

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

March 13, 2020

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawai'i

Hawai'i

Consent to Sublease of Non-Exclusive Easement No. S-5474, Waikoloa Beach Association, Lessee/Sublessor, to Nanea Kai, Inc., Sublessee, Anaehoomalu, South Kohala, Hawai'i, Tax Map Key: (3) 6-9-007: seaward of 011

APPLICANT:

Waikoloa Beach Association, a Hawai'i non-profit corporation, as Sublessor, to Nanea Kai, Inc. (NKI), a Hawai'i corporation, as Sublessee,

LEGAL REFERENCE:

Section 171-36(a)(6), Hawai'i Revised Statutes, as amended.

"Revision to Sublease Rent Participation Policy" adopted by the Board of Land and Natural Resources (Board) on May 26, 2000, agenda item D-24, as amended by "Resubmittal: Amendment to the Sublease Rent Participation Policy" approved by the Board on January 26, 2001, under agenda item D-8, and as further amended by "Modification of Staff Recommendation in Board Action of January 26, 2001, Item D-8, As Amended," on August 24, 2012, under agenda item D-14.

LOCATION:

Portion of Government lands of Anaehoomalu Bay situated at Waikoloa, South Kohala, Hawai'i, identified by Tax Map Key: (3) 6-9-007: seaward of 011, as shown on the attached map labeled Exhibit A.

AREA:

200 square feet, more or less.

TRUST LAND STATUS:

Section 5(b) lands of the Hawai'i Admission Act

DHHL 30% entitlement lands pursuant to the Hawai'i State Constitution: NO

LEASE CHARACTER OF USE:

Right, privilege and authority to construct, use, maintain, and repair five (5) commercial moorings, five (5) day-use moorings, a stern mooring, and an ingress/egress corridor.

SUBLEASE CHARACTER OF USE:

Non-exclusive use of easement moorings A and B (Exhibit B).

TERM OF LEASE:

40 years, commencing on 8/9/1991 and expiring on 8/8/2031. The next rental reopening is scheduled for 08/08/2026.

TERM OF SUBLEASE:

January 1, 2020 through December 31, 2030.

ANNUAL LEASE RENTAL:

\$5,240.00 per annum or 3% of the gross receipts¹ to be paid by March 31st of each year for the period covering the previous calendar year, whichever is higher.

ANNUAL SUBLEASE RENTAL:

\$1,084.00 or 3% of mooring revenues annually.

RECOMMENDED ADJUSTMENT TO LEASE RENTAL:

Not applicable as the subject term easement does not have a provision allowing for sandwich profits. However, staff is recommending that the gross receipts Hawaii Nautical, Inc. derives from its operations from Moorings A and B be included in WBA's calculation of percentage rent due to the State under Lease of Non-Exclusive Easement No. S-5474.

¹ The term "gross receipts" means all receipts, income, and revenue derived from, related to, or connected with the operations permitted by the lease of non-exclusive easement excluding, however, State excise tax collected.

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

In accordance with Hawaii Administrative Rules (HAR) Section 11-200.1-15 and the Exemption List for the Department of Land and Natural Resources reviewed and concurred by the Environmental Council on June 5, 2015, the subject request is exempt from the preparation of an environmental assessment pursuant to Exemption Class No. 1, Item 12, and Class 3, Item No. 47. See Exhibit C.

DCCA VERIFICATION:

SUBLESSOR: *Waikoloa Beach Assn.*

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>

SUBLESSEE: *Nanea Kai, Inc.*

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>

REMARKS:

Background:

At its meeting of August 9, 1991, under agenda item F-7, the Board of Land and Natural Resources approved the Term, Non-exclusive Easements covering offshore waters and submerged lands for the right to construct, use, maintain and repair five (5) commercial moorings, five (5) day-use moorings, a stern mooring, and an ingress/egress corridor. Grant of Term Easement No. S-5474 (GL S-5474) was issued for a period of forty (40) years effective August 9, 1991 through August 8, 2031. Although this document was issued as a lease of easement for mooring purposes, there is no specific provision regarding subletting.

