiness Gardens" shall not in any manner alter the general public's free use of the land and

"ADDENDUM"

the facilities located thereon. Furthermore, this Agreement shall not grant any form of exclusive use to the Lessee either in the land or any facility located thereon.

NOW, THEREFORE, in consideration of the terms, covenants and conditions contained in General Lease No. S-4786, the Lessee for itself, its successors and assigns, does hereby agree with the Lessor as follows:

PART A - GENERAL

1. Liability Insurance. The Lessee shall procure, at its own cost and expense, and maintain during the entire period of this agreement, a policy or policies of comprehensive public liability insurance, in an amount acceptable to the Chairman of the Board, insuring the Board and Lessee against all claims for personal injury, death and property damage; that said policy or policies shall cover the entire premises; including all buildings, improvements and grounds and all roadways or sidewalks on or adjacent to the premises being maintained by the Lessee. The Lessee shall furnish the Board with a certificate showing such policy to be initially in force and shall furnish a like certificate upon each renewal of such policy, each certificate to contain or be accompanied by an assurance of the insurer to notify the Board of any intention to cancel any such policy prior to actual cancellation. The procuring of this policy shall not release or relieve the Lessee of its responsibility under this agreement as set forth herein or limit the amount of its liability under this agreement. The notice to cancel shall be sent to the Board sixty (60) days prior to the date of cancellation.

2. Inspection. An annual inspection of the premises shall be conducted by representatives of State

Parks in company with representatives of the Lessee. The purpose of these inspections will be to identify specific maintenance items which require special attention of either State Parks or the Lessee.

3. Term of Agreement. This agreement shall remain in effect for the full term of General Lease No. S-4786, unless sooner terminated by the Board.

4. Non-Modification of General Lease. That except as modified by the amendments and additions as set forth in this document, all other terms, covenants and conditions as set forth in said General Lease No. S-4786 shall continue in full force and effect and that nothing herein contained shall serve to release or discharge the Lessee from the observance and performance of all of the terms, covenants and conditions.

PART B - GROUNDS

5. Routine policing of the premises will be performed so as to present a clean and neat appearance.

6. The Lessee shall daily remove all garbage, debris, and other waste material arising out of or connected to the park. Garbage and trash cans shall be cleaned and disinfected on a routine basis.

7. Planted lawns by Lessee shall be well trimmed, free of debris, and neat in appearance.

8. The Lessee shall maintain and repair outside lighting.

9. The Lessee shall provide, maintain and repair water hoses, sprinklers, etc., used for grounds maintenance.

10. New plantings or ornamental plants and shrubs must be approved by the District Park Superintendent prior to planting.

11. Removal of natural vegetation must be approved by the District Park Superintendent.

12. The Lessee is responsible for operation signs throughout the premises including their procurement, placement and maintenance. All signs must be compatible with State Parks standards. Signs and styles shall be approved by the District Park Superintendent when a specific standard does not exist.

13. Hazardous tree or limb removal is the responsibility of the Lessee.

14. The Lessee is responsible for the maintenance of roads and parking lots. The Lessee is responsible for the routine policing within these areas so as to present a clean and neat appearance.

PART C - BUILDINGS

15. All interior paintings is to be done by the Lessee on not less than a three-year cycle or as needed. Exceptions to the three-year cycle will be made only by the District Park Superintendent.

16. Repair and upkeep of interior wood trim around doors and windows will be accomplished as needed by the Lessee.

17. Repair and replacement of plumbing, plumbing fixtures, electrical wiring and electrical fixtures as needed in the routine operation of the park will be responsibilities of the Lessee. The replacement of these items as part of a general modernization or upgrading will be a capital expenditure and therefore a responsibility of State Parks.

18. Lessee shall inspect at least monthly and make immediate repairs or replacement to light bulbs, florescent tubes, etc., and to plumbing fixtures, and to take immediate

corrective action on items that are or could be potential safety hazards.

19. Lessee shall repair and maintain floors, floor coverings and walking surfaces within the buildings and attached porches.

20. Cyclic painting or staining of the exterior of all buildings will be performed at least every five years by the Lessee or more frequently when appropriate. The colors used will be approved by the District Park Superintendent.

21. Broken and cracked window glass shall be replaced promptly by the Lessee.

22. Leaky roofs shall be repaired by the Lessee and a reasonable effort made to control mosses and debris on roofs and in gutters to prevent water damage.

23. Foundations and underpinning shall be maintained by the Lessee to minimize costly rehabilitation.

24. Broken or rotted siding, window casings, porch decks and steps shall be repaired and maintained by the Lessee both for appearance and safety.

PART D - UTILITIES

25. Lessee will operate, maintain and repair the electrical and water distribution systems within the park. This will include changing faucets, washers and repairing leaks and stoppages.

26. The Lessee will pay the regular charges for electrical and water service.

PART E - BREACH OF AGREEMENT

Any breach or failure to perform or observe any of the provisions or conditions contained herein may at the option of the State of Hawaii be deemed as a breach of General Lease

No. S-4786 and may at the option of the State of Hawaii result in the cancellation of General Lease No. S-4786.

IN WITNESS WHEREOF, the STATE OF HAWAII, by its Board of Land and Natural Resources, has caused the seal of the Department of Land and Natural Resources to be hereunto affixed and these presents duly executed effective the day and year first above written, and HILO TRADING COMPANY, LTD., the Lessee under General Lease No. S-4786 dated May 28, 1981, has caused these presents to be duly executed effective the day and year first above written.

STATE OF HAWAII

APPROVED BY THE BOARD OF
LAND AND NATURAL RESOURCES
AT ITS MEETING HELD ON

June 12, 1981

By S. Ono
Chairman and Member
Board of Land and
Natural Resources

And By R. Higashi
Member, Board of Land
and Natural Resources

HILO TRADING COMPANY, LTD.

By X Shizuo Ueda
Its PRESIDENT

By Hisashi Ueda
Its VICE PRESIDENT

APPROVED AS TO FORM:

Dona L. Kamae
Deputy Attorney General

STATE OF HAWAII

)
) SS
)

COUNTY OF

On this _____ day of _____, 19____,
before me personally appeared _____
and _____ to me known to be
the person(s) described in and who executed the foregoing
instrument and acknowledged that _____ executed the same
as _____ free act and deed.

Notary Public, State of Hawaii

My commission expires: _____

STATE OF HAWAII

)
) SS
)

COUNTY OF HAWAII

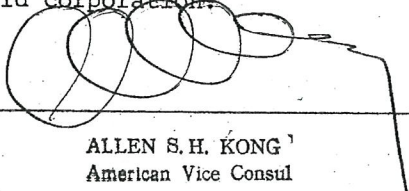
On this 23rd day of April, 1982,
before me appeared Hisashi Ueda
and _____, to me personally
known, who, being by me duly sworn, did say that ^{he is} ~~they are~~ the
Vice President and _____
_____, respectively, of HILO TRADING COMPANY,
LTD., a Hawaii corporation, and that the seal affixed to
the foregoing instrument is the corporate seal of said cor-
poration, and that said instrument was signed and sealed on
behalf of said corporation by authority of its Board of
Directors, and the said Hisashi Ueda and
_____ acknowledged that they executed
said instrument as the free act and deed of said corporation.

[Signature]
Notary Public, State of Hawaii

My commission expires: 10/14/84

JAPAN
PREFECTURE OF HYOGO
CITY OF KOBE
CONSULATE GENERAL OF THE
UNITED STATES OF AMERICA

At the 30th day of April, 1982, before me
personally appeared SHIZUO UEDA, to me personally known, who,
being duly sworn, did say that he is the President of
HILO RAD CO., LTD., a Hawaii corporation; and that the
seal affixed to the instrument is the corporate seal of said
corporation and that the instrument was signed and sealed
in behalf of said corporation by authority of its Board of
Directors and said SHIZUO UEDA acknowledged the instrument
to be the free act and deed of said corporation.



ALLEN S.H. KONG
American Vice Consul

EXHIBIT 3

BENJAMIN J. CAYETANO
GOVERNOR OF HAWAII



APR 15 8 21 AM '97
STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
DIVISION OF LAND MANAGEMENT
P.O. BOX 936
HILO, HAWAII 96721-0936

AQUACULTURE DEVELOPMENT
PROGRAM
AQUATIC RESOURCES
CONSERVATION AND
ENVIRONMENTAL AFFAIRS
CONSERVATION AND
RESOURCES ENFORCEMENT
CONVEYANCES
FORESTRY AND WILDLIFE
LAND MANAGEMENT
STATE PARKS
WATER AND LAND DEVELOPMENT

April 10, 1997

Hilo Trading Co., Ltd.
123 Lihiwai Street
Hilo, Hawaii 96721

SUBJECT: Implementation of a Special Installment Agreement Account
for General Lease #S-4786 issued to Hilo Trading Co.,
Ltd.

Attention: Steven Hironaka
General Manager

Gentlemen:

Thank you for your letters of January 30, 1996, June 4, 1996,
and August 15, 1996, requesting reasonable consideration for an
installment payment plan to cure outstanding percentage rent amount
from March 28, 1982 to May 31, 1996. This letter replaces our
February 26, 1996 letter which was to cover \$187,942.69.

We are aware of the very fragile local economy in Hilo. Your
concerns for your staff and the continuance of the restaurant
operation is well noted. The Governor, along with the Legislature
and our Department have been searching for alternative businesses
to help replace the sugar plantations. Progress is slow, but very
encouraging.

Presently, the interest rate the Department offers on an
installment plan is 10% per annum. Hilo Trading Co., Ltd. is
asking the Department for favorable consideration of a lower
interest rate of 5%. The following terms and conditions are
proposed.

- 1) The total amount due is \$271,846.21
- 2) Payments are to be rendered in monthly installments, totalling
three hundred sixty (360) payment periods.
- 3) The first payment is due on May 1, 1997 for the amount of one
thousand four hundred fifty-three dollars and twenty-seven

4.17.97: XC + HNL

EXHIBIT "3" *MAC*

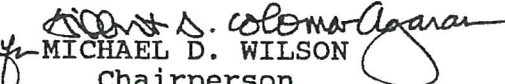
cents (\$1,453.27). Thereafter, monthly payments of one thousand four hundred fifty-three dollars and twenty-seven cents (\$1,453.27) including interest will be made until the balance is paid in full.

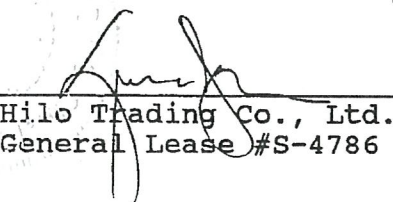
- 4) Interest at five percent (5%) per annum was used in amortizing this debt.
- 5) A delinquent installment payment will be assessed a one percent (1%) late payment charge for each month the installment is delinquent.
- 6) Interest will start accruing May 1, 1997.
- 7) Prepayments maybe made without penalty.
- 8) The Lessee shall keep current the regular ^{quarterly} ~~semi-annual~~ rental payments of four thousand dollars (\$4,000.00).
- 9) If you fail to make timely payments as agreed, Land Division will have no alternative but to default General Lease #S-4786 and refer the matter of collecting all monies due to the State to the Department of Attorney General or the collection agency contracted by the Department for appropriate action.
- 10) Our Fiscal Office shall bill you monthly under the above terms and conditions.

If you agree with the proposed schedule, please respond by April 15, 1997. If we do not hear from you by then, we will assume that you are no longer interested in our Special Installment Payment Agreement and will be forwarding the full percentage rental amount of \$271,846.21 to our office.

Should you have any questions, please contact Charlene Unoki at my Hawaii District office at 974-6203.

Very truly yours,


MICHAEL D. WILSON
Chairperson


Hilo Trading Co., Ltd.
General Lease #S-4786

4/14/97
Date

cc: Hawaii BM
Support Services
Fiscal Office
Attorney General's Office

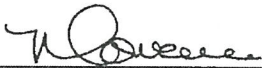
STATE OF HAWAII

COUNTY OF HAWAII

)
) SS.
)

On this 14 day of APRIL, 19 97,
before me appeared ~~Step~~^{he} Steven Hironaka

to me known to be the person____ described in and who executed the
foregoing instrument and acknowledged that he executed the
same as his free act and deed.


