

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Division of Boating and Ocean Recreation
Honolulu, Hawaii 96819

January 8, 2021

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

Land Board Members:

SUBJECT: Approve Settlement Agreement Between the State of Hawaii, Department of Land and Natural Resources, Division of Boating and Ocean Recreation, and GKM, Inc. Concerning Fuel Sales Under Harbor Lease No. H-82-4, Situated at Honokohau Small Boat Harbor, Kailua-Kona, Kealakehe, Island of Hawaii, Hawaii, Tax Map Key (3) 7-4-008:042 (por.)

REQUEST:

The Division of Boating and Ocean Recreation (“DOBOR”) is seeking approval from the Board of Land and Natural Resources (“Board”) to approve the settlement agreement between the State of Hawaii, Department of Land and Natural Resources, Division of Boating and Ocean Recreation, and GKM, Inc concerning fuel sales under Harbor Lease No. H-82-4 at a rate of \$0.05 per gallon of fuel sold at the Honokohau Small Boat Harbor, Hawaii. (see Exhibit A).

CHARACTER OF USE:

Occupy and use the premises principally for marine and marine-related activities which include the following:

Sales:

1. Marine hardware and supplies
2. Marine paints and other finish material

Services:

1. The construction, operation and maintenance of a boat haul-out facility for boat repair and storage
2. Repair facility for the maintenance and repair of boats
3. Marine workshop facilities
4. Rigging and swaging for vessels
5. Administrative offices for boat repair and storage facilities

6. The submerged land shall be used exclusively for the berthing of vessels for servicing and repair and the adjacent land area for use as a work dock area

The following additional marine-related activities may also be conducted within the demised premises upon prior written approval by the Lessor:

Sales:

1. Sailboats and power boats and other watercraft (new and brokerage)
2. Charts, maps, and nautical publications
3. Navigation instruments and supplies
4. Marine electrical and electronic gear and radios
5. Fishing tackle, lures, ice and fresh bait
6. Outboard and inboard engines and supplies

Services:

1. Sail making, canvas goods and repair
2. Repair and maintenance of marine electrical and electronic equipment
3. Marine surveys
4. The construction, operation and maintenance of vessels and marine equipment storage facilities
5. Scuba/skin diving services associated with marine repair and salvage
6. Repair and maintenance of marine instruments and navigation equipment
7. Marine upholstery, draperies and interior finishes
8. Repair facility for the maintenance and repair of boats
9. Cold storage facility or icehouse
10. Vending machines for the sale of sandwiches, snacks, hot and cold drinks, candies, cigarettes, etc.
11. Other related activities as approved in writing by the Lessor.

ANNUAL RENTAL:

Original Lease Term (35 Years)

April 1, 1984 to March 31, 1989 - \$25,000/year
April 1, 1989 to March 31, 1994 - \$60,000/year
April 1, 1994 to March 31, 1999 - \$60,000/year
April 1, 1999 to March 31, 2004 - \$60,000/year
April 1, 2004 to March 31, 2009 - \$75,500/year
April 1, 2009 to March 31, 2014 - \$75,500/year
April 1, 2014 to March 31, 2019 - \$120,184/year

Under their extended (20 Years) Lease Term:

April 1, 2019 to March 31, 2024 - \$200,000/year
April 1, 2024 to March 31, 2029 - Renegotiates
April 1, 2029 to March 31, 2034 - Renegotiates
April 1, 2034 to March 31, 2039 - Renegotiates

BACKGROUND:

At its meeting on October 12, 1984, under agenda item J-8, the Board consented to the sublease between Gentry-Pacific, LTD. (“Gentry”), as sublessor, and Honokohau Fuel, Inc. dba Honokohau Gas & Oil Co. (“HFI”), as sublessee. The sublease consent document was executed on December 5, 1984. The permitted use under Sublease No. GKM-011 (“Sublease”) was “selling of gas, diesel and oil to commercial, charter and pleasure boats within the Leased area.”

