

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

July 26, 2019

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

GL S-4588
OAHU

Approve Amendment to General Lease No. S-4588 as Resolution to Rental Reopening, InSite Towers Development, LLC; Kalawahine and Opu, Honolulu, Oahu, Hawaii; Tax Map Key: (1) 2-5-019: Portion of 013

APPLICANT:

InSite Towers Development, LLC, (“InSite”)

LEGAL REFERENCE:

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

LOCATION:

3800 Tantalus Drive, Honolulu, Oahu, Hawaii
The Puu Ohia Radio Station Sites A and B, and Parcels C, D, E and F
Portion of Government lands situated at Kalawahine and Opu, Honolulu, Oahu, identified by Tax Map Key: (1) 2-5-019:Portion of 013.

AREA:

188,586 sq. ft. total

ZONING:

State Land Use Commission: Conservation District
County Zoning: Restrictive Preservation District

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:

Radio-Telephone Transmission Facilities

TERM OF LEASE:

Original term of sixty-five (65) years, commencing on June 6, 1973 and expiring on June 5, 2038.

The lease was amended, as approved by the Board at its meeting on October 24, 2014 and by document dated May 12, 2016, to provide for sharing of gross revenue from subleases and licenses. The amendment provides 30 percent of revenue for the first sublease/license, 40 percent for the second sublease/license, and 50 percent for the third and subsequent subleases/licenses be paid by lessee to the lessor.

ANNUAL RENTAL UNDER LEASE:

Rent for the first 25 years was set at \$3,711 per year and reopens at the 20th, 30th, and 40th years thereafter.

June 6, 1973 to June 5, 1998 - \$3,711/year
June 6, 1998 to June 5, 2018 - \$26,600/year
June 6, 2018 to June 5, 2028 - Reopens
June 6, 2028 to June 5, 2038 - Reopens

RENTAL REOPENINGS:

Rental reopenings in the original term are at the end of the 25th, 45th, and 55th years of the term. The instant rental reopening occurred on June 6, 2018 and ends June 5, 2028.

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

The subject site is located near the top of Mount Tantalus, in Honolulu, on the island of Oahu. In 1973, the State leased the land by direct negotiation to Hawaiian Telephone Company for a term of 65 years to be used as a radio-telephone transmission facility. Hawaiian Telephone Company had a number of name changes over the years and is now known as Hawaiian Telcom, Inc. (“HTI”).

In the fall of 2014, HTI sought to assign the subject lease to InSite. The assignment was part of a larger transfer of HTI tower facilities to InSite. HTI had recently emerged from bankruptcy and made an economical business decision to transfer five (5) State leases to InSite who would then sublease the facilities back to HTI.

On October 24, 2014, the Board of Land and Natural Resources (“Board”) approved HTI’s request to assign the subject general lease to InSite, with the understanding that once consummated, HTI would take a sublease back from InSite. At the meeting, the Board also authorized the amendment of the subject general lease’s subletting provision. By Amendment dated May 12, 2016, the subletting provision now provides 30 percent of revenue for the first sublease/license, 40 percent for the second sublease/license, and 50 percent for the third and subsequent subleases/licenses be paid by lessee to the lessor. Currently, Hochman Hawaii-Three, HTI, Salem Media, Blow Up Media, and the US Secret Service are sublessees.

REMARKS:

The lease rent for the subject property reopened on June 6, 2018. An appraisal of rental value for the lease was completed by the Board’s appraiser. InSite did not agree with the appraised value and had its own appraiser prepare an appraisal report. While the two appraisers were nearly identical on the fair market value of the ground lease (\$39,300 – Board and \$39,000 - InSite), InSite’s appraiser based his ground lease valuation on the assumption that the sublease revenue applied only to the extent that the revenue share calculation exceeded the base rent. The Department of Land and Natural Resources, Land Division, (“Division”) disagreed.

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.” This resolution is in effect a settlement of the dispute because the mediation is

nonbinding and both parties, the Division and InSite, must 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 appraiser James Hallstrom, Jr., MAI, CRE, FRICS serve as the mediator. Mediation between the parties was conducted on May 1, 2019 in Honolulu. InSite was represented by its in-house general counsel, Roni Jackson, Esq., and by its Honolulu counsel, Rosemary Fazio, Esq. Participants from the Division were Russell Tsuji, Land Administrator; Blue Kaanehe, Project Development Specialist; Andrew Tellio, Appraisal and Real Estate Specialist; and David Day, Deputy Attorney General.

During the mediation, InSite shared that the rent the subleases generated, when factoring in revenue sharing and a base rent of \$39,300, was far less than the expenses incurred to maintain the subject site. See, Exhibit A. Unlike its predecessor-in-interest, HTI, InSite solely operates as a leasing agent. InSite explained that since the subject lease was assigned as part of a larger transfer from HTI, it expected to address the appropriateness of the revenue sharing provision at the June 6, 2018 rent reopening.