Notary Public, State of Hawaii

My Commission expires: 12-9-97

EXHIBIT 4

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

May 24, 2013

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

Ref. No. GL S-4786

Hawaii

Consent to 100% Stock Transfer in Hilo Trading Co. Ltd., Lessee under General Lease No. S-4786, from Steven I. Hironaka, Karen R. M. Hironaka and Roy T. Kaneko, Transferor, to Kimberly Snuggerud, Transferee, and Consent to Mortgage, Hilo Trading Co., Ltd. Mortgagor and First Hawaiian Bank, Mortgagee, Waiakea, South Hilo, Hawaii, Tax Map Key: 3rd/2-1-03:08.

APPLICANT AND REQUEST:

Steven I. Hironaka, Karen R. M. Hironaka and Roy T. Kaneko, as Transferor, to Kimberly Snuggerud, whose mailing address is Hilo, Hawaii 96720, as Transferee.

Hilo Trading Co., Ltd., requesting consent to mortgage from First Hawaiian Bank, Mortgagee, in an amount not to exceed \$500,000.

LEGAL REFERENCE:

Section 171-36(a)(5) and 171-22, Hawaii Revised Statutes, as amended.

LOCATION:

Portion of Government lands of Waiakea situated at Waiakea, South Hilo, Hawaii, identified by Tax Map Key: 3rd/2-1-03:08, as shown on the attached map labeled Exhibit A.

AREA:

.970 acres more or less.

APPROVED BY THE BOARD OF
LAND AND NATURAL RESOURCES
AT ITS MEETING HELD ON
May 24, 2013 *UP.*

D-6

EXHIBIT "4"

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:

Restaurant purposes.

TERM OF LEASE:

55 years, commencing on 3/23/1982 and expiring on 3/22/2037. Last rental reopening occurred on 3/23/2002; next rental reopening is scheduled for 3/23/2017.

ANNUAL RENTAL:

\$20,580.00 due in quarterly payments.

CONSIDERATION:

\$850,000.00.

RECOMMENDED PREMIUM:

\$ 0 (Refer to Exhibit B attached.)

DCCA VERIFICATION:

HILO TRADING CO. LTD.:

Place of business registration confirmed:	YES <u>X</u>	NO
Registered business name confirmed:	YES <u>X</u>	NO
Good standing confirmed:	YES <u>X</u>	NO

USE OF LOAN PROCEEDS:

Proceeds from loan will be used to complete extensive renovations to the existing restaurant on property. Lessee has submitted a preliminary floor plan laying out the redesign of the restaurant and kitchen. A more detailed set of plans will be submitted for chairperson approval in the coming weeks.

REMARKS:

General Lease No. S-4786 was sold at public auction on 3/23/1982 at the upset price of \$16,000.00 per annum to Hilo Trading Co., Ltd. for restaurant purposes. The lease encumbered 1.01 acres, more or less for a period of 55 years. The restaurant was constructed in 1983 and is currently doing business as Nihon Restaurant and Cultural Center.

On 4/14/1997, the Lessee entered into a Special Installment Agreement (SIA) for retroactive additional rent owed in the amount of \$271,846.21 resulting from the non-filing of financial statements as required in the lease agreement. This SIA is currently in effect and the Lessee is current with the payments.

Language in the original lease required the Lessee to maintain a portion of State property along the coastline as a park area known as Happiness Gardens. At its meeting of August 11, 2000 under agenda item D-13, the Board consented to the withdrawal of the area being maintained and incorporate it as an addition to the adjacent County of Hawaii Liliuokalani Gardens Park. The lease was amended to reflect the deletion of the maintenance agreement.

A special meeting of the Board of Directors and Shareholders of Hilo Trading Co., Ltd. was held on October 31, 2012 at which time the directors and shareholders authorized the sale of all outstanding shares of the company to Transferee, Kimberly Snuggerud.

The Department of Liquor Control for the County of Hawaii has approved the transferee's request to transfer the 100% stock interest in Hilo Trading Co., Ltd. Transferee advises staff that she has experience in the food and beverage industry as owner/manager of the Hilo Bay Café, an established restaurant in the Hilo area. Staff inspected the lease property on January 2, 2013 and found the premises to be in compliance with the terms and conditions of the lease. The property is well kept and orderly.

The Transferee has not had a lease, permit, easement or other disposition of State lands terminated within the last five years due to non-compliance with such terms and conditions.

The last rental reopening was on 3/23/2002. The next rental reopening is scheduled for 3/23/2017. An appraisal of the property was performed on 3/31/2002. A new rental fee of \$20,580.00 was offered and accepted by Hilo Trading Co., Ltd. There are no outstanding rental issues at this time.

RECOMMENDATION: That the Board:

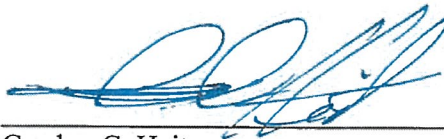
- A. Consent to the transfer of 100% of the issued and outstanding stock of Hilo Trading Co. Ltd. from Transferors Steven I. Hironaka, Karen R. M. Hironaka and Roy T. Kaneko, to Transferee Kimberly Snuggerud with respect to General Lease No. S-4786, subject to the following:

1. The standard terms and conditions of the most current consent to assignment form, as may be modified to reflect the Land Board's consent to the stock transfer;
2. Review and approval by the Department of the Attorney General; and
3. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

B. Consent to the mortgage between Hilo Trading Co., Ltd., Mortgagor, and First Hawaiian Bank, Mortgagee, subject to the following:

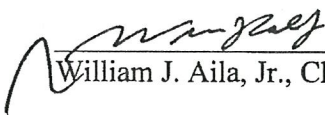
1. The loan proceeds shall be used for the purposes as stated in "Use of Loan Proceeds" above. The Lessee shall maintain records of loan expenditures which may be inspected by the Department;
2. The standard terms and conditions of the most current consent to mortgage form, as may be amended from time to time;
3. Review and approval by the Department of the Attorney General; and
4. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

Respectfully Submitted,



Gordon C. Heit
District Land Agent

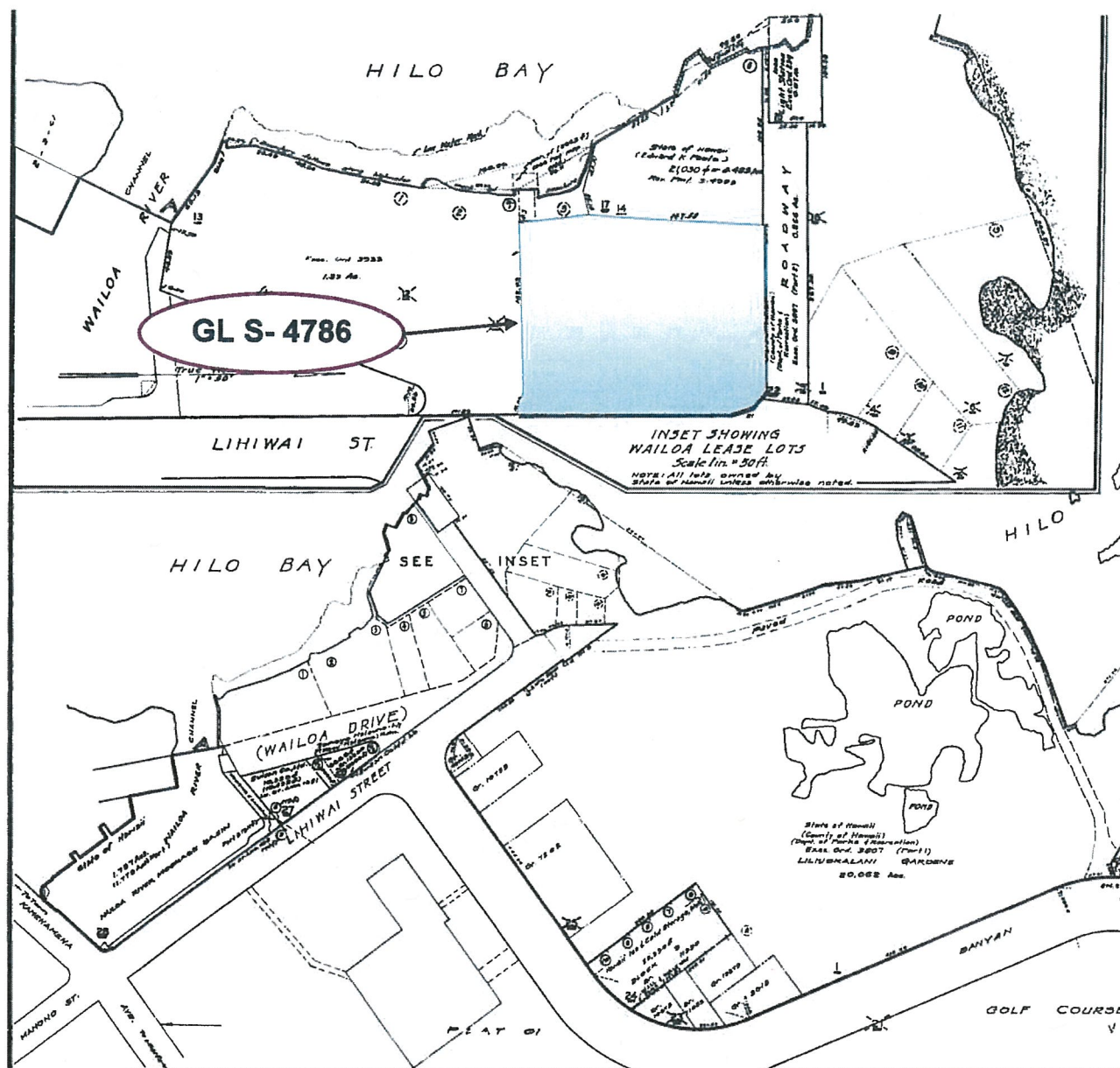
APPROVED FOR SUBMITTAL:



William J. Aila, Jr., Chairperson

EXHIBIT A

TMK: 3rd/2-1-03:08



GL S-4786



0 50 100 200 300 400
Feet





STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
LAND DIVISION

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

May 6, 2013

MEMORANDUM

TO: William J. Aila, Jr., Chairperson

THROUGH: Russell Y. Tsuji, Division Administrator

FROM: Gordon C. Heit, District Land Agent

SUBJECT: In-House Recommendation – Assignment of Lease Calculation

GL No.: S-4786

Lessee/Transferor: Hilo Trading Co., Ltd.

Transferee: Kim Snuggerud (100% stock purchase)

Location: Waiakea, South Hilo, Hawaii

Land Area: .970 acres more or less

Tax Map Key: 3rd/2-1-03:08

Char. of Use: Restaurant and Cultural Center purposes

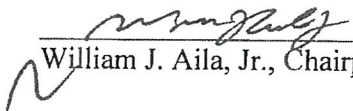
We have been requested to provide an in-house evaluation of the assignment premium due to the State for an assignment of GL S-4786 resulting from the transfer of 100% stock interest in Hilo Trading Co., Ltd., Lessee. The lease documents and information provided by lessee were analyzed and staff applied the formula approved by the Land Board on December 15, 1989, agenda item F-10, comprising of the Assignment of Lease Evaluation Policy.

Net consideration		\$263,080
Actual improvement cost	\$663,400	
Adjusted improvement cost	\$801,640	
Trade fixture cost	\$0	
Total improvement and trade fixture cost	\$801,640	
Less depreciation	<u>(\$456,935)</u>	
Depreciated value of improvements & fixtures	\$344,705	
Less adjusted improvement cost (inc. trade fixtures)		<u>(\$344,705)</u>
Excess		(\$81,625)
Premium % (31-35 years elapsed)		<u>20%</u>
Premium		(\$16,325)

EXHIBIT B

Based on these calculations resulting in a negative premium calculation, the premium due the State is \$0.