Honokohau Fuel, Inc. filed for bankruptcy between August 15-22, 1986. Gentry petitioned the United States Bankruptcy Court on January 27, 1989 with a Motion for Order Confirming Rejection and Termination of Lease (“Motion”). Gentry’s motion was granted, and the sublease was deemed rejected and terminated on February 3rd, 1989 by the United States Bankruptcy Court.

After the termination of the sublease, Gentry took over the operation of the fueling business. GKM, as its successor in interest, continues to sell fuel at the premises. However, the sale of fuel is not among the uses specified in Gentry’s lease, and the Gentry lease provides that any additional uses require the written consent of the Board. Staff is seeking such consent, after negotiating a proposed settlement agreement in which GKM agrees to pay additional rent based on the volume of their fuel sales, in an amount that is comparable to the amounts received by DOBOR from the neighboring State tenant (Kona Marine), which also sells fuel as authorized under its lease.

REMARKS:

At its meeting on September 11, 2020, under agenda item J-2, staff requested that the Board approve the sale of fuel by GKM to its subtenants at a rate of five percent (5%) of its gross fuel receipts.

Due to opposition and uncertainty regarding the specifics of this prior proposal, the Board requested DOBOR and GKM attempt to negotiate a compromise regarding GKM’s fuel sales at the premises, and to consider allowing GKM to sell fuel to the general public in addition to GKM subtenants.

DOBOR and GKM, through their respective attorneys, reached a settlement under which GKM can sell fuel and related products from its premises (see Exhibit B). In exchange, GKM will pay the State a fee of \$0.05 per gallon of fuel sold beginning January 1, 2021, or upon approval by the Board, whichever occurs last, and be subject to the following terms and conditions:

- GKM shall keep and maintain accurate accounting records of all fuel sales for seven (7) years. The State shall have the right to inspect and make copies of those records, and shall hold such information in the strictest confidence.
- GKM shall not use or store any hazardous substance regulated under the Comprehensive Environmental Response, Compensation, and Liability Act with respect to its use of the premises, and immediately notify the State in writing of:
 - All enforcement, clean up, removal, mitigation, government or regulatory actions pursuant to hazardous material laws affecting the premises.

- All claims made or threatened by a third part resulting from damage contribution, cost recovery, compensation, loss or injury resulting any hazardous materials.
- The discovery or occurrence or condition which could subject GKM or the State to any restriction on ownership, occupancy, transferability, or use of the premises.
- Obtain pollution liability insurance with the limits of \$1,000,000 per occurrence and \$2,000,000 aggregate.
- Acknowledge that fuel sales are allowed under the lease as “other related activities”.

Fees paid by GKM on fuel sales shall be considered to be additional rent and shall not be used to conclude any future ground rent reopenings.

The fee of \$0.05 per gallon of fuel sold is intended to be roughly comparable to the fuel sales revenue obtained from DOBOR’s other tenant at Honokohau, Kona Marine Holding, LLC. Kona Marine’s lease incorporates a separate petroleum supply agreement that utilizes a third-party petroleum provider to supply fuel and maintain the necessary equipment. The net result of Kona Marine’s petroleum supply agreement is that Kona Marine obtains a commission from their provider that, under recent market conditions, is approximately \$1 per gallon of fuel sold. Per Kona Marine’s lease, the State obtains 5% of this amount, which equates to \$.05 cents per gallon. GKM, on the other hand, has no petroleum supply agreement and constructed its own improvements (including fuel storage and dispensing equipment) on the leased premises. Thus, the proposed settlement agreement with GKM simply requires GKM to pay the State \$.05 cents per gallon of fuel sold.