The Division, on the other hand, maintained that the revenue sharing provision was not subject to negotiation at the rent reopening. Moreover, the provision was not against the base rent, but *in addition* to the base rent, as clarified by the Staff in its July 22, 2011 Board submittal. However, the parties evaluated InSite's claimed loss against the Division's need for good lease administration practices and the parties were able to reach a mediated settlement.

Ultimately, the parties agreed that, subject to Board approval, amendment of the lease would be an appropriate and fair resolution to the dispute, according to the terms negotiated in the proposed Second Amendment of General Lease No. S-4588, attached hereto as Exhibit B. Among other things, the proposed amendment states that the ground rent commencing June 6, 2018 through June 5, 2028 would be the *greater of* \$39,300 per annum, or revenue sharing based on the formula set in the May 12, 2016 Lease Amendment. In exchange for this amendment, InSite will pay a conversion fee of \$78,600¹ in a single lump-sum upon the full execution of the agreement. The rent for the last reopening period, commencing June 6, 2028 through June 5, 2038 shall be reopened with rents set based upon a fair market appraisal. At the Board's discretion, at the termination of the lease, InSite, at its own cost, will take down the tower and remove all improvements on the subject premises and restore the premises to the Board's specifications. This is a valuable consideration because the Lease as written does not provide for the Lessee to remove improvements, which could be costly to the Department. Lastly, InSite shall pay a true up payment representing the difference between the \$26,600 annual base rent and

¹ \$78,600 represents two years annual ground rent of \$39,300.

the agreed \$39,300 annual rent, not later than ten business days following the full execution of this amendment.

The Board may go into Executive Session pursuant to Section 92-5(a) (4), Hawai‘i Revised Statutes, in order to consult with counsel on questions and issues pertaining to the Board’s powers, duties, privileges, immunities, and liabilities.

RECOMMENDATION:

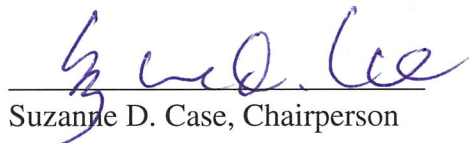
That the Board approve the Second Amendment of General Lease No. S-4588 according to the terms as attached herein as a resolution to the rental reopening.

Respectfully Submitted,



Russell Y. Tsuji
Land Division Administrator

APPROVED FOR SUBMITTAL:



Suzanne D. Case, Chairperson

InSite Towers Development, LLC
 TCF analysis
 HI037 & HI040; General Lease No. S-4588
 as of April 2019

Revenue	HI037	HI040	Total	Notes
Hochman Hawaii 3	\$0.00	\$1,990.09	\$1,990.09	Lease #1 (30% rev share)
HI Telecom	\$0.00	\$437.09	\$437.09	Lease #2 (40% rev share)
Salem Media	\$0.00	\$1,560.00	\$1,560.00	Lease #3 (50% rev share)
Blow Up Media	\$0.00	\$1,000.00	\$1,000.00	Lease #4 (50% rev share)
US Secret Service	\$0.00	\$550.00	\$550.00	Lease #5 (50% rev share)
Total Revenue	\$0.00	\$5,537.18	\$5,537.18	

Expenses	HI037	HI040	Total	Notes
Ground Rent	\$3,275.00	\$0.00	\$3,275.00	
Rev Share	\$0.00	\$2,326.86	\$2,326.86	
Insurance	\$43.00	\$50.00	\$93.00	
Maintenance	\$155.00	\$487.00	\$642.00	
Total	\$3,473.00	\$2,863.86	\$6,336.86	

TCF (monthly)	(\$3,473.00)	\$2,673.32	(\$799.68)	
TCF (Annualized)	(\$41,676.00)	\$32,079.81	(\$9,596.19)	

\$39,300 Annual Rent-With Revenue Share

30, 2014, recorded in the Bureau of Conveyances of the State of Hawaii as Document No. A-55140572, consent thereto given by the State of Hawaii, Board of Land and Natural Resources, by unrecorded instrument executed May 12, 2016; and

WHEREAS, pursuant to the terms of the Lease and HRS §171-17(d)(2), the Parties engaged in a mediation in Honolulu, Hawaii on May 1, 2019, with James Hallstrom, Jr., MAI, CRE, FRICS serving as mediator (the "Mediation") to determine the fair market rental for the premises demised by the Lease;

WHEREAS, as the result of the Mediation, the Parties were able to reach agreement with respect to modifying the rent structure under the Lease for the remainder of the Lease term as well as to the fair market rent for the premises to be paid by LESSEE under the Lease for the ten (10) year period commencing on June 6, 2018 through June 5, 2028.

NOW, THEREFORE, in consideration of the mutual promises herein set forth and other good and valuable consideration, LESSOR and LESSEE hereby agree as follows:

1. Unless otherwise defined herein, any capitalized term used in this Second Amendment shall have the meaning ascribed to such term in the Lease.