Approved/Disapproved:



William J. Aila, Jr., Chairperson

5/20/13
Date

cc: District Branch Files
Central Files

Table 1

Assignment of Lease Premium Calculation
GL S-4786: Hilo Trading Co., Ltd.

Net Consideration	\$263,080	
Improvement Cost	\$ 663,400	Value as of January 1, 2013
CCI (most recent)	210.5	2013
CCI (base year)	174.2	1983
Expired Term	373	mos.
Whole Term	660	mos.

1 Adjusted Cost of Improvements or Renovations

$$\text{Actual Cost} \times \frac{\text{CCI (most recent)}}{\text{CCI (base year)}}$$

$$\$663,400 \times \frac{210.5}{174.2} = \$801,640$$

2 Depreciation

$$\$801,640 \times \frac{373 \text{ mos.}}{660 \text{ mos.}} = \$456,935$$

3 Adjusted Depreciated Cost of Improvements or Renovations

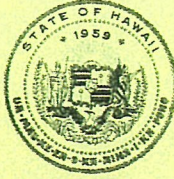
$$\$801,640 - \$456,935 = \$344,705$$

4 Premium Calculation

Net Consideration		\$	263,080
Adjusted Cost of Imp.	\$801,640		
Depreciation	(\$456,935)		
Adjusted Deprec. Cost of Imp.			<u>\$344,705</u>
Excess		\$	(81,625)
Premium Percentage	x		<u>20%</u>
Premium			<u>(\$16,325)</u>

EXHIBIT 5

DAVID Y. IGE
GOVERNOR OF HAWAII



SUZANNE D. CASE
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE
MANAGEMENT

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
LAND DIVISION

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

August 28, 2017

Certified Mail

Article No. 7016 2070 0000 4949 5235

Hilo Trading Co., Ltd.,
dba Hilo Bay Café
Attention: Ms. Kimberly Snuggerud
123 Lihiwai Street
Hilo, Hawaii 96720

Subject: **REOPENING OFFER LETTER**

Ground Rent for General Lease No. S-4786 located at Waiakea, South Hilo,
Island of Hawaii; TMK: (3) 2-1-003:008

Dear Ms. Snuggerud:

General Lease No. S-4786 states the annual rent shall be re-determined for the ten-year period from March 23, 2017 to March 22, 2027 by an appraiser whose services have been contracted for by the Lessor. We followed the procurement process spelled out in the enclosed Acquisition of Real Estate Appraisal Services and received an independent appraisal report (copy enclosed) which states the fair market annual base rent for this period should be \$43,758 per annum. In addition, we remind you that paragraph D [Additional Rent] remains applicable to this public auctioned lease, and therefore you will need submit a financial report (and any additional rent that may be due) to our Hawaii District Land Office on an annual basis.

Please indicate your acceptance or rejection by completing the following and returning a signed copy to this office. If you are rejecting our rent determination, you must hire your own appraiser and provide us with his/her name and contact information with your rejection notification. Please note that you must hire an appraiser that is licensed in the State of Hawaii as a Certified General Appraiser (CGA).

If we do not hear from you within 30 days of receipt of this offer, we will assume you accept the rent and will instruct our Fiscal Office as such.

Very truly yours,

A handwritten signature in black ink, appearing to be "R. Tsuji", is located below the "Very truly yours," text.

RUSSELL Y. TSUJI
Land Division Administrator

EXHIBIT "5"

EXHIBIT 6

September 18, 2017

Hilo Bay Cafe
123 Lihikai Street
Hilo, HI 96720

Mr. Russell Tsuji
State of Hawaii
Department of Land and Natural Resources
P.O. Box 621
Honolulu, HI 96809

Subject: Reopening Offer Letter, Ground Rent for General Lease No. S-4786 located at Waiakea, South Hilo, Island of Hawaii, TMK (3) 2-1-003:008

Dear Mr. Tsuji,

Hilo Bay Cafe has received the State's Reopening Letter and accepts the new lease rent of \$43,758 per annum, but we reject reinstating Paragraph D. Additional Rent (page 3). We request that this be removed from the lease or, at a minimum, we ask that it be waived for the current reopening. Here is our reasoning and plea.

Paragraph D has a history. The original lessees of Lease No. S-4786 neglected to pay this expense, which created a debt to DLNR that is currently being paid by us, Hilo Trading Company, Ltd. DBA Hilo Bay Cafe. When we purchased Hilo Trading Company in October 2012, the debt resulting from Paragraph D was \$178,493. Currently, the debt is \$132,444, which is a reduction of over \$46,000, and about the same amount paid in interest, with every payment made on time.

The former owner of Hilo Trading Company was not required to pay the fees in Paragraph D. They were waived (see enclosed). The letter states that this requirement is "... not typical in today's market and should not be required during the 15 year period beginning March 23, 2002." As I understand it, these fees are still not typically collected on DLNR ground leases.

Also, if the former owner was not required to pay these fees, it doesn't seem equitable for us to pay them. As far as we observe, the current market remains very similar to 2002, the year we began planning Hilo Bay Cafe, which opened in 2003. The current business climate is reasonable – fair to good with growth in some areas and some segments booming – and with no signs of eminent recession or depression.

It also seems odd that we would be required to pay these funds and the former owner was not, especially considering the following comparisons between the prior ownership and current:

- We have made an \$850,000 investment in the building and our business at 123 Lihikai, partially at the request of DOH, and also because we agree improvements were sorely needed. The former owner made no investment. The building was a complete and utter mess when we took it over (see photos, enclosed). Our construction loan and start-up expenses were funded by First Hawaiian Bank and by my personal loan to the business from mortgaging my house. We also cleaned up and re-landscaped the grounds at our expense, investing dollars and sweat equity. My partner, Mike, several staff members, and I pulled out truckloads of false maille vine. Our investment in the property is substantial, and we need time to recoup.

EXHIBIT " 6 "

- Although our sales might warrant it, the current ownership does not take a high a wage out of the business, which is a business decision and an ethical choice. The prior owner took a higher wage, though his sales were lower. I firmly believe, we pay our employees, vendors, loans, taxes, and other expenses first, then ownership last.
- We have no vendor debt or credit card debt, which was not true of the prior ownership. Except for what is currently due, our debt is limited to our construction loan, DLNR loan, and my personal loan. In other words, we are fiscally responsible owners and this request is based on that truth.

If Paragraph D is required, then Hilo Bay Cafe will **quickly go out of business**. Profit margins in restaurants are very small, and Hilo Bay Cafe is no exception. We average less than 7 cents on every dollar that we bring in, and we anticipate that this margin to drop over the next several years due to the over \$23,000 annual increase from our DLNR ground rent and other rising costs, especially labor and benefit costs, and higher cost of goods

If the State requires us to pay 5 cents on food sales and 10 cents on liquor sales, which combined constitute the majority of our sales, then we will not be able to pay all of our operating expenses. Also, it is certain that we will not be able to pay any of the expenses that come out of the several cents we earn on each dollar, such as our taxes and business loans, nor will we be able to put any money in the bank for emergency expenditures, which, I hope you agree, every healthy business needs to be able to do.

From our point of view, it makes no sense for the State to drive Hilo Bay Cafe out of business. We hear so much about improvements needed in the Banyan Drive area and, by all measures and accounts, we have done our part on our small corner. We are excellent tenants and pay the State fees and taxes, not the least of which is over \$120,000 in GE tax annually. We also pay the fees and taxes of other regulating agencies – we pay them because they are required, but, honestly, we also pay them because it is our responsibility to help fund the work of our regulating agencies. We maintain 65 good jobs with competitive, if not higher, wages and benefits. We also pay all of our vendors, many of whom are local food vendors and service providers, and we pay them on time. We give back to the Big Island community regularly. In fact, two Sundays ago, a group of Hilo Bay Cafe employees, including Mike and I, spent the day picking up marine debris at Kamilo Beach. We are good folks, working hard, doing our best. Please don't drive us out of business.

One final note: It doesn't seem prudent for us to hire an appraiser to settle this matter, since we accept the new lease at \$43,758.

Thank you for your consideration. Thank you very much.

Sincerely,

A handwritten signature in blue ink, appearing to read 'K. Snuggerud', with a stylized, flowing script.

Kim Snuggerud
Owner, General Manager

DAVID Y. IGE
GOVERNOR OF HAWAII



SUZANNE D. CASE
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE
MANAGEMENT

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
LAND DIVISION

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

August 28, 2017

Certified Mail

Article No. 7016 2070 0000 4949 5235

Hilo Trading Co., Ltd.,
dba Hilo Bay Café
Attention: Ms. Kimberly Snuggerud
123 Lihikai Street
Hilo, Hawaii 96720

Subject: **REOPENING OFFER LETTER**

Ground Rent for General Lease No. S-4786 located at Waiakea, South Hilo,
Island of Hawaii; TMK: (3) 2-1-003:008

Dear Ms. Snuggerud:

General Lease No. S-4786 states the annual rent shall be re-determined for the ten-year period from March 23, 2017 to March 22, 2027 by an appraiser whose services have been contracted for by the Lessor. We followed the procurement process spelled out in the enclosed Acquisition of Real Estate Appraisal Services and received an independent appraisal report (copy enclosed) which states the fair market annual base rent for this period should be \$43,758 per annum. In addition, we remind you that paragraph D [Additional Rent] remains applicable to this public auctioned lease, and therefore you will need submit a financial report (and any additional rent that may be due) to our Hawaii District Land Office on an annual basis.

Please indicate your acceptance or rejection by completing the following and returning a signed copy to this office. If you are rejecting our rent determination, you must hire your own appraiser and provide us with his/her name and contact information with your rejection notification. Please note that you must hire an appraiser that is licensed in the State of Hawaii as a Certified General Appraiser (CGA).

If we do not hear from you within 30 days of receipt of this offer, we will assume you accept the rent and will instruct our Fiscal Office as such.

Very truly yours,

A handwritten signature in black ink, appearing to be "R. Y. Tsuji", is written over a horizontal line.

RUSSELL Y. TSUJI
Land Division Administrator

RECEIVED
LAND DIVISION
2017 SEP 25 AM 11:19
DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

Hilo Trading Co., Ltd.,
dba Hilo Bay Café
Attention: Ms. Kimberly Snuggerud
August 28, 2017
Page Two

The Undersigned:

✓

Accepts the new lease rent of \$43,758 per annum under General Lease No. S-4786 offered by the State of Hawaii Department of Land and Natural Resources.

✓

Rejects the new lease rent of \$43,758 per annum under General Lease No. S-4786 offered by the State of Hawaii Department of Land and Natural Resources and hereby appoints the following appraiser:

Please see letter enclosed

Appraiser's Name

Phone No.

Appraiser's Mailing Address

Appraiser's Email Address

Hilo Trading Co., Ltd.
dba Hilo Bay Cafe

By
Its:

K. Snuggerud

Lessee

9/20/2017

Date

Enclosures

cc: Land Board Member
District Branch
Central Files



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
LAND DIVISION
P.O. BOX 621
HONOLULU, HAWAII 96809

AQUACULTURE DEVELOPMENT
PROGRAM
AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
CONSERVATION AND
RESOURCES ENFORCEMENT
CONVEYANCES
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
LAND DIVISION
STATE PARKS
WATER RESOURCE MANAGEMENT

February 12, 2002

Certified Mail
Article No. _____

Hilo Trading Co., Ltd.
DBA Nihon Restaurant
123 Lihikai Street
Hilo, Hawaii 96720

Re: Ground rent for G.L. S-4786
TMK: (3) 2-1-03:08

Dear Lessee:

General Lease S-4786 states the annual rent must be re-determined for the 15 year period beginning March 23, 2002. We determined via an appraisal done by an independent appraiser, that the fair market rent for this period should be \$20,580 per year. In addition, the appraiser concluded that the additional rent described in Paragraph D of General Lease S-4786 is not typical in today's market and should not be required during the 15 year period beginning March 23, 2002. We concur with the appraiser's recommendations and recognize that future reopenings may include the additional rent.

Please indicate your acceptance or rejection by completing the following and return a signed copy to this office. Upon your acceptance, our Fiscal Office will notify you of any balance owing. Also, be advised that pursuant to the lease terms and conditions, you are responsible for providing a performance bond in an amount equal to two times the annual rent. You may contact Our Hawaii District Office at 974-6204 to discuss this requirement.

