

CASE LOMBARDI & PETTIT
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June 22, 2022

State of Hawaii
Board of Land And Natural Resources
Chairperson, Suzanne D. Case
P.O. Box 621
Honolulu, Hawaii 96809

Via Email: blnr.testimony@hawaii.gov

RE: Lessee's Request for Consent to Mortgage with Estoppel Certificate,
General Lease No. S-5844 ("**Lease**"), WHR LLC, Lessee; Waiakea, South
Hilo, Hawaii, Tax Map Keys: 3rd/ 2-1-01:12 and 2-1-05:13, 16, 17, 27, 32,
and 46

Dear Chairperson Case:

On behalf of WHR LLC ("**WHR**"), Lessee under the above-referenced Lease and owner of the Grand Naniloa Hotel Double Tree by Hilton (the "**Hotel**"), we write to you with respect to the above referenced Lease, and as a follow up to certain issues raised by the Board at the hearing on June 9, 2022 and to address certain questions raised by Mr. Russell Tsuji in emails to WHR on June 21, 2022. Capitalized terms that are not otherwise defined herein shall have the meanings given in our letter of June 14, 2022.

WHR wishes to express its deep gratitude for your consideration in placing this matter on the agenda for the June 24, 2022 hearing. This matter is of great importance to the Hilo business community, as the Hotel directly employs approximately 170 people, and utilizes dozens of local vendors and suppliers. The Hotel's financial impact on Hilo is estimated to be at least a factor of 2.5 times the Hotel's actual revenue. Thus, the Hotel is one of the main financial engines in Hilo's economic recovery. The refinancing of the Existing Loan is critical to the Hotel's continued viability and without such refinancing, the future of the Hotel is uncertain. It is impossible to predict what would come of a foreclosure or bankruptcy filing, but it is certain that the impact on the local community would be significant, and could not come at a worse time given rising inflation and the general economic uncertainty. The only winner in such an outcome would be the Existing Lender and Rialto, who would reap the financial reward, but potentially leave the community devastated¹. The Board's consent provides a

¹ Rialto felt no compunction in refusing to pay employees, local suppliers and vendors, and franchise fees as part of its efforts to cram down the receiver.

mechanism for the State of Hawaii to ensure that the Hotel employees retain their jobs, and that Hilo's economic recovery continues. When viewed in this light, we believe that the issues weigh heavily in favor of the Board consenting to the Loan.

The issues that have been raised in the Staff Report, which was, unfortunately, not revised to reflect the information provided in our June 14, 2022 letter, were based largely on conjecture and a lack of understanding of the facts. We are confident that the information provided in this letter, together with our June 14, 2022 letter, addresses the concerns raised in the Staff Report and Mr. Tsuji's email, and demonstrates that the New Loan is financially sound, commercially reasonable, and appropriate for the Board's consent.

1. The New Loan is Financially Sound.

We have provided the Board, under separate cover, WHR's confidential and proprietary pro forma for the next two years. The pro forma assumed an initial interest rate of 8.75%, which is slightly higher than what the interest rate would be if the New Loan closed today (8.7%). The pro forma indicates that WHR will be able to pay the New Loan, together with all operating expenses, and remain profitable. As discussed below, WHR is purchasing an interest rate cap as part of the New Loan. Additionally, the New Loan comes with a \$2,000,000 interest reserve, and therefore there is an ample cushion in the event of an unforeseen drop in revenue. The State of Hawaii is also protected with respect to the ground lease rent by a \$1,000,000 payment bond, which has already been provided.

The pro forma is based upon conservative estimates that are in line with the generally accepted view that tourism is on the rebound, and is likely to increase over the next two years. Attached hereto as Exhibit "A" is a letter from Michael Paulin, who has an interest in WHR, based on his extensive 50+ years of experience in the Hawaii hotel industry. Mr. Paulin has reviewed the confidential and proprietary financial statements for the Hotel for the months of April and May 2022, which evidence the Hotel's continued outstanding performance. These financial statements demonstrate the fact that the Hotel currently is operating at a level above its pre-Covid performance; and with the continued expected rise in tourism, the Hotel should be able to pay its debt service and outstanding obligations without issue.

Therefore, the New Loan is financially sound, and the guesstimates with respect to WHR's ability to pay the debt service contained in the Staff Report are simply incorrect. We believe that this is the main objection contained within the Staff Report, and, having demonstrated that Staff Report's assumptions are incorrect, we believe that this is no longer a ground for the Board to withhold its consent.

2. The Assignment by Wells Fargo did not Require Board Consent.

Attached hereto as Exhibit "B" is a recorded copy of the Consent issued by the Board in connection with the Wells Fargo Loan. Pursuant to paragraph (b), Wells Fargo was free to assign the loan without further consent of the Board. Therefore, the prior assignment to the Existing Lender is not an appropriate ground to withhold consent to the New Loan.