The initial rent for GL S-5474 was set at \$156 per annum or a percentage rent of the gross receipts, whichever is higher. However, for the first fifteen years only, percentage rent of the gross receipts was not applicable. Rental reopenings were scheduled for the 15th, 25th and 35th years of the easement term. With regard to the percentage rent, the term "gross receipts" is defined as all receipts, income, and revenue derived from, related to, or connected with the operations permitted by this non-exclusive easement.

A rental reopening in 2016 established the fair market rent at \$5,240 per annum or 3% of gross receipts, whichever was higher, for the 10-year period beginning August 9, 2016 through August 8, 2026.

Sublease:

Prior to GL S-5474 being issued, Waikoloa Beach Association (WBA) entered into a Beach Concession Access Agreement for a portion of the beach at Anaehoomalu Bay to Nanea Kai, Inc. (NKI). After GL S-5474 was granted, the Beach Concession Access Agreement was amended to include the right to use Moorings A and B. Although DLNR was aware of the sub-lease arrangement under the Beach Concession Access Agreement, formal authorization was never obtained. WBA is now requesting formal authorization of the sublease agreement between WBA and NKI.

During the term and, if the option is exercised, the option term, NKI shall pay WBA a rental amount equal to the greater of the minimum rental fee and the percentage rental fee amounts for each period, details of which are provided above.

As mentioned above, for the initial 15-year term of GL S-5474 the rent was \$156 per year and percentage rent was not applicable. At the rent reopening on the 15th year of the lease (2006), rent was set at \$5,900 or 3% of gross receipts, whichever is higher. At the reopening on the 25th year of the lease (2016), rent was set at \$5,240 or 3% of gross receipts, whichever is higher. The lease also provides for an additional rent reopening in the 35th year of the lease term.

GL S-5474 is for mooring purposes with no specific subletting prohibition or provision per se, except it does prohibit general alienation without the State's consent. The document is silent on any consideration due to the State for the consent to alienate. Pursuant to the "Revision to Sublease Rent Participation Policy" adopted by the Board at its meeting of May 26, 2000, agenda item D-24, and amended at its meetings of January 26, 2001, under agenda item D-8, and August 24, 2012, under agenda item D-14:

If the lessee subleases improvements not owned by the State, the Board shall not receive any portion of sublease rents from subleasing improved space unless: (i) that right and method of calculation are specifically stated in the lease, or (ii) participation in sublease rents is warranted considering the age of the improvements (including but not limited to the extent to which the improvements have been depreciated or amortized), lessee's expenditures to maintain the same in relation to sublease revenues, and the extent to which the lessee actually occupies and uses the lease premises for its own business.

In the present case, staff believes there is already a basis for the State to participate in sublease rents because GL S-5474 provides for percentage rent. Staff explained to WBA that the Department's current general lease form contains a subletting provision stating that the sublessee's gross receipts are to be considered in determining WBA's percentage rent due. However, WBA asserts that including the sublessees' gross sales in the calculation of WBA's rent would be unfair and did not believe such practice was a standard in the commercial world. Nevertheless, under GL S-5474 as drafted and current Board policy, staff believes that the percentage rent provided for under GL S-5474 should

include the gross receipts that NKI derives from the moorings A and B. Staff is therefore including a recommendation below that the consent to sublease be conditioned on WBA including the gross receipts NKI derives from moorings A and B in the calculation of percentage rent due from WBA.

The Grantee (WBA) is compliant with all lease terms and conditions, including rent and insurance (term easement agreement does not require a performance bond).

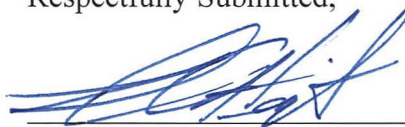
The last rental reopening occurred 8/09/2016. The next rental reopening is scheduled for 8/08/2026. There are no outstanding rental reopening issues.