Please note that General Lease S-4786 states the following:

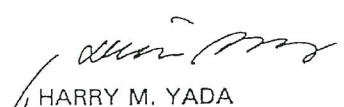
.. that should the Lessee fail to agree upon the fair market rental as determined by the Lessor's appraiser, the Lessee may appoint his own appraiser who shall prepare an independent appraisal report and the two appraisers shall then exchange their reports for review. The two appraisers shall make every effort to resolve whatever differences they may have. However, should differences still exist fourteen (14) days after the exchange, the two appraisers shall then appoint a third appraiser who shall also prepare

Page 2
Hilo Trading Co., Ltd.

an independent 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...

Please respond within 30 days of receipt of this offer. If you have any questions, call Benjamin Marx at 587-0384.

Very truly yours,


HARRY M. YADA
Acting Land Division Administrator

The Undersigned:

X

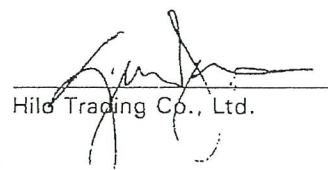
Accepts the new annual ground rent of \$\$20,580 per year for the 15 year period beginning March 23, 2002, and understands that the additional rent described in Paragraph D of General Lease S-4786 will not be required during this period. It is also understood that future reopenings may include the additional rent described in Paragraph D of said general lease.

Rejects the new annual ground rent of \$\$20,580 per year for the 15 year period beginning March 23, 2002 offered by the State of Hawaii Department of Land and Natural Resources. (G.L. No. S-4786).

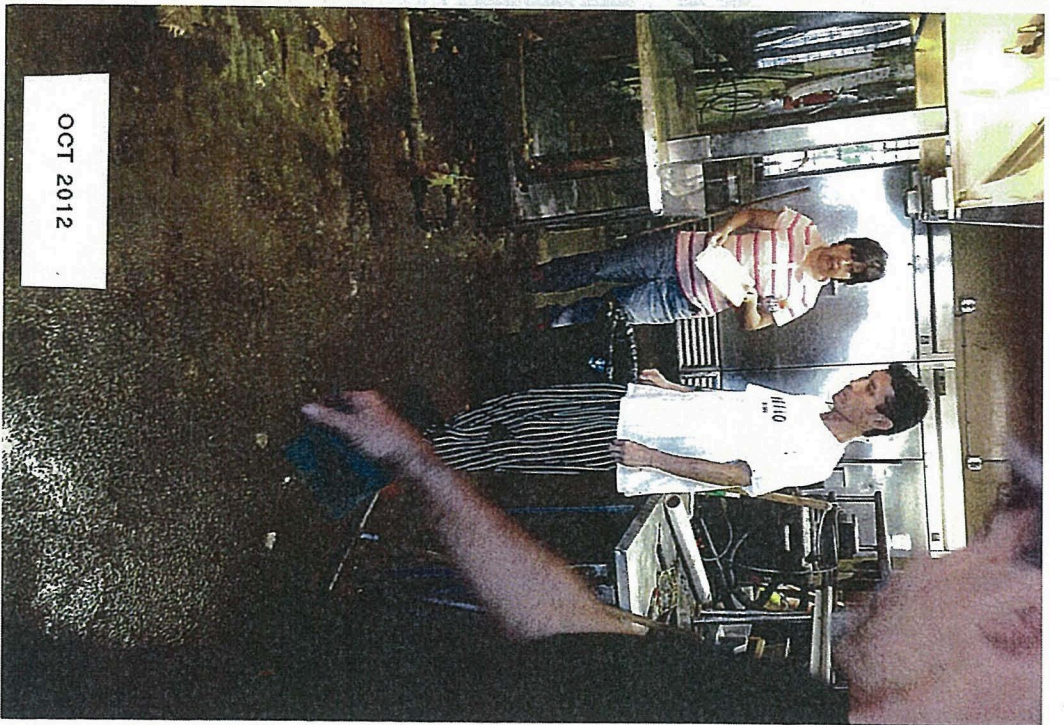
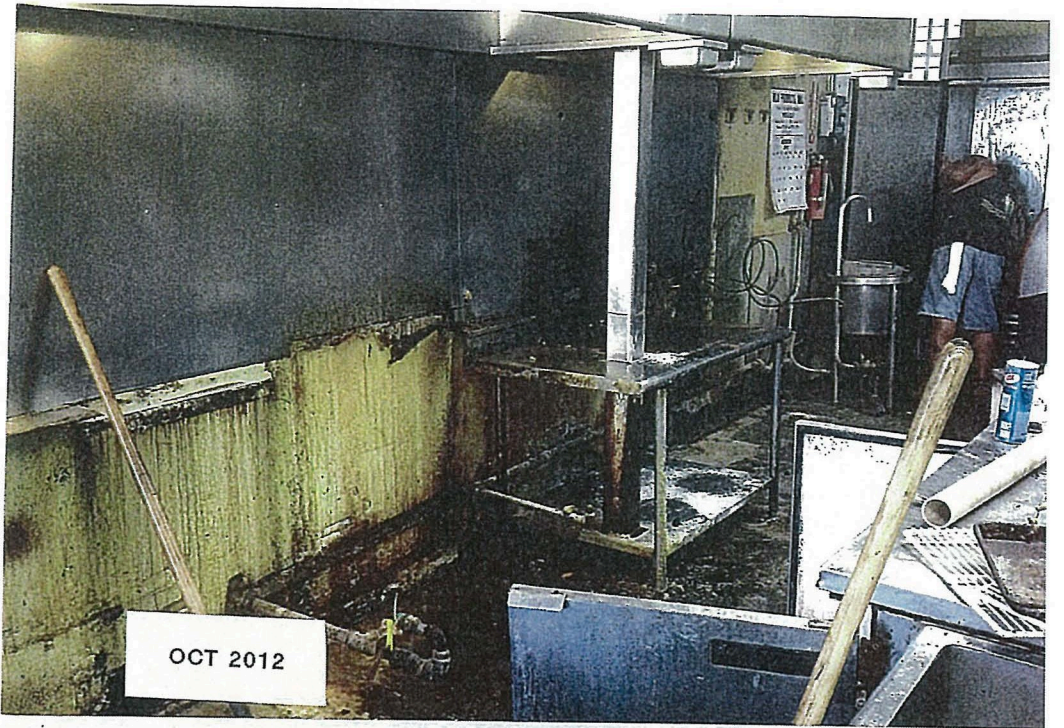
I have selected the following appraiser:

Name: _____

Telephone: _____


Hilo Trading Co., Ltd.

2/24/02
Date



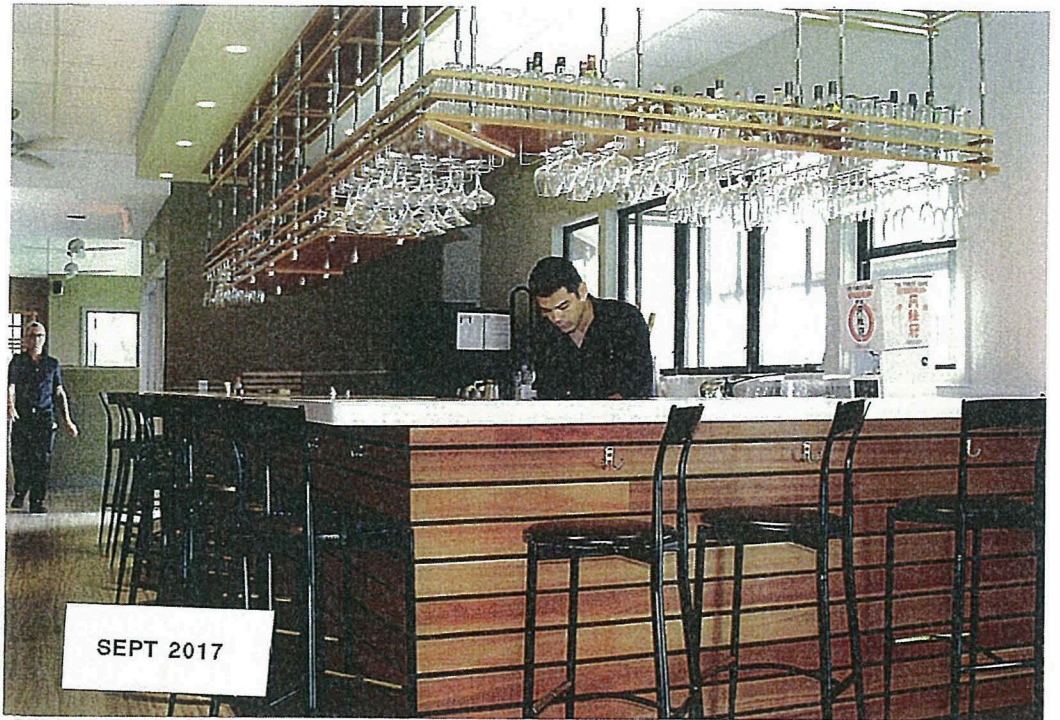












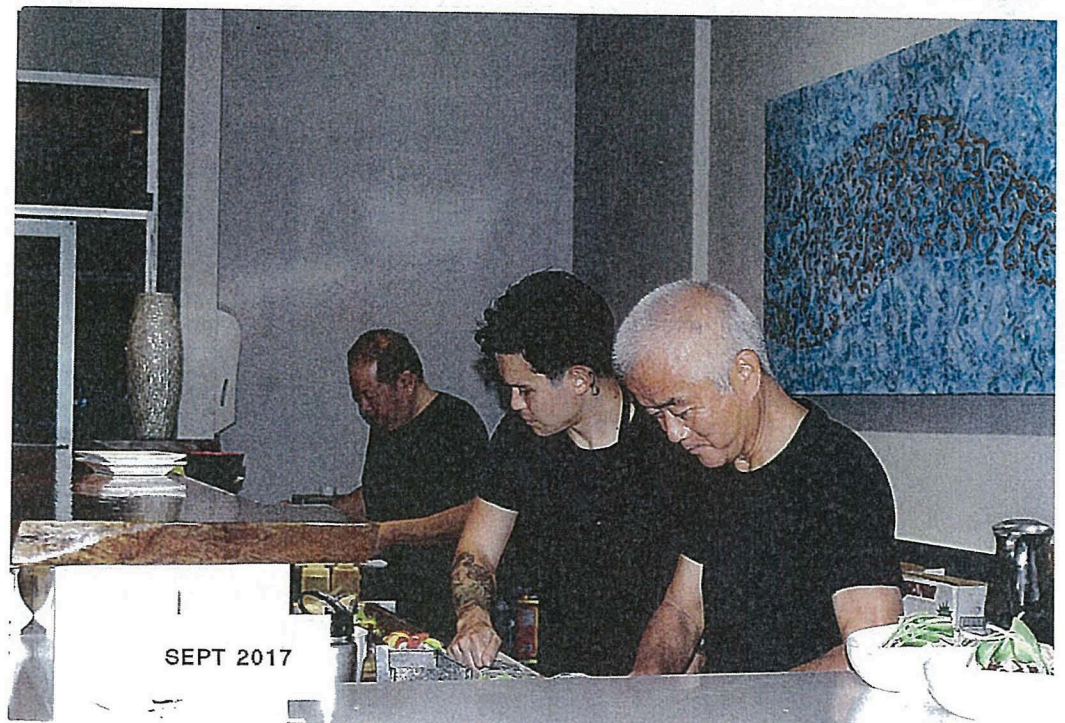




EXHIBIT 7

DAVID Y. IGE
GOVERNOR OF HAWAII



SUZANNE D. CASE
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE
MANAGEMENT

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
LAND DIVISION

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

September 28, 2017

Hilo Trading Co., Ltd., dba Hilo Bay Café
Attn: Kimberly Snuggerud
123 Lihiwai Street
Hilo, Hawaii 96720

Re: REOPENING OFFER LETTER
Ground Rent for General Lease No. S-4786
Located at Waiakea, South Hilo, Island of Hawaii
TMK: (3) 2-1-003:008

Dear Ms. Snuggerud:

Thank you for your letter of September 18, 2017, regarding Hilo Bay Café's ("HBC") acceptance of the new annual rent of \$43,758, and its request to remove or waive the additional rent provision contemplated in Paragraph D of the lease agreement ("Additional Rent"). Thank you, also, for the before and after photos of the subject property. It is evident that HBC is committed to the success of its business and the community it serves.

