

TO THE BOARD OF LAND AND NATURAL RESOURCES  
MEETING OF SEPTEMBER 11, 2020 RE AGENDA ITEM J-2

**GKM's Testimony in Opposition to Staff Recommendation  
re Conditions for Sale of Fuel under Harbor Lease No. H-82-4**

Chairperson and Members of the Board of Land and Natural Resources:

On behalf of GKM, Inc., we respectfully request that the Board of Land and Natural Resources (the "Board") disapprove Staff's request to allow GKM to sell fuel at Kona Marina only to its tenants—not to the public boating community—and to impose percentage rent on such fuel sales.

Staff's Report paints an inaccurate picture of the situation relying upon excerpts from decades' old letters, inexplicably failing to cite the Board's approval of GKM's fuel sales to the public and its approval of its Lease rent. GKM appreciates this opportunity to present the complete relevant facts.

It should be noted that staff previously proposed a similar request to the Board in July, 2018. GKM opposed the matter then, as it does now. The Board did not act in 2018 because staff withdrew its report (most likely because staff at the time recognized that its argument lacked merit when challenged with facts).

In summary, Harbor Lease No. H-82-4 ("Lease") permits broad use of the premises "principally for marine and marine-related activities." GKM and its predecessors have sold fuel there to the public for decades in compliance with the Lease and with full approval of DLNR and subsequent Board consent. Further, DOBOR and GKM renegotiated the Lease rent applicable for the five-year period from March 31, 2019, which settlement the Board approved at its meeting on May 8, 2020. The settlement did not include a percentage rent component.

**Fuel Sales at Honokohau Harbor**

The public has enjoyed the opportunity to obtain fuel at Kona Marina since 1985. Fuel was originally provided under a sublease from the property's Lessee (originally Gentry; now GKM, Inc.) with Honokohau Fuel, Inc.

Attached as Exhibit 1 is the Honokohau's Sublease dated February 12, 1985. The "Permitted Use" is set forth on page 2: "...selling of gas, diesel and oil to commercial, charter and pleasure boats within the Leased area." Attached as Exhibit 2 is the Board's Consent To Sublease allowing the permitted uses--including the selling of gas, diesel and oil without the restrictions now being requested by DOBOR. Finally, attached as Exhibit 3 is the Confirmation of the Commencement Date of February 15, 1985.

At that time, Honokohau's fuel pumps were in the center of where boats were hauled and interfered with hauling. GKM therefore shut down the fueling operation in 2004. Honokohau's sublease terminated in 2005.

Due to the strong demand from the boating community for continued fueling at Kona Marina, GKM requested approval for the relocation of the fueling dispensers to the north boundary of the Lease's premises. Steve Molmen of DLNR on December 29, 2004 approved those plans. At a hearing on March 24, 2006, the Board approved the relocation of the fuel dispensers and consented to GKM's mortgage of \$1,000,000 for the fuel dispenser relocation and steel building improvements to allow for continuation of fuel sales to the public. Since then, GKM (and not a sublessee) has owned and operated the convenience store/gas station and continued to provide fuel to the public.<sup>1</sup>

### *The Extra-Contractual Fuel Charge*

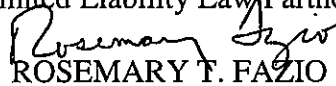
DOBOR's renewed attempt, years later, again to raise this matter comes as a surprise to GKM. As before, GKM once more strongly objects to DOBOR's attempt unilaterally to modify the Lease and impose an extra-contractual charge on operations that have been approved and ongoing for decades.

Neither the Lease nor the Extension of Lease authorizes such unilateral action. GKM in good faith recently settled the rent for the current five-year Lease rent period. BLNR approved that settlement at its meeting on May 8, 2020. That settlement and approved rent does not include a percentage rent feature.<sup>2</sup>

GKM has a huge reliance interest in the improved premises. GKM made those improvements for the continued operation of a public fueling station with the written consent of the Board years ago. DOBOR's suggestion that the Board can now impose a five percent (5%) charge on GKM's fuel sales (and limit those sales to GKM's subtenants) just because it wants to is contrary to law, the facts, and all aspects of fair dealing—including the recently concluded lease renegotiations that the Board earlier approved this year.

### *Conclusion*

GKM appreciates the opportunity to present this written testimony to the Board members, and would like the opportunity to appear at the meeting to respond to any Board questions. In conclusion, GKM respectfully requests the Board to disapprove Staff's recommendation.

ASHFORD & WRISTON  
A Limited Liability Law Partnership LLP  
By   
ROSEMARY T. FAZIO  
NAOMI KUWAYE

---

<sup>1</sup> Numerous letters and other documents can be provided to prove these facts, if the Board has any questions.

<sup>2</sup> Staff's request on page 4 references the Kona Marine Holdings, LLC's lease, which supposedly provides for percentage rent based upon gross receipts from fueling operations. It should be noted that this lease was executed at approximately the same time as GKM's Harbor Lease No. H-82-4, but GKM's Lease does not provide for percentage rent. (Furthermore, GKM understands the Kona Marine Holdings lease was later modified by a supply agreement.)

# **EXHIBIT “1”**

GENTRY KONA MARINA SUBLEASE

GENTRY-PACIFIC, LTD.

to

Honokohau Fuel, Inc. and

Arthur M. Barnes and Steven Sawyer

Sublease No. GKM-011

8/1/84

## TABLE OF CONTENTS

BASIC PROVISIONS AND EXHIBITS	Page
Item A - Premises . . . . .	1
Item B - Leased Area . . . . .	1
Item C - Sublease Term; Sublease Year; Extensions and Renewals . . . . .	1
Item D - Permitted Use . . . . .	2
Item E - Trade Name . . . . .	2
Item F - Fixed Minimum Rent . . . . .	2
Item G - Percentage Rent . . . . .	2
Item H - Security Deposit . . . . .	3
Item I - Guarantor(s) . . . . .	3
Item J - Sublessee's Share of Taxes and Assessments . . . . .	3
Item K - Common Area Expenses . . . . .	3
Item L - Broker(s) . . . . .	4
Item M - State of Hawaii, Department of Transportation Harbor Lease No. H-82-4. . . . .	4
Item N - Sublessor's Address For Rental Payments and Notice . . . . .	4
Item O - Exhibits . . . . .	4
Item P - Special Conditions . . . . .	4
<b>COVENANTS</b>	
1. Payment of Rent . . . . .	5
2. Service Charge and Default Rate of Interest . . . . .	5
3. Rental Redetermination . . . . .	5
4. Percentage Rent . . . . .	7
5. Gross Sales and Reports . . . . .	8
6. Gross Income Tax . . . . .	8
7. Preservation and Disclosure of Records . . . . .	8
8. Audits . . . . .	8
9. Taxes, Assessments, etc. . . . .	8
10. Minerals and Waters . . . . .	9
11. Prehistoric and Historic Remains . . . . .	9
12. Easements . . . . .	9
13. Construction of Improvements; Environmental Impact Assessment . . . . .	9
14. Improvement Bond . . . . .	10
15. Contractor's Insurance . . . . .	10
16. Utilities . . . . .	11
17. Utility Services; Rubbish Disposal . . . . .	11
18. Covenant Against Discrimination . . . . .	11
19. Sanitation, etc. . . . .	11
20. Waste and Unlawful, Improper or Offensive Use of Premises . . . . .	11
21. Compliance with Laws . . . . .	11
22. Inspection of Premises . . . . .	11
23. Improvements . . . . .	12
24. Repairs to Improvements. . . . .	12
25. Common Area; Rules and Regulations . . . . .	12
26. Encumbrances, Rights Reserved to Sublessor . . . . .	13
27. Right to Change . . . . .	13
28. Right to Enter . . . . .	13
29. Liens . . . . .	14
30. Assignments and Subletting. . . . .	14
31. Rental Revisions Under the Lease . . . . .	14
32. Mortgage . . . . .	14
33. Protection of Mortgagee . . . . .	16
34. Subordination and Attornment . . . . .	16
35. Financial Statements . . . . .	17
36. Indemnity . . . . .	17
37. Costs of Litigation . . . . .	17

38.	Insurance . . . . .	18
	A. Liability Insurance . . . . .	18
	B. Fire Insurance . . . . .	18
39.	Surrender . . . . .	19
40.	Breach . . . . .	20
41.	Condemnation . . . . .	21
42.	Inspection by Prospective Sublessees. . . . .	21
43.	Sale or Assignment by Sublessor. . . . .	22
44.	Attornment . . . . .	22
45.	Transfer of Sublessor's Obligations . . . . .	22
46.	Extension of Time. . . . .	22
47.	Quiet Enjoyment . . . . .	23
48.	Short Form Lease . . . . .	23
49.	Waiver of Jury Trial and Counterclaims . . . . .	23
50.	Signs . . . . .	23
51.	Non-Waiver . . . . .	23
52.	Brokerage Commissions. . . . .	23

GENTRY KONA MARINA SUBLEASE

THIS SUBLEASE made and entered into this 12<sup>th</sup> day of FEBRUARY, 1985, by and between GENTRY-PACIFIC, LTD., a Hawaii corporation, hereinafter called "Sublessor", and Honokohau Fuel Inc, and Honokohau Gas and Oil Company, whose principal place of business and post office address is P.O. Box 2078, Kailua-Kona, Hi. 96745, hereinafter called "Sublessee",

WITNESSETH:

In consideration of the rent to be paid and of the terms, covenants and conditions herein contained, all on the part of the Sublessee to be kept, observed and performed, the Sublessor does hereby demise and lease unto the Sublessee, and the Sublessee does hereby lease and hire from the Sublessor, the Premises hereinafter described in the Basic Provisions and Exhibits.