2. The Lease is hereby amended to reflect that from and as of June 6, 2018 the total monetary sum that Lessee must pay annually under the Lease shall be the *greater of* (i) the annual rental determined pursuant to Paragraphs B and C on pages 2 and 3 of the Lease, or (ii) the revenue share formula set forth in Section 14 ("Subletting") thereof.

3. Commencing on June 6, 2018, and continuing through and including June 5, 2028 (the "Current Ten Year Period"), the annual rental established pursuant to Paragraphs B and C on pages 2 and 3 of the Lease shall be Thirty-Nine Thousand Three Hundred and 00/100 Dollars (\$39,300.00).

4. Notwithstanding the foregoing, the Parties agree and acknowledge that there shall be no look back or true up with respect to rents and other amounts actually paid by LESSEE to LESSOR during the period June 6, 2018, through May 31, 2019, with the limited exception that LESSEE shall, not later than ten (10) business days following the full execution of this Second Amendment, tender a one-time payment to LESSOR in an amount representing the difference between the \$26,600.00 annual base

rent paid by LESSEE for the period from June 2018 through the calendar month in which this Second Amendment is fully-executed by both parties and the \$39,300.00 annual rental set forth in Paragraph 3 (the "Annual Rental True Up Payment"). LESSEE shall, not later than ten (10) business days following the full execution of this Second Amendment by the Parties, tender to LESSOR the Annual Rental True Up Payment by LESSEE'S check.

5. Section 31 of the Lease (entitled "Surrender") is hereby amended to read as follows:

"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 below.

At the option of the LESSOR to be exercised in its sole discretion, at the end of said term or other sooner termination of this lease, LESSEE agrees, at LESSEE'S cost and expense, to remove the improvements on the demised premises (including footings and, if applicable, concrete pads), to a depth of two feet (2') below ground surface in accordance with then-existing wireless infrastructure industry standards. LESSEE also agrees, at its own cost and expense, to restore the demised premises to a condition that is in good order and repair such that it blends with the surrounding landscape and environment, and to provide suitable ground cover planting (to be identified by the State of Hawaii's Division of Forestry and Wildlife ("DOFAW") in its commercially-reasonable discretion exercised in good faith) to prevent future erosion of the Property. (The obligations set forth in the two previous sentences are referred to herein as the "Premises Restoration Obligations"). In performing the Premises Restoration Obligations, LESSEE agrees to consult with DOFAW for the purpose of minimizing the introduction of invasive species onto the demised premises. Upon the completion of its Premises Restoration Obligations, LESSEE shall, at its cost and expense, conduct a Phase I Environmental Site Assessment (the "Phase I ESA"). If the Phase I ESA identifies a Recognized Environmental Condition ("REC") that arose on the premises demised by the Lease during the term of the Lease and up to and until the completion of the Premises Restoration Obligations, then LESSEE shall, also at its cost and expense, conduct a Phase II Environmental Site Assessment (a "Phase II ESA"). LESSEE shall, thereafter, cause the remediation measures identified in the Phase II ESA to be completed in a prompt, lawful, and good and workmanlike manner at LESSEE'S cost and expense."

6. In addition to the Annual Rental True Up Payment, LESSEE shall, not later than ten (10) business days following the full execution of this Second Amendment by the Parties, tender to LESSOR a one-time payment in the amount of Seventy-Eight Thousand Six Hundred and 00/100 (\$78,600.00) (the "One-Time Payment"), which One-Time Payment shall be made by LESSEE's check.

7. LESSOR and LESSEE agree that the terms of this Amendment shall not be deemed to set binding precedent with respect to future ground lease negotiations between the Parties or between LESSOR and any third party.

8. LESSOR and LESSEE respectively hereby covenant and warrant that the person executing this Second Amendment on its behalf is duly authorized to do so, and that this Second Amendment constitutes a binding obligation of the entity on whose behalf (s)he has signed. This Second Amendment may be executed in duplicate counterparts, each of which shall be deemed an original. The parties agree that, except as amended hereby, the terms and conditions of the Lease shall remain in full force and effect; provided, however, that in the event of a conflict between the terms of the Lease and the terms of this Second Amendment, the terms of this Second Amendment shall control.

9. This Amendment, read in conjunction with the Lease, sets forth the entire agreement between the Lessor and Lessee; and the general lease as amended and modified hereby shall not be altered or modified except by a memorandum in writing signed by the LESSOR and LESSEE.

[SIGNATURE PAGE FOLLOWS]

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 to be duly executed this _____ day of _____, 20____.

LESSOR:

STATE OF HAWAII

Approved by the Board of Land and Natural Resources at its meeting held on _____, 2019.

By: _____
SUZANNE D. CASE
Chairperson
Board of Land and Natural Resources

APPROVED AS TO FORM:

DAVID D. DAY
Deputy Attorney General
Dated: _____

LESSEE:

INSITE TOWERS DEVELOPMENT, LLC
a Delaware limited liability company

By: _____
RONI D. JACKSON
General Counsel