Commendation aside, the Division is unable to grant HBC's request to alter the lease. While HBC points out that in 2002, during the earlier rent reopening of the subject property, the requirement of Additional Rent was eliminated for the stated 15 year period, since then, the appropriateness of modifying leases has been examined and such actions have been found to be contrary to law.

The case of State of Hawaii v. Kahua Ranch, 47 Haw. 28, 384 P.2d 581, aff'd on reh'g, 47 Haw. 466, 390 P.2d 737, reh'g denied, 47 Haw. 485, 391 P.2d 872 (1964), held as to leases of public land that had been auctioned:

The statutory provisions of Hawaii forbid any agreement between the State and a prospective bidder for a lease of State land inconsistent with the terms of the notice of sale as published. Any such agreement contrary to the terms of the published notice of sale would be illegal and unenforceable.

47 Haw. at 36, 384 P.2d at 586.

EXHIBIT " 7 "

Given the Kahua holding, it is improper to remove or waive the Additional Rent provision because such exclusion would make the lease inconsistent with the published notice of sale. Nor is the applicability of the Additional Rent subject to determination by an appraiser. Since, again, to conclude anything other than what the lease agreement requires, would create a lease different from that which was offered to the public and would, therefore, be illegal. As a courtesy, we are enclosing the cited Supreme Court ruling in its entirety for your review and records.

While it may seem at first blush inequitable that HBC's predecessor in interest enjoyed a reprieve from the requirements of Additional Rent, it is arguable that the provision would never have been triggered given their fiscal status. Paragraph D, Additional Rent, states the following:

D. Additional rent. Each year during the month of January, the Lessee shall submit to the Lessor a financial report showing the gross proceeds from the sale of food and liquor sold on the demised premises during the year immediately preceding. Together with the financial report, the Lessee shall pay to the Lessor the additional rent due, if any, which amount shall be determined in the manner described below:

From the financial report, determine a value representing five percent (5%) of the gross proceeds from food sales and ten percent (10%) of the gross proceeds from liquor sales. The excess, if any of the value so derived over the basic annual rent constitutes the additional rent.


In other words, Additional Rent is only due when 5% of the gross proceeds from the food sales and 10% of the gross proceeds from the liquor sales are in excess of the lease rent. Thus, it is possible that in a given year Additional Rent would not become due.

We appreciate HBC's excellent tenancy. We hope the enclosed Supreme Court ruling and explanation of Additional Rent is instructive. We recognize that given the Division's position, HBC may want to revisit this matter. As such, we are providing a courtesy extension of 14 days from the date of this letter to accept or reject the new lease rent. Absent contrary advice on or before October 12, 2017, we will assume HBC's acceptance of the new lease rent of \$43,758 and will advise our fiscal office accordingly.

Very truly yours,

RUSSELL Y. TSUJI
Land Division Administrator

Enclosure
cc: District Office
Central Files

 KeyCite Yellow Flag - Negative Treatment
Rehearing Granted by State v. Kahua Ranch, Ltd., Hawai'i, November 15, 1963

47 Haw. 28
Supreme Court of Hawai'i.

STATE of Hawaii

v.

KAHUA RANCH, LIMITED.

No. 4211.

|


July 1, 1963.

Action by state to reform lease of public lands. The Third Circuit Court, Hawaii County, Tamao Monden, J., granted relief, and lessee appealed. The Supreme Court, Wirtz, J., held that in view of bidder's reliance on published notice of sale, and public interest in sale, lease of public lands which was made after published notice and auction and which conformed to terms in published notice was not subject to reformation at state's request to exclude an interest allegedly included by mistake.

Reversed and remanded with direction.


West Headnotes (11)

[1] **Auctions and Auctioneers**


 Rights and Liabilities of Seller and Buyer
Contract was made upon fall of hammer at auction.

Cases that cite this headnote

[2] **Reformation of Instruments**

 Mistake of Fact


Reformation of Instruments

 Mutuality of Mistake

Where private interests are involved, relief through reformation may be had when written instrument does not, through mutual mistake of fact, conform to intention of parties.

7 Cases that cite this headnote

[3] **Reformation of Instruments**

 Instruments Which May Be Reformed

Generally, sheriff's deed made pursuant to public auction after public notice of sale may not be reformed.

2 Cases that cite this headnote


[4] **Courts**

 Dicta

Holding that instruments given pursuant to statutory power are subject to reformation in equity was dictum where case involved private transaction between government and individuals rather than sale of public lands at public auction.

1 Cases that cite this headnote

[5] **Public Lands**

 Hawaii

Any agreement between state and prospective bidder contrary to terms of published notice of sale of public lands would be illegal and unenforceable.

1 Cases that cite this headnote


[6] **Public Lands**

 Hawaii

Sale of public lands is conclusive on all parties where there has been strict compliance with statutory requirements.

Cases that cite this headnote

[7] **Reformation of Instruments**

 Instruments Which May Be Reformed

In view of bidder's reliance on published notice of sale, and public interest in sale, lease of public lands which was made after published notice and auction and which conformed to terms in published notice was not subject to reformation at state's request to exclude an interest allegedly included by mistake. 48 U.S.C.A. §§ 665, 670; R.L.H.1955, §§ 99-12, 99-15, 99-40, 99-51, 99-53.

Cases that cite this headnote

[8] **Equity**

🔑 Application and Operation in General

Equity will refrain from acting where relief sought will do substantial injury to third person.

Cases that cite this headnote

[9] **Auctions and Auctioneers**

🔑 Conduct and Validity of Sale

Public Lands

🔑 Hawaii

Under a statutory sale of a lease of public lands at public auction, bids are made in reliance on the terms and conditions specifically expressed in the published notice of sale and reformation is impermissible as it would create a lease different from that which was offered at public auction.

Cases that cite this headnote

[10] **Auctions and Auctioneers**

🔑 Conduct and Validity of Sale

Public Lands

🔑 Hawaii

The public interest present in the statutory sale of a lease of public lands at public auction, in addition to that of bidders at the sale as well as that of prospective bidders, precludes reformation of a written instrument which conforms in its terms of the published notice of the sale.

Cases that cite this headnote

[11] **Public Lands**

🔑 Hawaii

States

🔑 Disposition of Property

The statutory provisions of Hawaii forbid any agreement between the State and a prospective bidder for a lease of State land

inconsistent with the terms of the notice of sale as published.

1 Cases that cite this headnote

Syllabus by the Court

****582** 1. At an auction an enforceable contract is formed upon the fall of the hammer.

2. Where private interests are involved, relief through reformation may be had when the written instrument does not, through a mutual mistake of fact, conform to the intention of the parties.

3. The statutory provisions of Hawaii forbid any agreement between the State and a prospective bidder for a lease of State land inconsistent with the terms of the notice of sale as published.

4. Under a statutory sale of a lease of public lands at public auction, bids are made in reliance on the terms and conditions specifically expressed in the published notice of sale and reformation is impermissible as it would create a lease different from that which was offered at public auction.

5. The public interest present in the statutory sale of a lease of public lands at public auction, in addition to that of bidders at the sale as well as that of prospective bidders, precludes reformation of a written instrument which conforms in its terms to the published notice of the sale.

Attorneys and Law Firms

***41** Frank D. Padgett, Honolulu (Robertson, Castle & Anthony, Honolulu, with him on the briefs), for defendant-appellant.

Bert Kobayashi, Atty. Gen., and Andrew S. O. Lee, Deputy Atty. Gen. (Shiro Kashiwa, Atty. Gen., and Morio Omori, Sp. Deputy Atty. Gen., Honolulu, on the brief), for plaintiff-appellee.

***28** Before TUSKIYAMA, C. J., CASSIDY and WRITZ, JJ., JAMIESON, Circuit Judge, in place of

LEWIS, J., disqualified, and HAWKINS, Circuit Judge,
in place of MIZUHA, J., disqualified.

Opinion

*29 WIRTZ, Justice.

This case concerns a bill for reformation brought by the State of Hawaii, plaintiff-appellee, as successor in interest to the Territory of Hawaii, covering the right of **583 **Kahua Ranch**, Limited, defendant-appellant as lessee of the State under General Lease No. 3358, dated February 14, 1951, (entered into between the Territory, as lessor, and **Kahua**, as lessee) to use 'the Government waters arising on the land of Kawaihae 1st.'

Under this lease the government demised to **Kahua** certain lands¹ in the Ahupuaa of Kawaihae 1st by metes and bounds:

'TOGETHER ALSO WITH the right to utilize so much of the Government waters arising on the land of Kawaihae 1st as are in excess of that which are or may be appurtenant to the lands of others, but the same shall be used by the Lessee only for his stock, irrigation, or domestic purposes, and not for resale to any other person or persons unless said Lessee shall have received the prior written consent of the Lessor.'

The bill for reformation alleges:

'That at the time of making said agreement [General Lease No. 3358] and immediately prior thereto, *30 it was agreed and understood between the parties hereto that when in said agreement they made reference to 'waters arising on the lands of Kawaihae 1st' they meant only those waters on the southwest side of the Kohala Mountains which flow naturally into the premises demised to defendant, and not 'Honokane waters,' that is, waters arising on the northeast side of the Kohala Mountains (in Kawaihae 1st) and flowing into Honokane Stream.'

In its answer to the bill, **Kahua** set forth a counterclaim alleging that the lease had been entered into pursuant to a notice of sale after a public auction, as required by statute, and that, since the terms of the lease were in accord with those of the published notice of sale, the lease was not subject to reformation. In reply to the counterclaim the State denied this allegation.

However, in its opening statement at the trial, the State admitted that General Lease No. 3358 had been made at public auction pursuant to statutory requirement of published notice. At this juncture, **Kahua** moved to dismiss on the basis of this admission. The trial judge reserved his ruling on the motion. The hearing concluded, and after consideration of memoranda of law, the trial judge filed his decision denying the motion and found that there was clear and convincing evidence that a mutual mistake had been made and that relief should be granted as prayed for.

In appealing from the judgment of reformation, **Kahua** assigns as its first specification of error that: 'The Court below erred as a matter of law in permitting reformation of a lease of public lands let pursuant to statute at public auction when no question of fraud or misrepresentation was raised.'

On December 14, 1950, the government, in accordance with the requirements of the Organic Act and the provisions *31 of R.L.H.1945, § 4531 and § 4542,² caused notice of **584 the auction to be published, stating that the lands would be leased:

'* * * together with the right to utilize government waters on the land of Kawaihae 1st in excess of that which may be pertinent to the lands of other owners, but is to be used by the purchaser only for his domestic, stock or irrigation purposes, and not for resale to any outside party unless and only with the written consent of the Commissioner of Public Lands * * *.'

At the auction held on February 14, 1951, **Kahua** was the high bidder. The bidding was spirited and brisk and the two participating bidders pushed the annual rental up to \$40,500 from the upset figure of \$7,500. Thereafter, General Lease No. 3358 was executed by the parties, effective as of February 14, 1951.

[1] It should be apparent that the contract between the parties was made upon the fall of the hammer at the auction on February 14, 1951. Territory v. Branco, 42 Haw. 304. Under the requirements of Section 73(d) and (i) of the Organic Act, the Hawaii statutes in force at *32 the time of the auction and particularly R.L.H.1945, § 4531 and § 4542, all of which are set forth in footnote 2, and also §§ 4511, 4514 and 4544,³ a lease such as that involved in the present case can be validly made only after a public auction held upon due publication of notice thereof, which notice must include in detail the particulars of the lease

to be offered. Here, there is no dispute that the notice of sale published December 14, 1950, and General Lease No. 3358 executed thereafter, effective as of February 14, 1951, accorded with respect to the waters which were to be granted with the lease.⁴ This is not an ****585** attempt to reform the written instrument to conform to the published notice of sale. Cf., *Newark v. Lodato*, 139 N.J.Eq. 471, 51 A.2d 895. Nor is relief sought to correct a clerical ***33** error or inadvertence. Cf., *Fullerton v. City of Des Moines*, 147 Iowa 254, 126 N.W. 159, but see earlier decision in 115 N.W. 607.