BASIC PROVISIONS AND EXHIBITS

Item A -- PREMISES: Premises is defined in this Sublease as the area outlined on Exhibit A which is attached hereto and made a part hereof. The Premises is located in the Honokohau Boat Harbor, and, is specifically in the area of property leased by Gentry-Pacific, Ltd. from the State of Hawaii.

Item B -- LEASED AREA: For all purposes under this Sublease, the Leased Area of the Premises shall be deemed to contain approximately na square feet.

Item C -- SUBLEASE TERM; SUBLEASE YEAR; EXTENSIONS AND RENEWALS:

*R/S* { The Sublease Term is 20 years, and no months and no days, commencing ~~30 days after issuance of Certificate of Occupancy, or date~~, ("the Commencement Date"), and ending no later than midnight on 20 years hence., ("the Termination Date"). A Sublease Year shall mean a period of twelve (12) consecutive full calendar months. The first Sublease Year shall begin on the Commencement Date if such Commencement Date shall occur on the first day of a calendar month. If such Commencement Date shall not fall on the first day of a calendar month, the first Sublease Year shall commence on the first day of the calendar month immediately following the month in which the term would otherwise have commenced. Each succeeding Sublease Year shall commence on the anniversary date of the first Sublease Year. The Sublease Term includes all extensions and renewals of the original Sublease term herein set forth. *13*  
*14*  
*15*

Item D -- PERMITTED USE: The Premises shall be used by the Sublessee solely for the following and for no other purpose(s): selling of gas, diesel and oil to commercial, charter and pleasure boats, within the Leased area.

The Sublessee is aware that the Sublessor does not guarantee that the Permitted Use listed above shall be for the exclusive use of the Sublessee within the area of the Honokohau Boat Harbor and/or within the area of Gentry's Kona Marina.

Item E -- TRADE NAME: Sublessee shall operate and do business on the Premises with all signs and advertising under the trade name: Honokohau Gas & Oil Company

Item F -- FIXED MINIMUM RENT:

(1) From the Commencement Date through year three, inclusive, a minimum annual rent of \$ 2,400.00, in monthly installments of \$ 200.00

(2) For Sublease Year 4, through 5, inclusive, a minimum annual rent of \$ 2,760.00 in monthly installments of \$ 230.00.

(3) For Sublease Year na, through na, inclusive, a minimum annual rent of \$ na in monthly installments of \$ na.

(4) For Sublease Year na, through na, inclusive, a minimum annual rent of \$ na in monthly installments of \$ na.

Rent for the remaining 3 five-year rental periods will be renegotiated in accordance with Covenant Number 3, entitled Rental Redetermination, but in no event will the rent for each new rental period be less than the rent for the immediately preceding rental period.

Item G -- PERCENTAGE RENT: none percent ( ---%) In the event this Sublease provides that the percentage rent is to be renegotiated, then the parties shall mutually agree to the new percentage rent not less than 90 days prior to the expiration of the last Sublease Year for which the percentage rent is fixed; and, in the event Sublessor and Sublessee fail to so agree on a new percentage rent, then such percentage rent shall be redetermined by an arbitrator or arbitrators in the same manner as they are appointed and used under paragraph no. 3 entitled Rental Redetermination, hereinafter. In no event shall the redetermined percentage rent be less than the percentage rent for the immediately preceding period.



Item H -- SECURITY DEPOSIT: \$ 200.00 . This Security Deposit shall be held by Sublessor as security for the faithful performance by Sublessee of all of the terms, covenants and conditions of this Sublease by Sublessee. This deposit bears no interest, may be comingled with Sublessor's other funds, shall be increased by Sublessee if the Fixed Minimum Rent increases and shall be returned at the termination of this Sublease if Sublessee has complied with all of the terms, covenants and conditions of this Sublease, including the payment of rent, and Sublessee has vacated the Premises.

Item I -- GUARANTOR(S): Arthur M. Barnes and Steven Sawyer

Item J -- SUBLESSEE'S SHARE OF TAXES AND ASSESSMENTS: three and 47/100 percent (3.47 %) for the land and na percent (na %) for the buildings and improvements. (10)  
12  
13

Said percentage has been calculated as shown in Exhibit "C" attached hereto and made a part hereof, and Sublessee hereby acknowledges that Sublessor may use any other method of weighted proration which reasonably allocates such charges among the leased areas, as solely determined by Sublessor. Sublessee also acknowledges that the square footages of the various classes of leaseable space and of the common area space as estimated in Exhibit "C" may materially change as solely determined by Sublessor, as the Gentry Kona Marina is developed and subsequently operated.

Item K -- COMMON AREA EXPENSES: Sublessee's percentage of common area expenses which Sublessee must bear is one 14/100 percent (1.14 %). Said percentage of common area expenses shall be paid by Sublessee monthly within 5 days after Sublessor notifies Sublessee of the monthly amount due. Sublessee agrees that Sublessor may adjust once per each Sublease Year the above percentage of common area expenses which Sublessee must bear. (14)  
14  
15

Said percentage has been calculated as shown in Exhibit "C" attached hereto and made a part hereof, and Sublessee hereby acknowledges that Sublessor may use any other method of weighted proration, which reasonably allocates such charges among the leased areas, as solely determined by Sublessor. Sublessee also acknowledges that the square footages of the various classes of leaseable space and of the common area space as estimated in Exhibit "C" may materially change as solely determined by Sublessor, as the Gentry Kona Marina is developed and subsequently operated.

Item L -- BROKER(S): NONE.

Item M -- STATE OF HAWAII, DEPARTMENT OF TRANSPORTATION HARBOR  
LEASE NO, H-82-4:

Notwithstanding anything contained to the contrary in this Sublease, in any and all events, the State of Hawaii, Department of Transportation Harbor Lease No. H-82-4 between the State of Hawaii and Gentry-Pacific, Ltd. controls and is paramount, which includes the required consent of the State of Hawaii, otherwise this Sublease will be of no force and effect. (Lease No. H-82-4 is herein sometimes referred to as the "Lease".) The property subject to said Lease No. H-82-4 is depicted in Exhibit "A", and legally described in Exhibit "B", of which the Premises is a part.

Sublessee hereby acknowledges and represents that Sublessee has received a copy of the Lease, and has reviewed the Lease.

Item N -- SUBLESSOR'S ADDRESS FOR RENTAL PAYMENTS AND NOTICE:  
Gentry-Pacific, Ltd., P. O. Box 295, Honolulu, Hawaii 96809, and at such other place as Sublessor may designate in writing to Sublessee from time to time.

Item O -- EXHIBITS: The following drawings and special provisions are attached hereto as exhibits and are expressly incorporated in this Lease for all purposes:

Exhibit "A" -- Plan outlining the Premises and Site plan of Gentry Kona Marina.

Exhibit "B" -- Legal description of Gentry Kona Marina.

Exhibits "C" -- Projected Allocation Estimates for Sublessee's Percentage Liability of Real Property Taxes and Assessments (Item J) and Common Area Expenses (Item K)

Note: Although Gentry-Pacific, Ltd. may lease additional land in the Honokohau Boat Harbor, those additional lands will not be included in computing the percentages in Items J and K.

Item P -- OTHER CONDITIONS:

1. Additional rent of one cent (\$.01) per gallon for every gallon sold which exceeds 20,000 gallons per month shall be paid by sublessee. Sublessee to report total gallons sold by the 10th day of each month in accordance with Covenant Number 4, entitled Percentage Rent.
2. Sublessee shall maintain fuel tankwalls and foundation, and fuel lines.
3. Sublessee is hereby permitted to use sublessor's three (3) fuel lines already in place during the term of this Sublease. Sublessee shall fully maintain said fuel lines during the term of this sublease.
4. Sublessor has provided Sublessee with full useage of one of two each four inch electric service ducts for the purpose of conducting business. Said ducts terminate in Sublessee's Space Number 22. Sublessee may, at Sublessor's sole discretion and with written approval from Sublessor, utilize any excess electrical capacity available in the said second four inch electric service duct which is controlled fully by Sublessor.