RECOMMENDATION:

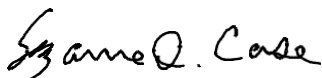
That the Board of Land and Natural Resources Approves the Settlement Agreement Between the State of Hawaii, Department of Land and Natural Resources, Division of Boating and Ocean Recreation, and GKM, Inc. allowing GKM, Inc. to conduct fuel sales, under the terms and conditions cited above, which are by this reference, incorporated herein.

Respectfully Submitted,



EDWARD R. UNDERWOOD, Administrator
Division of Boating & Ocean Recreation

APPROVED FOR SUBMITTAL:



SUZANNE D. CASE, Chairperson
Board of Land and Natural Resources

Attachments:


- A. Aerial Map of GKM Site Location
- B. Settlement Agreement

Honokohau Small Boat Harbor

GKM Inc. and Kona Marina Holdings Fuel Locations

Legend

 Fuel Locations

 GKM Inc. Fuel Location


 Kona Marina Holdings Fuel Location

EXHIBIT A

Google Earth

400 ft



DAVID Y. IGE
GOVERNOR



CLARE E. CONNORS
ATTORNEY GENERAL

DANA O. VIOLA
FIRST DEPUTY ATTORNEY GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
LAND TRANSPORTATION DIVISION
ROOM 300, KEKUANAO'A BUILDING
465 SOUTH KING STREET
HONOLULU, HAWAII 96813
Telephone No. (808) 587-2992
FAX No. (808) 587-2999

December 14, 2020

Rosemary T. Fazio, AAL ALC
Ashford & Wriston
First Hawaiian Center, Suite 1400
999 Bishop Street
Honolulu, HI 96813

Re: Settlement Agreement Between State of Hawaii, Department of Land and Natural Resources, Division of Boating and Ocean Recreation, and GKM, Inc.

Dear Rosemary:

Please see the attached Settlement Agreement for final approval and execution by you.

Thank you.

Very truly yours,

Is/ Daniel A. Morris
Daniel A. Morris
Deputy Attorney General

Enclosure

SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT ("Agreement") is entered into this day of December, 2020, by and between the STATE OF HAWAII, DEPARTMENT OF LAND AND NATURAL RESOURCES, DEPARTMENT OF BOATING AND OCEAN RECREATION ("STATE"), and GKM, Inc. ("GKM"), concerning Harbor Lease H-82-4 dated April 8, 1983, as amended, extended and assigned ("Lease"). STATE and GKM are collectively referred to herein as "PARTIES."

WHEREAS, at the September 11, 2020 meeting ("Meeting") of the Board of the Department of Land and Natural Resources ("BOARD"), the Division of Boating and Ocean Resources of the Department of Land and Natural Resources ("DOBOR") requested, in summary, that the BOARD approve the sale of fuel by GKM at the premises demised by the Lease ("Premises") at a rental rate of five percent (5%) of GKM's gross fuel receipts;

WHEREAS, at the Meeting, GKM presented opposition testimony, stating in summary that the Lease permitted GKM to sell fuel at the Premises without additional rent or other fees;

WHEREAS, at the Meeting, the BOARD requested DOBOR and GKM to attempt to negotiate a compromise regarding GKM's fuel sales at the Premises; and

WHEREAS, after extensive negotiations, DOBOR and GKM concluded that settling the dispute concerning fuel sales at the Premises is in their respective best interests.

NOW THEREFORE, STATE and GKM, by way of settlement and compromise, agree upon the terms and conditions set forth below:

1. Consideration. In consideration of this Agreement, the PARTIES agree that GKM can sell fuel and related products at the Premises in exchange for paying STATE the sum of \$0.05 per gallon of fuel sold. The PARTIES understand and agree that the terms of this Agreement and the start of the fuel sale payment are conditioned upon approval of this Agreement by the BOARD at a regularly scheduled meeting of the BOARD. This Agreement shall take effect as of January 1, 2021, or upon the first of the month following approval of the BOARD, whichever is the last to occur. This Agreement is also subject to the following terms and conditions:

A. GKM shall at all times keep and maintain accurate accounting records of all fuel sales revenue and receipts generated at, by, from or upon the Premises for a period of seven (7) consecutive years following the end of each calendar year. Upon thirty (30) days prior written notice to GKM, the State shall have the right to inspect and make copies of GKM's records, accounts and books bearing on its fuel sales at, in, or upon any part of the Premises. All such information shall be held by the State, its agents, attorneys, and accountants in strictest confidences to the extent permitted by law.