With this background in mind, we proceed to a consideration of the power of a court of equity to reform a contract which, because of mutual mistake, does not reflect the true intention of the parties thereto.

[2] As the State has pointed out, where private interests are involved, the general rule is that relief through reformation may be had when the written instrument does not, through a mutual mistake of fact, conform to the intention of the parties to the instrument. 3 Pomeroy, *Equity Jurisprudence*, 5th ed., § 870, pp. 384-386; 45 Am.Jur., *Reformation of Instruments*, § 55, p. 617; 5 Williston, *Contracts* (rev. ed.), § 1547, p. 4336; *Horner v. Horner*, 22 Haw. 9, 15; *Philippine Sugar Estates Dev. Co. v. Gov't of the Philippine Islands*, 247 U.S. 385, 39 S.Ct. 513, 62 L.Ed. 1177. Had this actually been a private sale, as the State in effect is contending, this rule resolving private interests might be applicable. Such, however, is not this case.⁵ The issue presented in the first specification of error under this appeal is whether the trial court 'erred as a matter of law in permitting reformation of a lease of *public lands* let pursuant to statute at *public auction* when no question of fraud or misrepresentation was raised.' (Emphasis supplied.)

[3] In support of its position that the trial court did so err, **Kahua** points that the rule forbidding reformation of sheriff's deeds made pursuant to public auction after public notice of sale, as an analogous situation. 3 Pomeroy, *Equity Jurisprudence*, 5th ed., § 871(b); 45 Am.Jur., *Reformation of Instruments*, §§ 21 and 22; *Davenport v. Biddle*, 223 Al. 28, 134 So. 642; ***34** *Cusimano v. Spencer*, 194 Miss. 509, 13 So.2d 27; *Stearns v. McHugh*, 35 S.D. 185, 151 N.W. 888. Cf., *Dove v. Bickle*, 171 Ark. 683, 285 S.W. 386; *Hull v. Calkins*, 137 Cal. 84, 69 P. 838; *Fisher v. Villamil*, 62 Fla. 472, 56 So. 559, 39 L.R.A.,N.S., 90. The rationale in support of this

rule is thus given in the leading case of *Trachtenberg v. Glen Alden Coal Co.*, 354 Pa. 521, 530, 47 A.2d 820, 824, 172 A.L.R. 647, where the court stated:

'* * * the public is entitled to be correctly informed by advertisement of the size and nature i. e. of the exact identity, of the property to be sold at the sheriff's sale so that possible purchasers may bid with exact information as to what they are bidding on. That there should be no concealment or misrepresentation, intentional or otherwise, of a fact which if known would affect bidding at a public sale conducted by an official representative of the Commonwealth is incontestable * * *.'

Or as stated by the court in *Alfalfa Lumber Co. v. Mudgett* (Tex.Civ.App.), 199 S.W. 337-339:

'* * * If upon the advertisement and sale of entirely different property the mistake in the original mortgage would permit a reformation of the sheriff's deed, the entire purpose of the advertisement of the property by the sheriff would be defeated * * *. It cannot be known who would have ****586** bid, nor the amount of the bid, nor that appellant would have been the purchaser * * *.'

[4] The State countered by pointing to authorities supporting the contrary rule permitting reformation in such situations. 3 Pomeroy, *Equity Jurisprudence*, 5th ed., § 871(b), p. 398; Annot., *Reformation after Foreclosure*, 172 A.L.R. 655-656, 665; *Quivey v. Baker*, 37 Cal. 465;⁶ ***35** *Randnor Bldg. & Loan Ass'n v. Scott*, 277 Pa. 56, 120 A. 804;⁷ *400 East 58th St. Copr. v. Weiner*, 179 Mis. 213, 38 N.Y.S.2d 155,⁸ *Perry v. Lucas*, 11 Haw. 350 was cited for the proposition that instruments given pursuant to a statutory power are subject to reformation in a court of equity.⁹

A sheriff's sale on mortgage foreclosure or upon execution of judgment is analogous to the sale of public lands, or interests therein, now under consideration only to the extent of requiring a sale at auction upon publication of a notice of sale. However, inasmuch as a sheriff's sale is not made to safeguard the public interest as such, as in the present situation, and involves private interests, there are situations where a court of equity might well exercise its authority to balance the equities between debtor, creditor and purchaser. This is illustrated in the cases collected in an annotation entitled *Reformation after Foreclosure*, in 172 A.L.R. 655.

Moreover, it would appear that the basis for the refusal to reform sheriff's deeds after foreclosure rests upon the proposition that the purchaser at a sheriff's sale gets only that which has been advertised and levied upon. It has been considered a jurisdictional question where relief has been denied, as the would-be purchaser cannot obtain relief in equity through reformation in order to have conveyed *36 to him that which has never been brought into court. See *Dunnivan v. Hughes*, 86 Ark. 443, 111 S.W. 271, where there was a mistake in the description presented both in the advertisement and the deed the court refused reformation saying the chancery court was without authority to reform the proceedings. See also *Tatum v. Croom*, 60 Ark. 487, 30 S.W. 885.

While some support could be derived from the rule denying reformation of sheriff's deeds made pursuant to public auction after public notice of sale, we prefer to bottom our ruling on firmer ground, leaving open the rule finally to be adopted by Hawaii in the sheriff's sale situation until squarely presented and considered in a proper case. We need not linger, then, over these cases or the reasons for the rules discussed therein. More adequate grounds for our decision are to be found elsewhere.

[5] [6] The statutory provisions of Hawaii forbid any agreement between the State and a prospective bidder for a lease of State land inconsistent with the terms of the notice of sale as published. Any such agreement contrary to the terms of the published notice of sale would be illegal and unenforceable. Otherwise, the statutory requirements become meaningless. **587 They were 'enacted to prevent improvident bargains and corruption.' *Fasi v. King*, Land Commissioner, *supra*, 41 Haw. 461, 475. Where there has been strict compliance with the statutory requirements the sale is conclusive on all parties.

Cf., *Munoz v. Ashford*, Commissioner of Public Lands, 40 Haw. 675, 689.

[7] Under a statutory sale of a lease of public lands at public auction, bids are made in reliance on the terms and conditions specifically expressed in the published notice of sale. Reformation would create a lease different from that which was offered at public auction. To allow modification thereof to effectuate a publicly undisclosed mental reservation or intent of the government would defeat the *37 very purpose of the statutory requirements of public notice and sale at auction. It would destroy the element of certainty in public competitive transactions and contravene the mandatory requirements of the statutes. This was early expressed in an opinion of the Attorney General of the Territory of Hawaii.

'Our statute * * * requires that all general leases be made at public auction and it is evident that to have competition the terms and conditions must be determined prior to the auction. Genuine competition can result only when parties are bidding against each other for precisely the same thing on precisely the same footing * * *. The objects sought are to secure the benefit and advantage of fair and just competition between bidders and at the same time close as far as possible every avenue to favoritism and fraud in its various forms by subjecting the sale of the lease to public competition. If the Land Commissioner were permitted to auction a lease without making public all the terms or to materially modify the terms thereafter, the object sought to be secured by public auction would be defeated. The attempted modification of a fifteen-year lease to one with an option to terminate at the end of seven (7) years is, in my opinion, a material modification, and consequently void.' *Ops. Att'y Gen.*, pp. 329-330 (1915-1916).

This purpose and importance of the published notice in competitive public transactions is thus stated by McQuillin:

'In order to attain competitive bidding in its true sense, proposals for bids must be invited under circumstances which afford a fair and reasonable opportunity for competition. Consequently it is essential that the bidders, so far as possible, be put on terms of perfect equality, so that they may bid on substantially *38 the same proposition, and on the same terms * * *.' 10 McQuillin, *Municipal Corp.*, (3d ed.) § 29.52, pp. 312-313.

Against this background of legislative intent requiring the notice of bidding to contain specifically the essentials of the contract to be entered into and the contract to be made by free and open public bidding, it shocks the conscience to even consider that a court of equity could render indirectly by reformation an agreement which, if made directly, would be illegal and unenforceable. That the State now claims to have imperfectly expressed its intent can have no relevance. Cf., *State v. Ort*, 66 Wash. 130, 119 P. 21; accord, *State v. Hewitt Land Co.*, 74 Wash. 573, 134 P. 474.

[8] The intervention of the public interest with that of the actual and prospective bidders brings into play the well settled principle that where the relief sought will do substantial injury to third persons, equity will refrain from acting. 2 Restatement, Contracts, § 504, p. 968. The detrimental effect to the public interest cannot be ignored as 'it is obvious that the effect of reformation if granted must influence the action of the court of equity on the application for it. Cases reviewed, 44 A.L.R. 78; Restatement, Contracts, § 504 * * *.' *Mutual Life Ins. Co. v. Metzger*, 167 Md. 27, 31, 172 A. 610, 612.

An exhaustive, as well as intensive, search has disclosed a paucity of cases bearing on this question of transfers of interests **588 in public lands inconsistent with the terms of a published notice of sale. In their lonely vigil, they bear desolate witness to the obviousness of the answer.

In *Markey v. City of Bayonne*, 24 N.J.Super. 105, 115, 93 A.2d 589, 594-595, the court held invalid a conveyance of more public land than had been advertised for sale stating: '* * * To permit a municipality to do so would be *39 a fraud upon the statute and in derogation of the public interest.

'The purpose of publicly advertising a contemplated sale of park lands under [the statute] is to give to the world clear and definite notice of the lands to be sold and the minimum price at which the municipality will sell. Those who read the public notice, and particularly the residents and taxpayers of the municipality, have a right to rely upon its terms * * *.

'The municipality claims that it intended all along to sell the [additional] land * * * and that the corporate purchaser intended to buy it * * *, since the [additional] area * * * is valueless by itself, being elevated land.

Assuming there was such an understanding between the parties to the deed, it cannot under the circumstances control. Both the seller and the buyer were bound by the explicit metes and bounds description contained in the authorizing resolution and the public notice of sale.'

In *Vaccaro v. Asbury Park Enterprises*, 42 N.J.Super. 288, 297, 126 A.2d 213, 218, the court denied the authority of the city council to issue a permit to the purchaser to build on a lot in contravention of a restriction imposed thereon in the grant by the city pursuant to the advertisement of sale, saying that 'if a municipal governing body could waive a restriction which it imposed on land as a condition of its sale after its sale and conveyance, the door would be wide open for fraud and favoritism.'

This is an unusual situation in that the bill for reformation is brought by the seller rather than by the buyer and seeks to cut down rather than enlarge upon the interest covered by the written instrument. However, such situation should not change the principles applicable to *40 reformation. See *Konig v. Mayor, etc., of Baltimore*, 126 Md. 606, 95 A. 478.

The public interest here present, in addition to that of bidders at the sale as well as that of prospective bidders, precludes reformation of a written instrument which conforms in its terms to the published notice of the sale of a lease of public lands at public auction. Accordingly, the trial judge below erred in denying the motion to dismiss.

In view of this conclusion, it is unnecessary to consider the remaining specifications of error relating to the admissibility of evidence and the findings of the trial judge. An examination of the record, however, prompts the observation that if any understanding between the State and Kahua relied upon as a basis for reformation had been established by the clear and convincing proof required for that purpose,¹⁰ such understanding appeared to cover a period so remote in point of time¹¹ as **589 to have little, if any, probative value. The testimony of the competing fellow bidder at the auction concerning her understanding as to available government waters would seem to be incompetent to establish the state of mind of Kahua in making its bid. See VII Wigmore, Evidence, § 1971, p. 112, n. 3. Cf., *Durrence v. Northern Nat'l Bank*, 117 Ga. 385, 43 S.E. 726; *State v. Kilburn*, 16 Utah 187, 52 P. 277; *Manufacturers & Traders' Bank v. Koch*, 105 N.Y.