THE SUBLESSEE COVENANTS AND AGREES WITH THE SUBLESSOR AS FOLLOWS:

1. **Payment of Rent.** Beginning with the Commencement Date, monthly in advance throughout the term of this Sublease, without demand or notice, Sublessee shall pay said rent in legal tender of the United States of America to Gentry Kona Marina at the time, in the manner and form set forth in the Basic Provisions and Exhibits, and at the place specified above, or at such other place and to such other nominee as Sublessor may from time to time designate. In the event the Commencement Date falls on other than the first day of the month, the rental for the first fractional month shall be computed on a daily basis from the Commencement Date to the end of the month by multiplying the Fixed Monthly Minimum Rent by a fraction, the numerator of which is the number of days from the Commencement Date to the end of the month and the denominator of which is the number of days in the month.

2. **Service Charge and Default Rate of Interest.** Without prejudice to any other remedy available to Sublessor, a service charge of four (4) cents for each dollar of each rental payment owed for the particular month which is not made on time shall be assessed against Sublessee if the rental is paid more than 5 days after the due date to cover the extra expense involved in handling delinquent payments, and, any amounts owing by Sublessee to Sublessor under the terms of this Sublease shall bear interest from the date same becomes due until paid at the specified maximum rate, if any, then allowed by applicable law or if there is no such specified maximum rate, at a floating rate equal to three (3) percentage points over the large business prime rate then being charged by Bank of Hawaii. Said interest shall be considered as a part of the rental payable in this Sublease.

3. **Rental Redetermination.** Rental Redetermination means that a new Fixed Minimum Rent must be renegotiated. In the event this Sublease requires a reopening of the Fixed Minimum Rent, then such Fixed Minimum Rent shall be the rental for the immediately preceding Sublease Year, or 100% of the fair market rental at the time of the redetermination, whichever is higher.

In determining the fair market rental, the land, buildings and Permitted Use of the Premises as set forth herein in this Sublease shall be considered. The value of Sublessee's

equipment and furnishings shall not be considered in determining the said rental rate.

At the time of redetermination, the fair market rental shall be determined by mutual agreement of Sublessor and Sublessee not less than ninety (90) days prior to the expiration of the period for which minimum rent is fixed. If Sublessor and Sublessee fail to agree upon such fair market rental not less than ninety (90) days prior to the expiration of said fixed period, the fair market rental shall be determined by an arbitrator or arbitrators appointed as hereinafter provided.

Either party may give to the other written notice of its desire to fix such fair market rental by arbitration. If, within ten (10) days after the receipt of such notice, Sublessor and Sublessee are able to agree upon a single arbitrator, then said arbitrator alone shall determine said fair market rental. The decision and award of such arbitrator shall be final, conclusive and binding upon both parties for the period of redetermined rent, unless the same shall be vacated, modified or corrected, as provided in Chapter 658, Hawaii Revised Statutes, as the same may be amended. If Sublessor and Sublessee have not agreed upon one (1) such arbitrator within ten (10) days after said receipt of such notice, then such determination shall be made by two (2) arbitrators, each of whom must be a member of the American Institute of Real Estate Appraisers, and either party may give to the other party a written notice naming one (1) of the two (2) arbitrators. Thereupon, the other party shall, within ten (10) days after receipt of such notice, name a second arbitrator, and in case of failure so to do, the party who has already named an arbitrator may have the second arbitrator selected or appointed by any judge of the First Circuit Court of the State of Hawaii. With forty-five (45) days of their respective appointments, each arbitrator shall determine said fair market rental and submit their reports to the Sublessor and Sublessee. If the fair market rental determined by each of the arbitrators varies by five percent (5%) or less between them, the average of the two shall be controlling, unless the same shall be vacated, modified or corrected, as provided in said Chapter 658. If the fair market rental determined by each arbitrator varies by more than five percent (5%) between them, then, within ten (10) calendar days of the submission of the last fair market rental determination, both arbitrators shall appoint a third arbitrator who shall be a member of the American Institute of Real Estate Appraisers, and in case of failure so to do, either party may have the third arbitrator selected or appointed by any

judge of the First Circuit Court of the State of Hawaii. Said third arbitrator shall, within thirty (30) calendar days of his appointment, determine said fair market rental and submit his report to the Sublessor and Sublessee. The fair market rental determined by the third arbitrator shall be controlling unless it is less than that set forth in the lower fair market rental report previously obtained, in which case the fair market rental set forth in said lower report shall be controlling, or unless it is greater than that set forth in the higher fair market rental report previously obtained, in which case the fair market rental set forth in said higher report shall be controlling, and, unless the determination as herein provided with respect to the third arbitrator shall be vacated, modified or corrected, as provided in said Chapter 658. The arbitrator or arbitrators shall have all the powers and duties prescribed by said Chapter 658, and judgment may be entered upon any such decision and award as provided in said Chapter 658. All costs and expenses of the arbitration shall be borne equally by Sublessor and Sublessee except that each party shall bear the fees and costs of the arbitrator appointed by it, or by the Court on its behalf in lieu of appointment, and shall bear its own attorneys' and witnesses' fees and costs of court if the arbitration becomes the subject of litigation. If and whenever the fixing of such fair market rental is under arbitration, Sublessee, pending the determination thereof, shall continue to pay the then monthly rental which it had been paying during the period of fixed rent and shall promptly pay without any prior demand therefor and without any deduction or set off whatsoever, the deficiency, if any, upon the conclusion of the arbitration proceedings together with interest thereon at the rate of twelve percent (12%) per annum from the commencement of the period of rental redetermination until the date upon which said deficiency and interest are actually paid to Sublessor.

4. **Percentage Rent.** For each and every calendar month or fraction thereof during the term of this Sublease, Sublessee shall pay to Sublessor, on or before the tenth (10th) day of the next succeeding month, as additional rent, a sum of money determined by deducting the Fixed Minimum monthly or fractional monthly rent from the percentage rent for such preceding calendar month or fractional month. The percentage rent shall be determined by multiplying the percentage as set forth in Item G of the Basic Provisions hereinabove by Sublessee's gross sales for each month. In no event, however, shall the monthly rent to be paid by Sublessee to Sublessor be less than the Fixed Minimum Rent herein specified.

5. **Gross Sales and Reports.** The term "gross sales," means the entire amount of the actual sales price, whether for cash or otherwise, of all sales of merchandise or services, and all other receipts whatsoever of all business conducted at, in, from or upon the Premises, less any Hawaii State General Excise Taxes. Sublessee shall submit to Sublessor on or before the tenth (10th) day of each and every calendar month (excluding the 10th day of the first month of the first Sublease Year but including the 10th day of the month following the end of the term) at the place then fixed for the payment of rent, together with the remittance of monthly percentage rent, a written statement signed by Sublessee or by a person duly authorized by Sublessee showing in detail the amount of gross sales of the preceding calendar month or fractional month, if any.

6. **Gross Income Tax.** Sublessee shall also pay to Sublessor as additional rent, together with each payment of rental, real property taxes, and other charges payable by Sublessee hereunder, including but not limited to, the State of Hawaii General Excise Tax (the payment for which under this Sublease would presently be 4.167%).

7. **Preservation and Disclosure of Records.** For the purpose of ascertaining the amount of rent, Sublessee agrees to prepare and keep on the Premises for a period of not less than two (2) years following the end of each Sublease Year, or until Sublessor's auditors have had reasonable opportunity to audit the same, whichever is later, adequate records which shall show inventories and receipts of merchandise at the Premises and daily receipts from all sales and other transactions on the Premises by Sublessee and any other persons conducting any business upon said Premises.

8. **Audits.** Sublessee grants unto Sublessor and its agents the right at all reasonable times to have access to all books, accounts, records and reports, including, without limitation, gross income tax reports and purchase orders, which must be kept by Sublessee with respect to its business on the Premises for at least three (3) years following the end of a calendar year.

9. **Taxes, Assessments, etc.** Sublessee shall pay or cause to be paid, when due, as additional rent, its prorated amount, which is the percentage set forth in the Basic Provisions and Exhibits (Item J, and as set forth in Exhibit "C"), of all taxes, rates, assessments and other charges of every description to which said Premises are subject, including any improvements thereon and the parcel of land of which the Premises is a

part, which taxes, rates, assessments and other charges are now or may hereafter be assessed against the Sublessor or Sublessee by authority of law during the term of this Sublease; provided, however, that with respect to any assessment made under any betterment or improvement law which may be payable in installments, Sublessee shall be required to pay proratably only such installments, together with interest, as shall become due and payable during the term of this Sublease.