RECOMMENDATION:

That the Board consent to the sublease under Grant of Term Easement No. S-5474 between Waikoloa Beach Association, as Sublessor, and Nanea Kai, Inc., as Sublessee, subject to any applicable conditions cited above which are by this reference incorporated herein and further subject to the following terms and conditions:

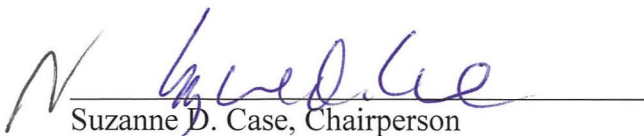
1. The standard terms and conditions of the most current consent to sublease form, as may be amended from time to time;
2. The gross receipts Nanea Kai, Inc. derives from its operations on moorings A and B shall be included in the calculation of gross receipts due to the State under Grant of Term Easement No. S-5474;
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:



Suzanne D. Case, Chairperson



DAVID Y. IGE
GOVERNOR OF HAWAII



**STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES**

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HONOLULU, HAWAII 96809

March 13, 2020

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

ROBERT K. MASUDA
FIRST DEPUTY

M. KALEO MANUEL
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

EXEMPTION NOTIFICATION

Regarding the preparation of an environmental assessment pursuant to Chapter 343, HRS and Chapter 11-200.1, HAR

Project Title:	Consent to Sublease of Non-Exclusive Easement for Mooring Purposes.
Project / Reference No.:	GL S-5474
Project Location:	Anaehoomalu, South Kohala, Hawaii, Tax Map Key: (3) 6-9-007: seaward of 011
Project Description:	The subject term easement is for offshore mooring purposes. There are currently five (5) moorings within the easement. There is a request for the sublease of two of these moorings.
Chap. 343 Trigger(s):	Use of State Land
Exemption Class No. and Description:	In accordance with Hawaii Administrative Rule Section 11-200.1-15 and the Exemption List for the Department of Land and Natural Resources reviewed and concurred on by the Environmental Council and dated June 5, 2015, the subject request is exempt from the preparation of an environmental assessment pursuant to Exemption Class No. 1, Item 12 that states "Operation, repair and maintenance of existing loading docks, piers, piles, boat launch ramps, offshore mooring facilities, and other similar support structures, as permitted by the U.S. Army Corps of Engineers, Honolulu District, under a Nationwide Permit 3 (Maintenance)." And Item No. 47 that states "Leases of state land involving negligible or no expansion or change of use beyond that previously existing".
Cumulative Impact of Planned Successive Actions in Same Place Significant?	No. The use of these offshore moorings for commercial purposes is a continuation of the previous use of the property and is compliant with county zoning requirements. Staff believes there are no cumulative impacts involved.

Exhibit C

**Action May Have
Significant Impact on
Particularly Sensitive
Environment?**

No. There are no particular sensitive environmental issues involved with the proposed use of the properties.

Analysis:

The existing commercial, day-use and stern moorings were issued to Waikoloa Beach Association through a non-exclusive Term Easement (GL S-5474) for a period of forty (40) Years beginning August 9, 1991. Prior to the issuance of the term easement the applicant submitted a Conservation District Use Permit (CDUP - Dec. 1988) along with an Environmental Impact Statement (EIS – June 1990). The EIS included a letter of permission from the U.S. Army Corps of Engineers with conditions agreed to by the applicant. The current request is a sublease for two of the moorings for commercial purposes and represents a continuation of the easement character of use. Therefore, staff believes that this intended use would result in no significant impact to the natural, environmental and/or cultural resources in the area, and that it should be found to be exempt from the preparation of an environmental assessment.

Consulted Parties:

Department of Land and Natural Resources, Division of Boating and Ocean Recreation (DOBOR), and the Division of Aquatic Resources (DAR).

DOBOR concurs with the recommendation from Land Division for the consent to sublease of moorings A and B.

Recommendation:

That the Board find this project will probably have minimal or no significant effect on the environment and is presumed to be exempt from the preparation of an environmental assessment.