630, 12 N.E. 9; State v. Pierce, 85 Minn. 101, 88 N.W. 417.

However, as seen, it is not required that the findings of the trial judge be considered and reviewed.

All Citations

47 Haw. 28, 384 P.2d 581

Reversed and remanded for entry of judgment for defendant, dismissing the bill for reformation.

Footnotes

- 1 The land of Kawaihae 1st is in South Kohala on the island of Hawaii and consists of two sections, namely, (1) the Hawaiian Homes Commission land, which extends from a crest of the Kohala Mountains, formed by Puu Ahia, Puu Mala and Puu Pala, in a southwesterly direction to the ocean along Kawaihae Bay, and (2) the forest reserve area, being a portion of the Kohala Mountain Forest Reserve, adjacent to the Hawaiian Homes Commission land and extending from such crest in an easterly direction toward the Hamakua coast. The demise under General Lease No. 3358 covered the first section only, with the exception of four small kuleanas and the area covered by the Kamuela-Mahukona road, together with the above set forth right to 'waters arising on the land of Kawaihae 1st,' which as seen above included the second section of forest reserve area. These waters flow naturally in two almost opposite directions because of the crest of the Kohala Mountains and the controversy centers on the portion of these waters of the forest reserve area which flow naturally away from the demised premises in a northeasterly direction.
- 2 Section 73(d) of the Organic Act required all leases to 'be sold at public auction to the highest bidder after due notice as provided in subdivision (i) of this section and the laws of the Territory of Hawaii.' Each such notice shall state all the terms and conditions of the sale.
Section 73(i) of the Organic Act required the notice to be 'by publication for a period of not less than sixty days in one or more newspapers of general circulation published in the Territory: * * *.'
R.L.H.1945, § 4531 (now R.L.H.1955, § 99-40) provided:
'Except as otherwise provided, all transfers of government lands shall be made at public auction after not less than sixty days' notice by advertisement in two newspapers published * * *.'
'Notice of any auction as above required shall contain a full description of the land to be sold as to locality, area and quality * * *.'
R.L.H.1945, § 4542 (now R.L.H.1955, § 99-51) provided:
'* * * Each * * * lease shall be sold at public auction to the highest bidder after due notice as provided in subdivision (i) of Section 73 of the Organic Act and the laws of the Territory. Each such notice shall state all the terms and conditions of the sale.'
- 3 'Sec. 4511. The commissioner of public lands * * * shall have power to lease, sell or otherwise dispose of the public lands * * * in such manner as he may deem best for the protection of agriculture, and the general welfare of the Territory * * *.'
(Now R.L.H.1955, § 99-12.)
Section 4514 provides that all '* * * leases * * * of any government land * * * shall be prepared by, and issued from the office of the commissioner of public lands; * * *.'
(Now R.L.H.1955, § 99-15.)
'Sec. 4544. Except as provided in section 4542, and subject to the approval of the board of public lands when required by section 4541, the commissioner may at his discretion make general leases of public lands for any number of years, not to exceed twenty-one, at public auction * * *.'
(Now R.L.H.1955, § 99-53.)
- 4 Outside of conforming the language to the situation, i. e., by substituting in the lease the words 'lessee' for 'purchaser' and 'lessor' for 'Commissioner of Public Lands,' and an improvement in style, i. e., by substituting in the lease the word 'appurtenant' for 'pertinent,' the only real change involved the insertion in the lease of the word 'arising' after 'government waters.' While this might affect the quantity and classification of the government waters, as 'waters on the land' may not necessarily be and include more than 'waters arising on the land,' no significance was ascribed to the *insertion* and no issue concerning this change was raised either at the trial or on argument before this court. However, the record discloses that initially the State, and most of its witnesses, felt that all of the waters flowing through the Kahua ditch were in controversy. Such, however, was not the case as the evidence clearly showed that only a portion of the waters flowing in the Kahua ditch, which traverses the forest reserve portion of Kawaihae 1st, arise 'on the land of Kawaihae 1st.' These are the waters which flow naturally away from the demised premises in a northeasterly direction from the crest of the Kohala Mountains. The Kahua ditch is operated by the Kohala Ditch Company, Limited, a licensee of the State.

- 5 The fact that **Kahua** made suggestions relative to improvement of the land by the lessee does not change the character of the public sale. *Fasi v. King*, Land Commissioner, 41 Haw. 461.
- 6 While questioned in *Hull v. Calkins*, supra, 137 Cal. 84, 69 P. 838, it was not overruled. *Handlon v. Western Loan & Bldg. Co.*, 46 Cal.App.2d 580, 116 P.2d 465.
- 7 Not alluded to or even cited in the later *Trachtenberg* case, supra, 354 Pa. 521, 47 A.2d 820.
- 8 Actually involved reformation of admittedly ambiguous language.
- 9 Dictum as the involved a Land Commission Award based on a private transaction between the government and the individuals involved rather than a sale of public lands at public auction. There the court was faced with a 'bill to remove a cloud, to establish boundaries and for an injunction.' The relief was denied and in so doing the court inadvertently included in its decision the words 'a bill to reform' as synonymous with 'a bill to remove a cloud.' The court, nonetheless, stated: 'It is evident that the bill cannot be sustained as a bill to reform the Award and Patent for, *not to mention other reasons*, there are no allegations to show how they ought to be reformed.' (Emphasis supplied.) 11 Haw. 356.
- 10 *Leong Kau v. Monting*, 7 Haw. 415.
- 11 Subsequent to the expiration on June 30, 1949, of the previous government lease covering the demised premises, which contained no provision relative to the use of water, discussions were had between all interested parties, including representatives of **Kahua**, at public meetings of the Land Board, commencing at the August 1949 meeting, as to the feasibility of leasing the land of Kawaihae 1st in two parts rather than as a whole in conjunction with the problem of water use and culminating with the meeting of December 9, 1949, at which time it was decided by the Land Board to lease the land in its entirety. There was also correspondence on the subject from representatives of **Kahua** to the Land Commissioner during this period. However, the record is silent as to what, if anything, took place between the meeting of December 9, 1949 and the publication of the auction notice on December 14, 1950 and the auction held on February 14, 1951.

47 Haw. 466
Supreme Court of Hawai'i.

STATE of Hawaii
v.

KAHUA RANCH, LIMITED.

No. 4211.

March 31, 1964.

Action by State to reform lease of public lands. The Third Circuit Court, Hawaii County, Tamao Monden, J., granted relief, and lessee appealed. The Supreme Court, 384 P.2d 581, reversed and remanded with directions, and lessee obtained rehearing. The Supreme Court, Wirtz, J., held that scope of appeal from judgment which denied lessee's request to dismiss State's action to reform lease of public lands, granted reformation, and denied counterclaims, all on legal theory that lease could be reformed, excluded propriety of denial of counterclaim, where specification of error raised only question whether lease could be reformed and lessee sought only that judgment be reversed and cause remanded for further proceedings.

Decisions affirmed and request for amendment of remand denied.

West Headnotes (9)

[1] **Appeal and Error**

⚙ Failure to Urge Objections

All errors of trial court which are not properly specified in brief are deemed to have been abandoned or waived and consequently outside scope of review and will not be considered on appeal. Supreme Court Rules, rule 3(b) (3, 4).

2 Cases that cite this headnote

[2] **Appeal and Error**

⚙ Partial Judgment or Decision

Appeal and Error

⚙ Verdict, Findings, or Judgment

Judgment

⚙ Appeal and Error

Appeal from portion of judgment is allowable and brings up for review only part thereof so designated in specifications of error.

Cases that cite this headnote

[3] **Appeal and Error**

⚙ Specification of Errors

Proper specification of error requires separate listing of particular rulings of trial court claimed to be erroneous. Supreme Court Rules, rule 3(b) (3, 4).

1 Cases that cite this headnote

[4] **Appeal and Error**

⚙ Rulings on Pleadings

Even if trial court's ruling in denying counterclaim, which had been asserted to State's action to reform lease of public lands, were properly before reviewing court, objection was waived where lessee neither urged nor argued in briefs or upon oral argument that denial of counterclaim was improper.

2 Cases that cite this headnote

[5] **Appeal and Error**

⚙ Contentions Other Than Those Made on the Hearing

Questions not advanced on original hearing will not be considered on petition for rehearing, except under unusual circumstances or where fundamental or jurisdictional error is involved.

2 Cases that cite this headnote

[6] **Appeal and Error**

⚙ Contentions Other Than Those Made on the Hearing

Failure to consider matters not advanced at original hearing is not ground for rehearing.

1 Cases that cite this headnote

[7] **Appeal and Error**

🔑 Scope and Effect of Assignment

Reformation of Instruments

🔑 Appeal

Scope of appeal from judgment which denied lessee's request to dismiss State's action to reform lease of public lands, granted reformation, and denied counterclaims, all on legal theory that lease could be reformed, excluded propriety of denial of counterclaims, where specifications of error raised only question whether lease could be reformed and lessee sought only that judgment be reversed and cause remanded for further proceedings. Supreme Court Rules, rule 3(b) (3, 4).

1 Cases that cite this headnote

[8] **Appeal and Error**

🔑 Scope and Effect of Assignment

Under Rule 3(b) of this court the scope of appeal is limited to the points set forth in or 'necessarily suggested' by the questions involved under the specifications of error.

3 Cases that cite this headnote

[9] **Appeal and Error**

🔑 Failure to Urge Objections

Specified or assigned errors which are not urged or argued in the brief or oral argument are deemed to have been waived.

2 Cases that cite this headnote

Syllabus by the Court

1. Errors of the trial court not properly specified in the brief are deemed to have been abandoned or waived and consequently outside the scope of appellate review and will not be considered on appeal.

2. Under Rule 3(b) of this court the scope of appeal is limited to the points set forth in or 'necessarily suggested' by the questions involved under the specifications of error.

3. Specified or assigned errors which are not urged or argued in the brief or oral argument are deemed to have been waived.

4. Questions not advanced on the original hearing will not be considered on a petition for rehearing, except under unusual circumstances, or where fundamental or jurisdictional error is involved.

Attorneys and Law Firms

****738 *472** Frank D. Padgett, Honolulu (Robertson, Castle & Anthony, Honolulu, on the briefs), for defendant-appellant.

Bert Kobayashi, Atty. Gen., and Andrew S. O. Lee, Deputy Atty. Gen. (Shiro Kashiwa, Atty. Gen., and Morio Omori, Sp. Deputy Atty. Gen., on the brief), for plaintiff-appellee.

***466** Before TSUKIYAMA, C. J., CASSIDY and WIRTZ, JJ., JAMIESON, Circuit Judge, in place of LEWIS, J., disqualified, and HAWKINS, Circuit Judge, in place of MIZUHA, J., disqualified.

Opinion

***467** WIRTZ, Justice.

By decision dated July 1, 1963, in 47 Haw. 28, 384 P.2d 581, this court, after holding that reformation of the public lease in question would not lie, concluded by stating: 'Reversed and remanded for entry of judgment for defendant, dismissing the bill for reformation.'

A petition for rehearing was filed on July 11, 1963, and after consideration of the reply to the petition this court by decision and order dated November 15, 1963, granted the rehearing. The petition seeks 'an amendment of the decision entered herein to allow the court below to pass upon defendant-appellant's counterclaim which was not previously ruled upon by the court below due to its decision in favor of the plaintiff-appellee.'

For purposes of better understanding it is advisable to consider the pleadings in the record of the court below. To the bill for reformation filed by the State, the defendant,

in addition to its answer, filed a counterclaim with two counts. By the first count defendant sought a declaration of its rights to the water involved in the litigation and under count two defendant sought damages on the theory that the plaintiff had withheld water which had been sold to the defendant under the lease in question. The State in its answer to the counterclaim denied the allegations of count one and as to count two admitted that it had withheld this water but denied that its action in so doing was wrongful. At the close of the State's opening statement, defendant moved to dismiss the action on the basis of the admission that the public lease sought to be reformed had been let pursuant to a published notice of sale and public auction.