10. **Minerals and Waters.** Pursuant to the Lease, the State of Hawaii has reserved the right to all minerals as hereinafter defined, in, on or under the demised premises therein and the Premises herein, 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 the 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, sulfur, 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, in, on or under the land.

11. **Prehistoric and Historic Remains.** All prehistoric and historic remains found on the premises demised herein shall be and remain the property of the State of Hawaii and shall not be disturbed or removed by Sublessee, its employees, agents or contractors, without the express approval of the Director of Transportation of the State of Hawaii.

12. **Easements.** Sublessor and the State of Hawaii reserve the right to establish, or to sell or grant to others, easements required for maritime or utility purposes, provided that such easements shall not, in any substantial way, interfere with Sublessee's use of the Premises.

13. **Construction of Improvements; Environmental Impact Assessment.** In the construction of any improvements by Sublessee, if required by the State of Hawaii, Sublessee shall, within sixty (60) days of the issuance of the building permit, prior to constructing any improvements on the Premises, submit an Environmental Impact Assessment to the Department of Transportation of the State of Hawaii. Within thirty (30) days after the approval of any such required Environmental Impact Statement or

Negative Declaration, whichever is necessary to comply with Chapter 343, Hawaii Revised Statutes, as amended, and the Regulations of the State of Hawaii's Environmental Quality Commission, Sublessee will submit completed building plans to the Harbors Division and Sublessor for approval.

If required by the State of Hawaii or County of Hawaii, prior to construction, Sublessee must obtain Department of Health approval for disposal of sewage, Hawaii County approval of a shoreline management permit, and Hawaii County approval for shoreline setback requirements and a building permit from Hawaii County. All costs associated with meeting the requirements hereinabove will be borne by Sublessee. Sublessee must also file and receive, if required by the State of Hawaii and/or County of Hawaii, approval of a Conservation District Use Application from the Department of Land and Natural Resources.

During the term of this Sublease, no improvements, alterations or additions will be constructed on or under the Premises unless Sublessee first submits its plans and specifications to Sublessor for its approval (and to the State of Hawaii if required) and approval is granted by Sublessor in writing (and the State of Hawaii, if so required). The plans and specifications must be in full compliance with all statutes, ordinances, and rules and regulations applicable thereto.

14. **Improvement Bond.** Sublessee will, at the time of the issuance of any building permit to Sublessee procure and deposit with Sublessor a surety bond in the amount of the construction costs, which bond shall (1) name the State of Hawaii and Sublessor as obligees, (2) be conditioned upon the faithful observance and performance of the building plans submitted to and approved by Sublessor (and the State of Hawaii, if required) and (3) save and hold the State of Hawaii and Sublessor harmless from all liens, suits, actions or damages arising out of, caused by or attributable to such work performed under the building permit.

15. **Contractor's Insurance.** Before commencing the construction or installation of any improvements, equipment or fixtures on the Premises, Sublessee shall require that all contractors and subcontractors employed on the Premises by Sublessee or Sublessee's contractor procure and maintain in full force and effect during the course of construction and installation the following insurance:



- a. Workmen's Compensation as required by law.
- b. Contractor's Comprehensive General Liability and Property Damage with a combined minimum single limit of \$1,000,000.00 for bodily injury and property damage per occurrence.
- c. Contractor's Automobile General Liability and Protective Property with a combined minimum single limit of \$500,000.00 for bodily injury and property damage per occurrence.

16. **Utilities.** Water, sewer, and electricity are available at the approximate locations depicted on Exhibit "A".

17. **Utility Services; Rubbish Disposal.** Sublessee 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 Premises, or any part thereof, or any improvements thereon or Sublessor or Sublessee in respect thereof may during the term of this Sublease become liable, whether assessed to or payable by Sublessor or Sublessee. If such utility services are furnished by Sublessor, the charges to Sublessee will be the greater of Sublessor's actual costs for the furnishing of said services or the rate which would be payable if the Tenant were to purchase the same services from the public utility involved.

18. **Covenant Against Discrimination.** The use and enjoyment of the Premises shall not be in support of any policy which discriminates against anyone based upon race, sex, color, religion or ancestry.

19. **Sanitation, etc.** Sublessee shall keep the Premises and improvements in a strictly clean, sanitary and orderly condition.

20. **Waste and Unlawful, Improper or Offensive Use of Premises.** Sublessee shall not commit, suffer or permit to be committed any waste, nuisance, strip, loud or offensive noise, or unlawful, improper or offensive use of the Premises, or any part thereof.

21. **Compliance with Laws.** Sublessee shall comply with all of the requirements of all municipal, state and federal authorities and observe all municipal ordinances and state and federal statutes pertaining to the Premises, now in force or which may hereinafter be in force.

22. **Inspection of Premises.** Sublessee will permit Sublessor and the State of Hawaii

and their agents, at all reasonable times during the said term, to enter the Premises and examine the state of repair and condition thereof.

23. **Improvements.** Sublessee shall not at any time during the term of this Sublease construct, place, maintain and/or install on the Premises any building, structure and/or improvement of any kind and description whatsoever except with the prior approval of Sublessor and the prior approval of the Director of Transportation of the State of Hawaii, if required by the Director, and Sublessor and upon such conditions as said Director and Sublessor may impose.

24. **Repairs to Improvements.** Sublessee shall, at its own expense, keep, repair and maintain the Premises and improvements thereon now existing or hereafter constructed or installed on the Premises in good order, condition and repair, reasonable wear and tear excepted.

25. **Common Area; Rules and Regulations.** The term "common area," as used in this Sublease, shall be deemed to include those portions of the Gentry Kona Marina as are designated by Sublessor for the non-exclusive use of Sublessee in common with other authorized users, including but not limited to, roadways, service areas, driveways, areas of ingress and egress, landscaped and planted areas, sidewalks and other pedestrian ways, corridors, courts, public washrooms, drinking fountains, community rooms, toilets, stairs, ramps, areas containing buildings or structures used in connection with the maintenance of said common area, together with the buildings and structures constructed thereon, and all other similar facilities from time to time provided for the joint use and convenience of such authorized users.

Sublessee shall pay to Sublessor during the term of this Sublease, as additional rent, its pro rata share which is the percentage set forth in the Basic Provisions and Exhibits at Item K, and as set forth in Exhibit "C", of the cost and expenses which are incurred by or on behalf of Sublessor each calendar year, or part thereof, in maintaining and operating the common area (as hereinabove defined), including insurance premiums for the common areas, and the utility systems, lines, conduits, appurtenances thereto and security services serving the Gentry Kona Marina.

Sublessor shall have the exclusive right to police, regulate traffic in and otherwise control the use of parking, sidewalks, and all other portions of the common areas of the

Gentry Kona Marina. In furtherance of such right, Sublessor may from time to time promulgate and amend reasonable rules and regulations with respect to the common area, including hours of operation, which shall be binding upon Sublessee on reasonable notice. For the enforcement of said rules and regulations, Sublessor shall have all remedies in this Sublease provided for a breach of the term of this Sublease, as if said rules and regulations were expressly incorporated herein, and all other legal or equitable remedies whether or not provided for in this Sublease.

26. **Encumbrances, Rights Reserved to Sublessor.** Sublessor reserves the following rights:

(a) The right to grant or relocate all easements now or hereafter required by Sublessor for the construction, installation, operation, maintenance, repair and replacement of rights of way, underground lines and other transmission facilities and appurtenances for electricity, gas, telephone, water, sewage, drainage and other public services and utilities; and

(b) The exclusive right to the use of the roof, exterior walls and area beneath the Premises, together with the right, from time to time, to install, maintain, use, repair and replace utility mains and other facilities serving other premises within the Gentry Kona Marina, when such location is dictated by necessities of engineering design, good practice and/or code requirements.

27. **Right to Change.** Sublessor reserves the absolute right at any time and from time to time to increase, reduce, change, or alter the size, height, layout, or location of any buildings, driveways, entrances and exits, automobile parking areas, and other circulation areas now or at any time hereafter forming a part of the Gentry Kona Marina.

28. **Right to Enter.** The agents and representatives of the State of Hawaii and the County of Hawaii may enter and cross any portion of the Premises for the purpose of performing any public or official duties; provided, however, in the exercise of such duties, the rights of the Sublessee to the use and enjoyment of the Premises shall not be unreasonably interfered with.