B. GKM shall not store or use any fuel or other hazardous substance, pollutant, or contaminant regulated under the Comprehensive Environmental Response, Compensation, and Liability Act in any manner not sanctioned by law nor bring onto the Premises any such

hazardous material except in the ordinary course of GKM's business, but only to the extent in compliance with all hazardous materials laws. GKM shall immediately advise the State in writing of (i) any and all enforcement, clean up, removal, mitigation, or other governmental or regulatory actions instituted, contemplated, or threatened pursuant to any hazardous materials laws affecting the Premises; (ii) all claims made or threatened by any third party relating to damage, contribution, cost recovery, compensation, loss, or injury resulting from any hazardous materials; and (iii) the discovery or occurrence or condition on the Premises which could subject GKM, the State or the Premises to any restriction on ownership occupancy, transferability, or use of the Premises under any hazardous materials laws, except with respect to conditions existing prior to GKM's use of the Premises for fuel sales.

C. GKM shall obtain pollution liability insurance as additional liability insurance to cover claims for property damage, personal injury, and cleanup costs associated with environmental contamination, which shall be written on a claims made basis with a limit of liability of not less than ONE MILLION (\$1,000,000) per claim and an aggregate limit of not less than TWO MILLION DOLLARS (\$2,000,000).

D. The terms, conditions, and covenants contained in the Lease are incorporated herein by reference and shall continue to remain in full force and effect. This Agreement constitutes written approval of fuel sales as "other related activities" which are permissible in addition to those uses specifically enumerated in the Lease.

2. Mutual Release. Upon execution of this Agreement, STATE and GKM hereby forever release, acquit and forever discharge the other and their respective officers, directors, shareholders, members, managers, agents, representative, employees, successors and assigns, of and from any and all claims or disputes of every kind, nature, character or description, whether known or unknown, arising out of, connected with, or in any way related to the dispute over sale of fuel at the Premises.

3. Entire Agreement. This Agreement contains all the agreements and terms agreed upon between STATE and GKM regarding the matters set forth herein. This Agreement shall not be altered, amended or modified or otherwise changed in any respect, except by a writing duly executed by STATE and **GKM**.

4. Interpretation. This Agreement has been negotiating at arm's length among sophisticated parties represented by experienced counsel. As a result, the rule of "interpretation against the draftsman" shall not apply in any dispute over the interpretation of the terms of this Agreement.

5. Successors and Assigns. This Agreement shall be binding upon and shall inure to the benefit of the PARTIES hereto, jointly and severally, and their respective officers, agents, employees, administrators, heirs, personal representatives, trustees, attorneys, successors and assigns.

6. Counterparts and Facsimile/Electronic Signatures. This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original and all of which shall constitute but one and the same Agreement. The PARTIES agree that when this

Agreement is executed by any party, a facsimile or electronic copy of that signature shall be deemed to be an original signature for all purposes.

IN WITNESS WHEREOF, the PARTIES each declare that he or she has carefully read, had explained and fully understands this Agreement and thereby executes this Agreement.

APPROVED AS TO FORM:

Attorney for STATE

State of Hawaii, Department of Land and
Natural Resources, Department of Boating and
Ocean Recreation

By _____
Edward R. Underwood
Its Administrator

APPROVED AS TO FORM:

Attorney for GKM

GKM, Inc.

By _____
Gary Lambert
Its President

APPROVED:

Board of the Department of Land
and Natural Resources

By _____
Shanne D. Case
Its Chairperson

Dated: