

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

February 26, 2021

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

Hawaii

Consent to Sublease of Term Non-Exclusive Easement No. S-5913, KW Kona Investors, LLC, Lessee, to Charter Boat Holdings, Inc., Sublessee, Kahuwai Bay, Kaupulehu, North Kona, Hawaii, Seaward of Tax Map Key: (3) 7-2-010:010

APPLICANT:

KW Kona Investors, LLC, a Hawaii limited liability company, as Sublessor, to Charter Boat Holdings, Inc., a Hawaii corporation, as Sublessee.

LEGAL REFERENCE:

Section 171-36(a)(6), Hawaii Revised Statutes (HRS), as amended.

LOCATION:

Portion of Government lands of Kahuwai Bay situated at Kaupulehu, North Kona, Hawaii, identified as seaward of Tax Map Key: (3) 7-2-010:010, as shown on the attached map labeled Exhibit A.

AREA:

Sublease area of 100 square feet, more or less with rights of ingress/egress.

TRUST LAND STATUS:

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

LEASE CHARACTER OF USE:

Right, privilege and authority to install, use, maintain, and repair three existing two point commercial moorings, one swim platform mooring, a near shore boat pin, a shoreline post and an ingress/egress corridor.

SUBLEASE CHARACTER OF USE:

Non-exclusive use of easement mooring E and in the alternative and at the sublessor's discretion either easement mooring F or G.

TERM OF LEASE:

55 years, commencing on 01/27/2006 and expiring on 01/26/2061. The next rental reopening is scheduled for 01/27/2026.

TERM OF SUBLEASE:

5 years, commencing on 01/01/2021 and expiring on 01/25/2026.

ANNUAL LEASE RENTAL:

\$5,440.00 per annum or 3% of the gross receipts, whichever is greater, to be paid by March 31<sup>st</sup> of each year for the period covering the previous calendar year.

ANNUAL SUBLEASE RENTAL:

The terms and conditions of the sublease agreement require the Sublessee to pay 1/8<sup>th</sup> of the annual rent (\$680.00) or its proportional share of the percentage rent as set forth in the lease terms and conditions.

RECOMMENDED ADJUSTMENT TO LEASE RENTAL:

Staff is not recommending an adjustment to the lease rental as the subject term easement does not have a provision allowing for sharing of profits. However, staff is recommending that the gross receipts of Charter Boat Holdings, Inc. derived from its operations from Moorings E, F or G (whichever is being used) be included in the calculation of percentage rent due to the State under Lease of Non-Exclusive Easement No. S-5913 (GLS-5913).

DCCA VERIFICATION:

SUBLESSOR: *KW Kona Investors, LLC*

Place of business registration confirmed: YES

Registered business name confirmed: YES

Good standing confirmed: YES

SUBLESSEE: *Charter Boat Holdings, Inc.*

Place of business registration confirmed: YES

Registered business name confirmed: YES

Good standing confirmed: YES

REMARKS:

At its meeting of January 27, 2006, Item D-4, the Board of Land and Natural Resources approved a term, non-exclusive easement to Kona Village Investors, LLC covering the subject offshore waters and submerged lands at the Kona Village Resort for mooring, swim platform and ingress/egress corridor. The grant of easement is to run with the land and inure to the benefit of the real property identified as TMK: (3) 7-2-010:010.

At its meeting of November 14, 2008, Item D-11, the Board amended its prior approval by adding language specifying rental reopening periods, which had been inadvertently overlooked at the time of the initial approval.

The initial lease rent was set at \$6,300 per year or 3% of the gross receipts, whichever is greater. Since issuance of the lease, the percentage rent of gross receipts has not been applicable as the amount has not exceeded the annual rental amount.

A rental reopening in 2016 established the fair market rent at \$5,440 per annum or 3% of gross receipts, whichever is greater, for the 10-year period beginning January 27, 2016 through January 26, 2026.

On August 12, 2016 an Assignment and Assumption of Ground Lease and Lease of Easement was recorded at the Bureau of Conveyances transferring GLS-5913 from Kona Village Investors, LLC to KW Kona Investors, LLC. The grant of easement does not require Board approval to transfer the easement to a new entity, however, the grantee notified staff of the transfer at the time.