Sublessee will permit Sublessor and its agents to enter into and upon said premises at all reasonable times for the purpose of inspecting the same or for the purpose of maintaining the building in which said Premises are situated, or for the purpose of making

repairs, alterations or additions to any other portion of said building, including the erection and maintenance of such scaffolding, canopies, fences and props as may be required, without any rebate of rent and without any liability to Sublessee for any loss of occupation or quiet enjoyment of the Premises thereby occasioned; provided, that except in case of emergencies, Sublessor shall make such entry for the purpose of repairing and maintaining the building only during non-business hours, and all such work shall be done in such manner as to cause as little interference as reasonably possible.

29. **Liens.** Sublessee will not commit or suffer any act or neglect whereby the Premises or any improvement thereon or the estate of the State of Hawaii or Sublessor or Sublessee become subject to any attachment, lien, charge or encumbrance whatsoever, and shall indemnify and hold harmless the Sublessor and the State of Hawaii from and against all attachments, liens, charges and encumbrances and all expenses resulting therefrom.

30. **Assignments and Subletting.** Sublessee shall not transfer or assign this Sublease or any interest herein. Sublessee shall not rent nor further sublet the whole or any portion of the Premises, without the prior written approval of Sublessor and the Director of Transportation of the State of Hawaii, which written approval each may unilaterally and arbitrarily withhold. Sublessee understands that said Director and Sublessor also have the right to deny uses contrary to the primary purpose of this Sublease.

31. **Rental Revisions under the Lease.** Sublessee understands that the Board (as it is defined in the Lease) has the right to review and approve the rent to be charged to Sublessee herein and, if necessary, to revise the rent and rent structure charged to the Lessee by the State of Hawaii in the Lease in light of the rental rate to be charged to the Sublessee herein by Sublessor. In the event such revision takes place under the Lease, then Sublessor may revise the rent and rent structure charged to Sublessee herein by passing onto Sublessee the share of such revision attributed to the increase of the rent charged by the State of Hawaii in the Lease to Lessee therein. Likewise, Sublessee understands that this same procedure and rental revision right applies to any assignment or subletting which may be approved under paragraph no. 30 entitled, Assignments and Subletting, above.

32. **Mortgage.** Upon due application and with the written consent of Sublessor and

the State of Hawaii, Sublessee may mortgage this lease or any interest herein or create a security interest in the Premises. Any such mortgage, hypothecation or pledge given by Sublessee without the prior written approval of the Sublessor and said Director shall be null and void. If the mortgage or security interest is to a recognized lending institution, authorized to do business as a lending institution, in either the State of Hawaii or elsewhere in the United States, such consent may extend to foreclosure and sale of Sublessee's interest at such foreclosure to any purchaser, including the mortgagee, without regard to whether or not the purchaser is qualified under Chapter 171, Hawaii Revised Statutes, as amended, to lease, own or otherwise acquire and hold the land or any interest therein. The interest of the mortgagee or holder of this Sublease 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 on the holder than those conferred with respect to any of the aforementioned Federal agencies.

Sublessee shall upon execution of any such mortgage promptly deliver a true copy of such mortgage or written notice thereof to Sublessor. The mortgagee or its assigns may enforce such mortgage and acquire title to the leasehold estate in any lawful way, and pending foreclosure of such mortgage may take possession of and rent the Premises, and upon foreclosure thereof may without further consent of Sublessor sell and assign the leasehold estate by assignment in which the assignee shall expressly assume and agree to observe and perform all the covenants of the Sublessee contained in the mortgaged lease, and such assignee may make a purchase money mortgage thereof to the assignor, provided that upon execution of any such assignment or mortgage a true copy thereof shall be delivered promptly to Sublessor and that no other or further assignment of this Sublease for which any provision hereof requires written consent of Sublessor shall be made without such consent. The mortgagee or its assigns of such mortgage shall be liable to perform

the obligations of the Sublessee under such mortgaged Lease only during the period such person has possession or ownership of the leasehold estate. Nothing contained in such mortgage shall release or be deemed to relieve Sublessee from the full and faithful observance and performance of Sublessee's covenants herein contained or from any liability for the nonobservance or nonperformance thereof, nor be deemed to constitute a waiver of any rights of Sublessor hereunder, and the terms, covenants and conditions of this Sublease shall control in case of any conflict with the provisions of such mortgage.

33. **Protection of Mortgagee.** During the continuance in effect of any authorized mortgage of this Sublease, Sublessor will not terminate this Sublease because of any default on the part of Sublessee to observe or perform any of the covenants or conditions herein contained if the mortgagee or its assigns, within sixty (60) days after Sublessor has mailed to the mortgagee or its assigns at the last known address thereof a written notice of intention to terminate this Sublease for such cause, shall cure such default, if the same can be cured by the payment of money, or, if such is not the case, shall undertake in writing to perform and shall thereafter perform all the covenants of this Sublease capable of performance by the mortgagee or its assigns until such time as the leasehold estate shall be sold upon foreclosure of such mortgage, and any default consisting of Sublessee's failure promptly to discharge any lien, charge or encumbrance against the leasehold estate junior in priority to such mortgage shall be deemed to be duly cured if such mortgage shall be foreclosed by appropriate action instituted within said 60-day period and thereafter prosecuted in diligent and timely manner.

34. **Subordination and Attornment.** Sublessee agrees upon request of Sublessor to subordinate this Sublease and Sublessee's rights hereunder to the loans and mortgages now or hereafter placed, charged or enforced against Sublessor's interest in this Sublease and the leasehold estate hereby created, the Premises or the land, building or improvements included therein or of which the Premises are a part, and execute and deliver (but without cost to Sublessee) at any time and from time to time upon demand by Sublessor such documents as may be required to effectuate such subordination, and in the event that Sublessee shall fail, neglect or refuse to execute and deliver any such document within ten (10) days after receipt of written notice so to do and the receipt by Sublessee of the documents to be executed by it, Sublessee hereby appoints Sublessor, its successors and

assigns, the attorney in fact of Sublessee irrevocably to execute and deliver any and all such documents for and on behalf of Sublessee, provided that such holder of a mortgage shall agree that Sublessee may attorn to it or to any purchaser on foreclosure and this Sublease shall continue in effect if Sublessee is not then in default hereunder. In the event that the mortgagee or beneficiary of any such mortgage or deed of trust elects to have this Sublease a prior lien to its mortgage or deed of trust, then and in such event upon such mortgagee or beneficiary giving written notice to Sublessee to that effect, this Lease shall be deemed a prior lien to such mortgage or deed of trust whether this Sublease is dated or recorded prior to or subsequent to the date of filing of such mortgage or deed of trust.

35. **Financial Statements.** Should a lender advancing funds to Sublessor for the purpose of financing the construction of the Premises, or should the Sublessor require financial statements relating to Sublessee, Sublessee shall submit to such lender or to the Sublessor the required balance sheets and profit and loss statements and financial statements, and shall keep such reports, in the case of a lender, current so long as such lender shall require.

36. **Indemnity.** Sublessee will indemnify, defend and hold Sublessor and the State of Hawaii harmless (1) from and against any claim or demand by third persons for loss, liability or damage, including claim for property damage, personal injury or wrongful death, arising out of any accident in or about the Premises, 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 Sublessee to maintain the premises in a safe condition; and will reimburse Sublessor and the State of Hawaii for all costs and expenses in connection with the defense of such claims; (2) 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.

37. **Costs of Litigation.** In case Sublessor or the State of Hawaii shall, without any fault on their part, be made a party to any litigation commenced by or against Sublessee (other than condemnation proceedings), Sublessee shall and will pay all costs and expenses

incurred by or imposed on Sublessor and/or the State of Hawaii; furthermore, Sublessee shall and will pay all costs and expenses which may be incurred or paid by Sublessor or the State of Hawaii in enforcing the covenants and agreements of this Sublease, in recovering possession of the Premises or in the collection of delinquent rental, taxes and any and all other charges. In the event Sublessee brings an action or proceeding against Sublessor arising out of any breach of the terms and conditions hereof, and prevails against Sublessor, Sublessee shall be entitled to recover its costs and reasonable attorneys' fees from Sublessor.

**38. Insurance.**

A. **Liability Insurance.** Sublessee shall procure, at its own cost and expense, and keep in force during the entire term of this Sublease, with an insurance company or companies acceptable to Sublessor, a policy or policies of comprehensive general liability insurance in a combined single limit amount of not less than \$1,000,000.00 for bodily injury and property damage per occurrence; that said policy or policies shall cover the Premises, including all buildings, improvements and grounds and all roadways and sidewalks on or adjacent to the Premises in the control of Sublessee. Sublessee shall furnish Sublessor with a certificate showing such policy to be 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 that Sublessor and the State of Hawaii, through its Director of Transportation, shall be notified at least thirty (30) days prior to any termination or cancellation of, or material change in said policy. The procuring of this policy shall not release or relieve Sublessee of its responsibility under this Sublease. The policy or policies required under this provision shall name Sublessor and the State of Hawaii as additional insureds.