After the trial the court below entered its judgment granting reformation of the public lease as prayed for while denying defendant's motion to dismiss the bill for reformation and defendant's counterclaim as well.

*468 In appealing from this judgment the defendant specified three errors in its brief of which only the first is material to this court's decision of July 1, 1963, and this rehearing, namely:

'1. The Court below erred as a matter of law in *permitting reformation* of a lease of public lands let pursuant to statute at public auction when no question of fraud or misrepresentation was raised.' (Emphasis added.)

In connection with this specification of error defendant in its brief posed as the question involved the following:

'1. Can a lease of public lands let at public auction pursuant to statute be reformed in the absence of fraud or misrepresentation?'

Nowhere in the briefs is there any specific mention of the trial court's ruling under the judgment in denying the counterclaim. Nor was this point mentioned in oral argument. The only possible reference to the court's action as to the counterclaim is found in the concluding paragraphs of defendant's opening and reply briefs. In the opening brief defendant concluded: 'For the reasons above, the judgment below should be reversed and the cause remanded for further proceedings,' and in the reply brief the defendant concluded: 'In these circumstances, we submit the judgment below **739 should be reversed for further proceedings consistent with the order of this

Court.' Defendant contends that these requests for a remand for further proceedings cover by inference further proceedings in connection with the counterclaim.

The issue presented in this rehearing is simply whether the scope of the appeal under the foregoing specification of error and question involved embraced and included the ruling of the court below denying the counterclaim.

Rules 3(b)(3) and (4) of the Rules of this Court require briefs on appeal to present a concise statement *469 of the questions involved and the manner in which they are raised as well as separated and particular specification of each error relief upon. Rule 3(b)(3) contains the admonition that '[o]rdinarily no point will be considered which is not thus set forth in or *necessarily suggested* by the statement of questions involved.' (Emphasis added.)

This court in *Watumull v. Borthwick*, Tax Commissioner, 34 Haw. 84, in dismissing the appeal for want of any specification of error dealt specifically with Rule 3(b) and noted that although strict compliance with the rule was not required a substantial and reasonable observance thereof was necessary so as to enable the appellate court to readily appreciate and understand the error complained of and to enable the opposing counsel to know what points are relied upon and what is urged as error in the action of the trial court. In *Miller v. Loo*, 43 Haw. 76, 80, this court, in referring to Rule 3(b)(3) concluded that 'in considering [that] appeal, we may confine ourselves to the points set forth in or necessarily suggested by the foregoing questions.' And cf., *Lalakea v. Baker*, 43 Haw. 321.

[1] [2] [3] It is elementary that all errors of the trial court which are not properly specified in the brief are deemed to have been abandoned or waived and consequently outside the scope of appellate review and will not be considered on appeal. 5 C.J.S. Appeal & Error § 1322; 5 Am.Jur.2d, Appeal and Error, §§ 654, 693. An appeal from a portion of a judgment is allowable and brings up for review only the part thereof so designated in the specifications of error. *Glassco v. El Sereno County Club, Inc.*, 217 Cal. 90, 17 P.2d 703; *St. Louis, I. M. & S. Ry. Co. v. Craft*, 115 Ark. 483, 171 S.W. 1185, L.R.A.1916C, 817; *Riss & Co. v. Wallace*, 350 Mo. 1208, 171 S.W.2d 641, 151 A.L.R. 512. This being so, the proper specification of errors requires the separate listing of the particular rulings of the trial court claimed to be erroneous. *Barnett v. United States*, 82 F.2d 765 (9th Cir.1936). The court in *470 *Cross v. Campbell*, 173

Or. 477, 146 P.2d 83, while permitting, for the sake of conciseness, the inclusion of all rulings resulting from the application of a single principle of law within a single assignment of error where all are susceptible to like treatment, still would not relieve the appellant of his duty to state separately each and every ruling which he claimed to be erroneous.

In the instant case it is clear that the trial court made several rulings resulting in its final judgment. First, it denied defendant's motion to dismiss the bill for reformation and granted the prayer for reformation and then went on to deny the defendant's counterclaim. The basis for each ruling was the same theory of law, namely that reformation of the public lease in question was permissible. However, from the specification of error relied on none of the three rulings of the court below which formed the basis of the judgment appealed from were separately and particularly referred to. The briefs shaped the issues and in the absence of objection this court in its decision considered only the denial of the motion to dismiss the bill for reformation and the granting of the prayer of the bill as 'necessarily suggested' by the error of law in 'permitting reformation' posed by the specification and question involved. It is difficult to see where the ruling denying the counterclaim, not being an incidental issue, could be **740 'necessarily suggested.' Cf., *You Goo Ho v. Ing*, 43 Haw. 330. The language used, namely that 'the court below erred as a matter of law in permitting reformation' would seem to lead to the inescapable conclusion that defendant was taking exception only to the lower court's denial of the motion to dismiss and its granting of the prayer of the bill for reformation.

[4] Even were it possible to consider the lower court's ruling in denying the counterclaim as properly specified in that it was 'necessarily suggested' by the question involved *471 under the specification of error considered, it was nevertheless waived since it was neither urged nor argued in the briefs or upon oral argument. *Godfrey v. Kidwell*, 15 Haw. 526; *Kavanaugh v. Johnson*, 290 Mass. 587, 195 N.W. 797. As Dean Pound so aptly states at page 200 in *Appellate Procedure in Civil Cases*:

'Errors assigned not urged or argued in the brief or oral argument were held waived. This was universal. It takes three columns of the Century Digest to set forth the cases in which it was repeatedly so decided * * *. * * * The several errors had to be argued separately or in groups which *asserted each specifically* even if it was to be argued as one of a group raising the same questions of law.' (Emphasis added.)

In *Kavanaugh v. Johnson*, supra, under a similar factual situation, an alleged error in dismissing the counterclaim was held to have been waived as not having been argued in the briefs.

[5] [6] Questions not advanced on the original hearing will not be considered on a petition for rehearing, except under unusual circumstances, or where fundamental or jurisdictional error is involved. *Honolulu Iron Works v. Bigelow*, 33 Haw. 632. This is true where the question had not been assigned as error, *Dillingham v. Scott*, 20 Haw. 55, as well as where the question had not been previously argued, *Godfrey v. Kidwell*, supra, 15 Haw. 526. The failure to consider matters not advanced at the original hearing is not a ground for rehearing.

[7] We can only conclude that the scope of appeal here was limited to a consideration only of those rulings of the court below 'necessarily suggested' by the question involved under the specification of error considered, namely the denial of the motion to dismiss the bill for reformation and the granting of the prayer of the bill. But even if the lower court's ruling denying the counterclaim could be considered as being within the scope of the appeal, consideration of that question was waived by the failure to urge and argue the same.

The decision of July 1, 1963, is affirmed and the request for amendment of the remand to include further proceedings on the counterclaim is denied.

All Citations

47 Haw. 466, 390 P.2d 737

EXHIBIT 8

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November 15, 2017

RECEIVED
LAND DIVISION
2017 NOV 17 AM 11:00
DEPT. OF LAND &
NATURAL RESOURCES
STATE OF HAWAII

VIA U.S. MAIL

Mr. Russell Y. Tsuji
Land Division Administrator
State of Hawaii
Department of Land and Natural Resources
Land Division
P.O. Box 621
Honolulu, Hawaii 96809

Re: Submission of Appraisal
Rent for General Lease No. S-4786 located at Waiakea, South Hilo, Island of
Hawaii; TMK No.: (3) 2-1-003:008 (the "Property")

Dear Mr. Tsuji:

As mentioned in our October 10, 2017 letter to you, Carlsmith Ball LLP represents Hilo Trading Co., Ltd., dba Hilo Bay Cafe ("**HBC**") in the above-referenced matter. Enclosed is a USPAP Compliant Appraisal Report of the Fair Market Rent For The As If Unimproved Industrial Land ("Appraisal") for the above-referenced Property, prepared by R.J. Kirchner, SRA of Paradise Appraisals, LLC.

You will note that the Appraisal concludes that the Market Rent for the Property is \$26,500.00, and that any "additional rent" should not be collected as it exceeds the allowable fair market rent.

In your letter of September 28, 2017 to HBC, you indicated that the "additional rent" as provided under Paragraph D of General Lease No. S-4786 was not subject to determination by an appraiser because such inclusion would make the lease inconsistent with the published notice of sale. The enclosed Notice of Sale for the March 23, 1982 Public Auction states:

UPSET RENTAL: \$16,000 per annum, payable quarterly in advance;
PERCENTAGE RENTAL: 5 percent of gross food sales plus 10 percent of gross liquor sales; RENTAL REOPENING: At the end of the 20th, 35th and 45th years of the lease term; EFFECTIVE RENTAL: Lease rental bid or 5 percent of the gross food sales plus 10 percent of gross liquor sales, whichever is greater.

The Public Notice thus indicated that the Rental Reopening pertained to the rental charged for the Property, and was not limited to just the "Upset Rental", but included the "Percentage Rental" as well (i.e. the "Effective Rental"). There is nothing in the Public Notice to indicate that the percentage rental (referred to as "additional rent" in General Lease No. S-4786) would not be reopened during the rental reopening periods.

We also enclose a letter dated February 2, 1996 from DLNR which states: "instances when the State would have a revaluation of your minimum and additional rent would be ... if there was a reopening (section 171-17(d))" [emphasis added].

In fact, the DLNR allowed the rental reopening of the "additional rent" when it determined the rent for the March 23, 2002 to March 23, 2017 period. In the enclosed February 12, 2002 letter, the DLNR stated that they concurred with an appraisal that concluded that "the additional rent described in Paragraph D of General Lease No. S-4786 is not typical in today's market and should not be required during the 15 year period beginning March 23, 2002."

HRS §171-17(d) provides: "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 the reopening." This is consistent with the Public Notice which made no distinction between the "Upset Rental" and "Percentage Rental" when discussing the rental reopening.

In previous correspondence with HBC, DLNR indicated that it could not "modify leases" that were put out to public auction. We are not seeking to modify the lease terms as put out for public auction. The public auction notice was clear that rental reopening referred to the Percentage Rental and Upset Rental, and this is consistent with HRS §171-17(d) which mandates the rent assessed after a rental reopening to be the fair market rental.

As stated in the Appraisal, the fair market rental for the Property is \$26,500.00, and that any "additional rent" should not be collected as it exceeds the allowable fair market rent. Based upon the above, it is clear that the DLNR not only has the authority, but is required to consider the percentage rental when assessing the fair market rental at the time of reopening.

Additionally, as pointed out in the enclosed Appraisal the DLNR did not follow the statutory requirement in HRS §171-17(d) to have its appraiser determine the fair market rental at least six months prior to the March 2017 rental reopening date, nor did the DLNR's Restricted Use Appraisal Report of the Property comply with the minimum standards of the Uniform Standards of Professional Appraisal Practice.

Without waiving any right, claims, causes of action, and/or arguments that HBC has as a result of the DLNR and/or Board of Land and Natural Resources' failure to adhere to statutes, laws, rules, and regulations applicable to General Lease No. S-4786, it is HBC's position that based on the enclosed Appraisal and existing law, the fair market rental for the period March 23,

Mr. Russell Y. Tsuji
November 15, 2017
Page 3

2017 through March 22, 2027 is \$26,500.00 and the "additional rent" exceeds the allowable fair market rental for the Property in contravention of HRS §171-17(d).¹

Please feel free to contact me with any questions or concerns.

Sincerely,



Katherine A. Garson

cc: client
Mr. Gordon Heit (via hand-delivery)

enclosures

4852-2549-2820, v. 2

¹ Furthermore, HRS §171-17(d) is supportive of the inclusion of "additional rent" in the fair market rental, as HRS §171-17(d) provides: "Any language in the present leases to the contrary notwithstanding, the provisions of this subsection [HRS §171-17(d)] when possible and notwithstanding the six-month notice required, shall apply to leases with original lease rental reopening dates before and after July 1, 1996." The first rental reopening for General Lease No. S-4786 was March of 2002, after July 1, 1996. Thus, DLNR is mandated to consider the percentage rental when assessing the fair market rent at the time of the rental reopening.