KW Kona Investors (KWKI) is requesting consent to sublease one of eight offshore moorings under GLS-5913 to Charter Boat Holdings, Inc. (CBH) to be used for mooring purposes in connection with CBH's operation of the Four Seasons Hualalai Resort's ocean pursuits amenities. The sublease prohibits any onloading/offloading of passengers, commercial sales, activities or advertisement at the mooring location. The sublease is for mooring E, however, in the event KWKI determines necessary CBH may be required to relocate to either mooring F or G (alternative moorings) at the discretion of KWKI. Refer to attached Exhibit A for locations.

The lease requires that "any and all agreements with concessionaires and/or operators shall be subject to consent by the State of Hawaii, Board of Land and Natural Resources". However, no specific language regarding subletting or rent participation is

present in the lease.

Pursuant to the "Revision to Sublease Rent Participation Policy" adopted by the Board at its meeting of May 26, 2000, agenda item D-24, and amended at its meetings of January 26, 2001, under agenda item D-8, and August 24, 2012, under agenda item D-14:

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

HRS 171-36 (a)(6) states that:

The lessee shall not sublet the whole or any part of the demised premises, except with the approval of the board; provided that prior to the approval, the board shall have the right to review and approve the rent to be charged to the sublessee; provided further that in the case where the lessee is required to pay rent based on a percentage of its gross receipts, the receipts of the sublessee shall be included as part of the lessee's gross receipts; provided further that the board shall have the right to review and, if necessary, revise the rent of the demised premises based upon the rental rate charged to the sublessee, including the percentage rent, if applicable, and provided that the rent may not be revised downward"

Since the sublease requires the sublessee to pay 1/8<sup>th</sup> of the annual lease rent or its prorated share of the percentage rent, there are no excess profits of rent. Staff believes the prudent way to address this issue is to require the lessee to include the sublessee's gross receipts derived from the sublessee's operations from moorings E, F or G (whichever is being used) to be included in the calculation of percentage rent due to the State annually under GLS-5913.

The Lessee is compliant with all lease terms and conditions, including rent, annual reports and insurance (term easement agreement does not require a performance bond). The Sublessee is properly permitted and licensed with the State Division of Boating and Ocean Recreation as a commercial operator.

The last rental reopening occurred 01/27/2016. The next rental reopening is scheduled for 01/27/2026. There are no outstanding rental reopening issues.

RECOMMENDATION:

That the Board consent to the sublease under Grant of Term Easement No. S-5913 between KW Kona Investors, LLC, Lessee, to Charter Boat Holdings, Inc., Sublessee, subject to any applicable conditions cited above which are by this reference incorporated herein and further subject to the following terms and conditions:

1. The standard terms and conditions of the most current consent to sublease form, as may be amended from time to time;
2. The gross receipts Charter Boat Holdings, Inc. derived from its operations on moorings E, F or G shall be included in the calculation of gross receipts due to the State under Grant of Term Easement No. S-5913;
3. Review and approval by the Department of the Attorney General; and
4. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

Respectfully Submitted,

*Candace Martin*

*KEM*

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Candace Martin  
Land Agent

*gch*

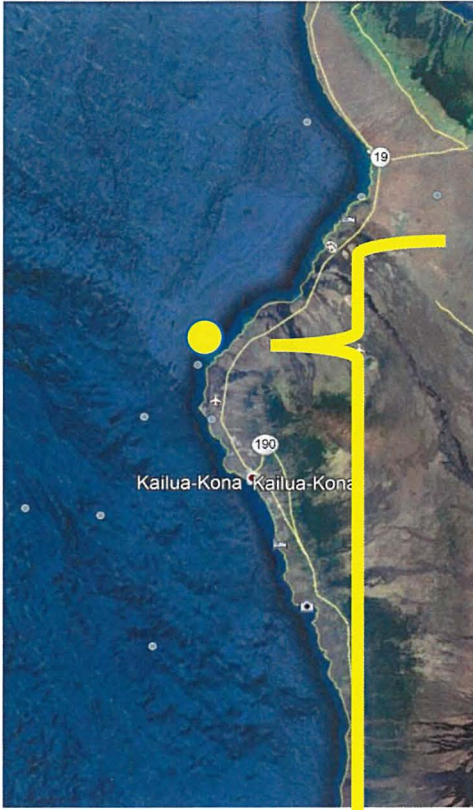
APPROVED FOR SUBMITTAL:

*Suzanne D. Case*

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Suzanne D. Case, Chairperson

*RT*





Map of GLS-5913