The minimum limits of insurance recited herein may be increased by such amounts as Sublessor and/or the Director of Transportation, in the exercise of sound and prudent judgment, may require.

B. **Fire Insurance.** Sublessee will, at its own expense, at all times during the term of this Sublease, keep the Premises insured in the names of Sublessor, the State of Hawaii, Sublessee and all Mortgagees, if any, as their interests 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, in a company or companies approved by Sublessor, 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 Sublessor, the State of Hawaii, Sublessee, and the Mortgagees, if any, as their interests may appear, and shall be deposited with the Mortgagee, if any, otherwise with Sublessor; 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 Sublessee for rebuilding, repairing, or otherwise reinstating the buildings in a good and substantial manner according to the plans and specifications approved in writing by Sublessor, and the Director of Transportation; provided, however, that with the approval of Sublessor, Sublessee may surrender this lease and pay the balance owing on any mortgage and Sublessee shall then receive that portion of said proceeds which the unexpired term of this sublease at the time of said loss or damage bears to the whole of said term, Sublessor to retain the balance of said proceeds.

Sublessee shall furnish to Sublessor, the State of Hawaii, and the Mortgagees, if any, 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 Sublessor, the State of Hawaii, and the Mortgagees, if any, of any intention to cancel or materially change any such policy or policies, 30 days prior to actual cancellation.

39. Surrender. Sublessee shall and will at the expiration or sooner termination of this sublease, peaceably and quietly surrender and deliver possession of the Premises to Sublessor, together with all improvements constructed thereon by Sublessee of whatever nature or description, in good order and condition, reasonable wear and tear excepted; provided, that trade fixtures, equipment and personal property may be removed by Sublessee prior to such expiration or termination; and provided further, that within sixty (60) days after the termination or expiration of this Sublease, Sublessor may, at its option and upon written notice to Sublessee, require Sublessee to remove all or any portion of any improvement constructed by Sublessee on the Premises, and its equipment, fixtures, trade or otherwise, and/or personal property all at Sublessee's sole expense and cost.

Sublessee shall, in the removal of any of its improvements, equipment, trade fixtures

and/or personal property from the Premises, conduct such removal in such a manner as to cause no damage to the Premises, and in the event of such damage, Sublessee shall, at its own cost and expense, repair or replace the same.

If Sublessee fails or neglects, when so required by Sublessor, to remove all or any portion of any improvement constructed on the Premises by Sublessee of whatever nature or description, equipment, fixtures, trade or otherwise, and/or personal property within sixty (60) days after receipt of written notice to so remove, Sublessor may remove and dispose of the same and charge the cost of such removal and disposal to Sublessee, which costs Sublessee hereby agrees to pay.

40. Breach. Time is of the essence of this Sublease and if Sublessee shall fail to yield or pay such rent, costs, charges, assessments, or the like, as required of Sublessee in this Sublease, or any part thereof at the times and in the manner aforesaid, or shall become bankrupt, or shall abandon the Premises, or if this Sublease and the Premises shall be attached or otherwise be taken by operation of law, or if any assignment be made of Sublessee's property for the benefit of creditors, or if Sublessee 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 ten (10) days with respect to the payment of rent with no written notice required, and for a period of more than thirty (30) days after delivery by Sublessor of a written notice of any other breach or default by personal service, registered mail or certified mail to the Sublessee at its last known address and to each mortgagee or holder of record having a security interest in the Premises, if any, Sublessor may, at once re-enter the Premises or any part thereof, and upon or without such entry, at its option, terminate this Sublease 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 constructed thereon by Sublessee shall become the property of the Sublessor, or at Sublessor's option, be removed by Sublessee as provided in paragraph 38 hereinabove.

In the case of the non-payment of rent during the term of this Sublease, Sublessor may re-enter the Premises and terminate the Sublease. Sublessee shall be liable for subsequently accruing rent during the term of the Sublease when the Premises are not

re-let and for any deficiency resulting from a re-letting of such Premises plus expenses for the re-letting.

In the event Sublessee discontinues using the Premises for 15 consecutive days for the uses enumerated herein and activities related thereto, without the consent of Sublessor from the date hereof, Sublessor reserves the right to terminate the Sublease on 10 days' written notice.

41. **Condemnation.** In the event that at any time during the term of this Sublease, the Premises or any part thereof shall be required, taken or condemned for any public use, by any condemning authority, the estate and interest of Sublessee in the property taken shall at once terminate, and all compensation payable or to be paid by reason of the taking of any land shall be payable to and be the sole property of Sublessor, and Sublessee shall not by reason of the taking be entitled to any claim against Sublessor for compensation or indemnity for its leasehold interest; that such compensation as shall represent the value of any buildings or improvements erected or owned by Sublessee upon the land shall be divided between Sublessor and Sublessee in the ratios that the expired and unexpired portions of the term of this Sublease, respectively, shall bear to the whole term hereby created, and that in case only a part of the buildings or improvements constructed or owned by Sublessee are taken, Sublessee may claim and receive from the condemning authority but not from Sublessor, any expense incurred by Sublessee in repairing any damage thereto; provided that, in case a part of the Premises shall be required, taken or condemned, the rent thereafter payable for the remainder of the term shall be reduced in the proportion that the area of land so taken shall bear to the area hereby subleased; provided, further, that in case such condemnation and taking shall by mutual agreement of the parties hereto be held to render the remainder of the Premises unfit for the purposes of Sublessee, Sublessee shall have the option to surrender this Sublease within 15 days of such condemnation and taking.

42. **Inspection by Prospective Sublessees.** Sublessor shall have the right to authorize any person or persons to enter upon and inspect the Premises at all reasonable times following a published notice for the proposed sale or other disposition of the Premises for purposes of informing and apprising such person or persons of the condition of the Premises 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 Sublessee, and shall, if Sublessee so requires, be made in the company of Sublessee or designated agents of Sublessee; provided, further, that no such authorization shall be given more than one year before the expiration of the term of this Sublease.

43. **Sale or Assignment by Sublessor.** Sublessor may at any time assign or transfer its interest as Sublessor in and to this Sublease, or any part thereof, and may at any time sell or transfer its interest in and to the whole or any portion of the Premises.

44. **Attornment.** Sublessee hereby agrees to attorn to the assignee, transferee, or purchaser of Sublessor from and after the date of notice to Sublessee of such assignment, transfer or sale, in the same manner and with the same force and effect as though this Sublease were made, in the first instance, by and between Sublessee and such assignee, transferee or purchaser.

45. **Transfer of Sublessor's Obligations.** In the event of any transfer or conveyance of the Sublessor's interest hereunder other than by way of security only, the Sublessor herein named, except as hereinafter provided (and in case of any subsequent transfers or conveyances, except by way of security only, the then Grantor) shall be automatically free and relieved from and after the date of such transfer or conveyance of all personal liability with respect to the performance of any covenants or obligations on the part of Sublessor contained in this Sublease thereafter to be performed, provided that any funds in the hands of such Sublessor, or the then Grantor, at the time of such transfer or conveyance in which Sublessee has interest shall be turned over to the Transferee or Grantee, and any amount then due and payable to Sublessee by Sublessor, or by the then Grantor, under any provisions of this Sublease shall be paid to Sublessee, it being intended hereby that the covenants and obligations contained in this Sublease on the part of the Sublessor to be kept and performed by it shall, subject as aforesaid, be binding on Sublessor, its successors and assigns only during and in respect to their respective successive periods of ownership.

46. **Extension of Time.** Notwithstanding any provision contained herein to the contrary, wherever applicable, Sublessor may for good cause shown, and in its sole discretion, allow additional time beyond the time or times specified herein to Sublessee, in which to comply with, observe or perform any of the terms, conditions and covenants

contained herein.

47. **Quiet Enjoyment.** Sublessor hereby covenants and agrees with Sublessee 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 Sublessee to be observed and performed, Sublessee shall and may have, hold, possess and enjoy the demised premises for the term hereby demised, without hindrance or interruption by Sublessor or any other person or persons lawfully claiming by, through or under it.

48. **Short Form Lease.** This Sublease shall not be recorded by either Sublessor or Sublessee, provided, that Sublessor may, at its discretion, permit Sublessee to record a short-form counterpart of this Sublease, setting forth only the date of commencement and the date of termination of this Sublease and describing the Premises.

49. **Waiver of Jury Trial and Counterclaims.** The parties hereto shall and they hereby do waive trial by jury in any action, proceeding or counterclaim brought by either of the parties hereto against the other on matters relating to the payment of rent in this Sublease and matters relating to the proper use of the Premises.

50. **Signs.** All exterior signs, installed or painted, advertising the business or activity conducted on the Premises, shall be restricted to the appurtenant equipment or any improvements constructed by Sublessee and are subject to the approval of the Sublessor. All signs installed or painted shall be done in good aesthetic taste and shall strictly conform to the sign ordinance of Hawaii County.

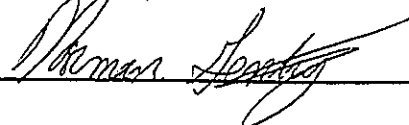
51. **Non-Waiver.** The waiver by Sublessor of any breach of any term, covenant or condition herein contained, including the acceptance of rent, shall not be deemed to be a waiver of the term, covenant or condition or any subsequent breach of the same or any other term, covenant or condition herein contained, and the exercise of one right or remedy by Sublessor shall not impair Sublessor's right to any other remedy.

52. **Brokerage Commissions.** Sublessee represents that Sublessee has dealt directly with (and only with) the broker(s) identified in Item L of the above Basic Provisions and Exhibits in connection with this Sublease, and that no other broker negotiated this Sublease or is entitled to any commission in connection herewith. Sublessee agrees to indemnify Sublessor against, and hold Sublessor harmless from, all liabilities arising from

the claims of any other broker based upon acts of Sublessee (including, without limitation, attorneys' fees incurred by Sublessor in connection therewith).

IN WITNESS WHEREOF, the State of Hawaii, Sublessor, and Sublessee herein have caused these presents to be executed this 12<sup>th</sup> day of February, <sup>1985</sup>~~1984~~, both B  
P  
M  
effective on the day and year hereinabove set forth.

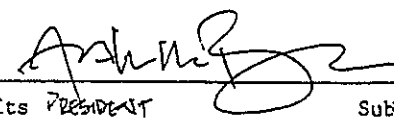
GENTRY-PACIFIC, LTD.

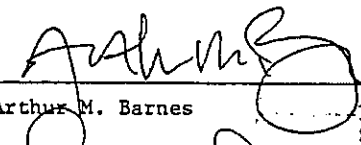
By   
Its \_\_\_\_\_

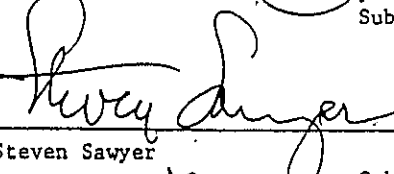
By \_\_\_\_\_  
Its \_\_\_\_\_

Sublessor

HONOKOHAU FUEL, INC.

By   
Its ~~PRESIDENT~~ \_\_\_\_\_ Sublessee

  
Arthur M. Barnes \_\_\_\_\_ Sublessee

  
Steven Sawyer \_\_\_\_\_ Sublessee  
D.E.  
n.p.

STATE OF HAWAII )  
 ) : SS:  
CITY AND COUNTY OF HONOLULU )

*JP*

On this 28th. day of May, 1985, before  
me appeared NORMAN GENTRY and -----

*JP*

to me personally known, who, being by me duly sworn, did say that  
he is  
~~they are~~ the Vice President and -----,  
respectively, of GENTRY-PACIFIC, LTD.

a Hawaii corporation, and that the seal affixed to the foregoing  
instrument is the corporate seal of said corporation, and that said  
instrument was signed and sealed in behalf of said corporation by  
authority of its Board of Directors, and the said NORMAN GENTRY

*JP*

and ----- acknowledged said instrument to be the  
free act and deed of said corporation.

*Walter L. ...*  
\_\_\_\_\_  
Notary Public, First Judicial Circuit,  
State of Hawaii

My commission expires: 25 December 1986

STATE OF HAWAII )  
CITY AND COUNTY OF HONOLULU ) : SS:

On this <sup>20th</sup> ~~5th~~ day of November, 19 84, before  
me appeared Arthur M. Burns and -  
to me personally known, who, being by me duly sworn, did say that  
they are the President and -,  
respectively, of Honokahau Fuel, Inc.,  
a Hawaii corporation, and that the seal affixed to the foregoing  
instrument is the corporate seal of said corporation, and that said  
instrument was signed and sealed in behalf of said corporation by  
authority of its Board of Directors, and the said President  
and - acknowledged said instrument to be the  
free act and deed of said corporation.

Edward M. Shaffer  
Notary Public, First Judicial Circuit,  
State of Hawaii

My commission expires: 10-29-85

L.S.



STATE OF HAWAII )  
 ) SS:  
CITY AND COUNTY OF HONOLULU )

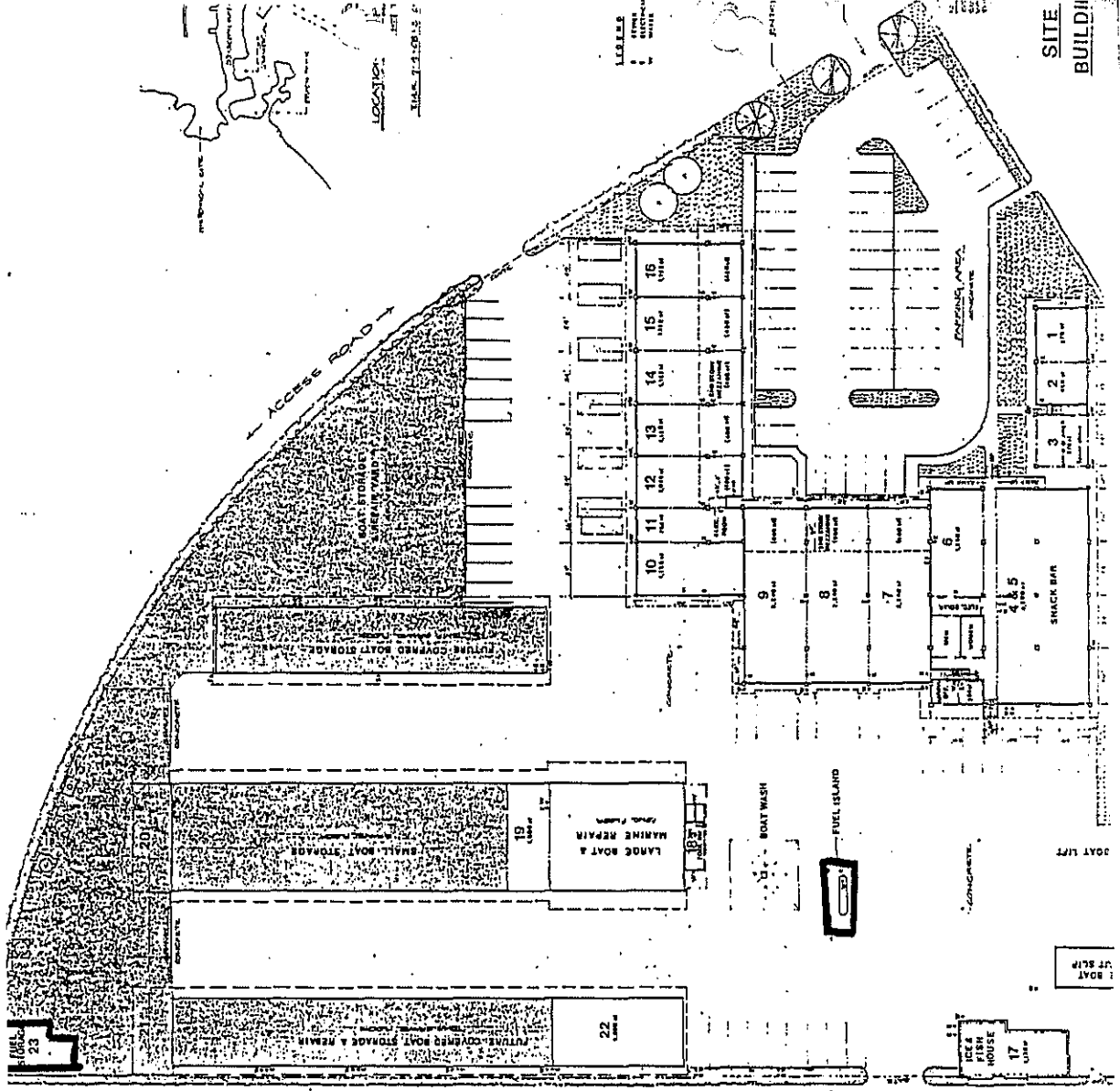
On this 5<sup>th</sup> day of December, 1984,  
before me personally appeared Stevan Sawyer

---

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.

Annette L. Clemmer  
Notary Public, State of Hawaii  
My commission expires: 9/1/85

# SITE BUILDII



DRIVE FROM WALLAZ  
PLANING

REPAIR YARD  
HONOKOHAU BOAT HARBOR

Being a portion of Government Land of Kealakehe

Being also a portion of submerged land of Honokohau Boat Harbor

Land situated at Kealakehe, North Kona, Island of Hawaii, State of Hawaii

Beginning at the northwest corner of the Repair Yard, on the northwest side of Access Road, the coordinates of said point of beginning referred to "HAWAII PLANE COORDINATE GRID SYSTEM, ZONE 1" (Central Meridian 155° 30' 00.00") being 305,540.20 feet north and 319,530.41 feet east and running by azimuths measured clockwise from Grid South of said Hawaii Plane Coordinate Grid System, Zone 1:

1. 307° 52' 49" 425.78 feet along on a curve to the right with a radius of 485.00 feet;
2. 333° 55' 233.09 feet along Access Road;
3. 63° 55' 156.33 feet along the southeast boundary of the Repair Yard;
4. 96° 03' 238.34 feet along the southern boundary of the Repair Yard;
5. 6° 03' 40.00 feet along a portion of the Repair Yard, walkway and submerged land of the boat harbor;
6. 96° 03' 115.00 feet along submerged land of the boat harbor;
7. 186° 03' 545.09 feet along a portion of submerged land of the boat harbor and western boundary of the Repair Yard to the point of beginning and containing an area of 177,860 square feet or 4.083 acres.

EXHIBIT B

EXHIBIT "C"  
-----

GENTRY KONA MARINA  
PROJECTED ALLOCATION ESTIMATES FOR  
SUBLESSEE'S PERCENTAGE LIABILITY OF REAL PROPERTY TAXES  
AND ASSESSMENTS (ITEM J) AND COMMON AREA EXPENSES (ITEM K)

## I. APPROXIMATE SQUARE FOOTAGE OF AREAS IN GENTRY KONA MARINA (GKM):

"Class I", which is Improved, Enclosed Space	23,383 sf
"Class II", which is Partially Improved, Roofed Space	14,556 sf
"Class III", which is Open Space	34,156 sf
-----	
Approximate total leasable sf in GKM	72,095 sf
Approximate common area square feet	102,145 sf
-----	
Approximate total area sf of GKM	174,240 sf
=====	

## II. COMPUTATION OF REAL PROPERTY TAXES AND ASSESSMENTS FOR SUBLESSEE:

## A. Computation on land - Sublessee's pro rata share of taxes and assessments for land is computed as follows:

2,500 sq. ft. (Sublessee's space) : 72,095 sq. ft. (Approximate total leaseable square feet in Gentry Kona Marina) = 3.47 % (Sublessee's percentage of liability for real property taxes and assessments on all land in GKM)

## B. Computation on buildings and improvements - Sublessee's weighted pro rata share of taxes and assessments for buildings and improvements is computed as follows:

Class I, which is 23,383 sq. ft. (and is to be weighted 6.7) x 6.7 = 156,666 sf (which is the weighted amount of Class I improvements)  
Class II, which is 14,556 sq. ft. (and is to be weighted 2.0) x 2.0 = 29,112 sf (which is the weighted amount of Class II improvements)

Total weighted amount of Class I and II improvements = 185,778 sf

2,500 sq. ft. of Class III (Sublessee's Premises x na, which is na weight = na (Sublessee's weighted space) na (total weighted space) = na % (Sublessee's percentage of liability for real property taxes and assessments on all buildings and improvements in GKM)

## III. COMPUTATION OF COMMON AREA MAINTENANCE CHARGE FOR SUBLESSEE:

Sublessee's weighted pro rata share of common area maintenance charges is computed as follows:

Class I, which is 23,383 sf (and is to be weighted 6.7) x 6.7 = 156,666 sf  
Class II, which is 14,556 sf (and is to be weighted 2.0) x 2.0 = 29,112 sf  
Class III, which is 34,156 sf (and is to be weighted 1.0) x 1.0 = 34,156 sf

Total weighted amount of Class I, II, and III space = 219,934 sf

2500 sq. ft. of Class III (Sublessee's Premises x 1.0, which is Class III weighted = 2,500 (Sublessee's weighted space) 219,934 (total weighted space) = 1.14 % (Sublessee's percentage of liability for common area maintenance charges)

# **EXHIBIT “2”**

CONSENT TO SUBLEASE

KNOW ALL MEN BY THESE PRESENTS:

That the STATE OF HAWAII, Lessor in Harbor Lease No. H-82-4, does hereby consent to the Sublease by GENTRY-PACIFIC, LTD. of a portion of the premises demised under said Lease, to wit: An area containing approximately N/A square feet to Honokohau Fuel, Inc., dba Honokohau Gas & Oil Co., whose principal place of business and post office address is P.O. Box 2078, Kailua-Kona, HI 96745.

This Consent shall (1) neither authorize nor be deemed to authorize any further or other sublease of said portion or any other portion or portions of the premises demised under said Lease; (2) not be deemed a waiver of any terms, covenants, provisions or conditions in said Lease contained and on the part of the Lessee to be observed or performed; (3) not be construed as a waiver by the STATE of any legal rights it may have under or in connection with said Lease; (4) not be deemed to estop the STATE from pursuing any cause of action it may have against Lessee either legal or equitable.

This Consent is further subject to the condition that the STATE does not hereby incur any additional liability, either direct or implied.

DATED: Honolulu, Hawaii, 12/5/80

APPROVED AS TO FORM:

Beatrice K. Dawson  
Deputy Attorney General

STATE OF HAWAII

By [Signature]  
Its Director of Transportation

APPROVED:

BOARD OF LAND AND NATURAL RESOURCES

By \_\_\_\_\_  
Chairman and Member

By [Signature]  
Member

Approved by the Board  
at its meeting held on

10/12/84, J-8 [Signature]

# **EXHIBIT “3”**

GENTRY'S KONA MARINACONFIRMATION OF COMMENCEMENT DATE

THIS CONFIRMATION made and agreed upon this 15th day of  
February, 1985, by and between Gentry-Pacific, LTD., a  
Hawaii Corporation (hereinafter referred to as "Sublessor"), and Honokohau Fuel, Inc  
and Arthur M. Barnes and Steven Sawyer-----

(hereinafter referred to as "Sublessee");

## W I T N E S S E T H :

The Sublessor and Sublessee entered into a certain sublease dated  
February 12,, 1985, covering certain Premises designated  
as Space 23, which premises are a portion of the Gentry  
Kona Marina, said premises being more particularly described in said sublease.

NOW, THEREFORE, in consideration of the foregoing, the parties  
hereto hereby mutually agree as follows:

1. For the purpose of confirming the establishment of the  
commencement date, as required by the provisions of Item C of said sublease,  
Sublessor and Sublessee hereby agree that:

a. The date February 15,, 1985, is hereby  
established as the "Commencement Date" of the term of said  
sublease.

2. Sublessee hereby confirms the following:

a. That it has accepted possession of the Premises pursuant  
to the terms of said Lease;

b. That the improvements and space required to be furnished  
by Sublessor according to said sublease have been completed;

c. That Sublessor has fulfilled all of its duties of an  
inducement nature;

d. That said Sublease has not been modified, altered or  
amended except as follows:



NA

e. That there are no offsets of credits against rentals, nor has any security deposit been paid except as provided by the sublease terms;

f. That said rentals commence to accrue on the 15th day of February, 1985.

g. That Sublessee has no notice of a prior assignment, hypothecation or pledge of rents of said sublease, and

h. That said sublease is in full force and effect.

i. That Sublessee is aware that a Certificate of Occupancy has been issued for said Premises effective n/a.

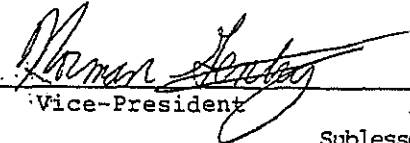
j. That Sublessee has received n/a keys to the "Premises" on n/a.

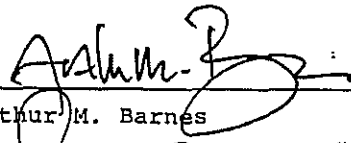
3. This Confirmation, and each and all of the provisions hereof, shall inure to the benefit, or bind, as the case may require, the parties hereto and their respective heirs, successors and assigns.

IN WITNESS WHEREOF, the parties hereto have executed this instrument on the day and year first above written.

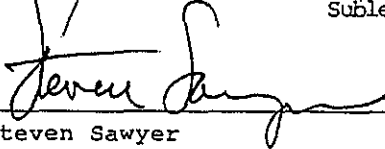
GENIRY-PACIFIC, LTD.

By:

  
Its Vice-President  
Sublessor

  
Arthur M. Barnes

Sublessee

  
Steven Sawyer