3. The Internal WHR dispute has been resolved.

Attached hereto as Exhibit "C" are copies of the filed dismissals in the intracompany dispute with the Olson entities. The parties have reached a settlement agreement, and, assuming the New Loan closes, the matter is resolved. As we noted in our prior letter, the entity in question holds less than a 20% interest in WHR, and thus the consent of the Board is not required for the disposition of the Olson interest. The Olson entities will no longer be a part of WHR once the New Loan has funded.

4. The Loan is Commercially Reasonable in Today's Market.

The New Loan is, by design, a short-term loan that will allow the Hotel to regain its footing. All of the issues that caused distress under the Existing Loan arose out of the Covid-19 pandemic. It is unfortunate that the Existing Lender has taken advantage of the pandemic to put WHR in the position where it needs to refinance, but this is all the more reason for the Board to consent to the New Loan to remove the Existing Lender from the equation.

The New Loan has been professionally underwritten by Sculptor, which is a large institutional lender with industry-standard underwriting requirements. Each lender's underwriting standards are proprietary, but it is customary in today's market for loan-to-value to be in the 60-70% range, meaning that Sculptor has valued the Hotel in the range of \$90,000,000-\$110,000,000. WHR could easily sell the Hotel for \$62,000,000, especially in light of the impressive cash flows, which are higher than they have ever been and continuing to improve. However, WHR is comprised of many local investors, and has demonstrated its commitment to Hilo, its employees, and the Big Island, and has no intention of selling the Hotel at this time.

5. Interest Rate Calculation

Mr. Tsuji's email requested certain clarifications with respect to the interest rate. The interest rate for the New Loan is comprised of two factors. The interest rate accrues at a benchmark base rate of the "Term SOFR" benchmark (as defined in the Loan Agreement) + the "Spread" (defined in the Loan Agreement as 11.75%). Assuming Term SOFR is 1.45%, the interest rate for the first month would be: 1.45%

("Term SOFR") + 11.75%² ("Spread") = 13.2%. The interest rate fluctuates daily, but is averaged over a 30 day month. The interest rate adjusts monthly. The actual interest rate that would have been charged for June 2022 will not be known until the end of the month, and could be lower than 1.45% SOFR. However, a portion of the accrued interest is deferred until the end of the Term, and thus the amount that is payable each month is currently 8.7% (1.45% SOFR + 725 basis points); provided however we used 8.75% to calculate the payments under the pro forma. The New Loan permits a payoff without penalty at 21 months. The total amount of the balloon payment, assuming interest at the maximum capped rate with a payoff of 21 months is estimated to be \$67,070,016.55, and if WHR elects to go a full 24 months is estimated to be \$67,827,387.29. It is unknown whether interest rates will continue to rise, or whether inflation, and that interest rates will return to more normal levels over the term of the loan. WHR is also free to use the excess cash flow generated by the Hotel operations to pay down the Loan during the Term, which WHR anticipates it will do in order to reduce the amount of the potential balloon payment.

As noted above, there is a \$2,000,000 interest reserve. The interest reserve, plus the excess cash generated by the Hotel, are more than sufficient to cover the amount of interest up to the capped rate. The rate cap limits interest fluctuations in excess of 4.5%. The excess amounts that are added to the balloon payment effect the equity held by WHR, but otherwise do not impact the State, as the State remains protected as to its ground lease rents through the \$1,000,000 payment bond. Again, given the loan-to-value, the impact of the balloon payment is essentially a risk for WHR and its investors, and not something that has an impact on the State. This is also not a situation where there is an out-of-state fly-by-night lessee looking to squeeze out all the equity and leave a mess that the State must clean up. WHR has demonstrated that it is willing to stand by the Hotel, its employees, and the Hilo business community through the worst of times, and to work tirelessly to consummate this New Loan so that it may continue its operations.

6. The Foreclosure is on Hold Pending the Board's Action.

The foreclosure action filed by the Existing Lender is on hold pending the Board's action. Having forced a receiver on the Hotel, the Existing Lender has no incentive to do anything but soak up the Hotel's equity as it insists on default interest that WHR believes it is not entitled to. The receiver continues to operate the Hotel using WHR's business plan, and the Hotel remains successful. The Board's consent to the New Loan will allow WHR to resolve the lawsuit, pay off the Existing Lender, and close the book on the Covid-19 crisis. In the event the Board withholds its consent, the situation will be forced to a resolution by foreclosure or bankruptcy, either of which will lead to an uncertain future, with potentially an unknown operator for the Hotel given the

² Mr. Tsuji's email contains a typographical error with the reference to the rate being 11.65%.

mortgagee protections contained in the Lease. Such an outcome would compound the Covid-19 crisis to no good end. Board consent to a program that provides the best chance for a positive outcome for the hundreds of local families and businesses is the obvious choice.

7. Standard of Review.

The Lease provides at Section 20(a): "Lessee may from time to time with the prior written consent of the chairperson, which consent **shall not be unreasonably withheld**, assign this lease by way of mortgage . . . to any . . . other lending institution." (emphases added).

Thus, the standard of review for the Board is one of reasonableness, and is subject to the covenant of good faith and fair dealing. See e.g. See Kapiolani Commercial Ctr. v. A & S P'ship, 68 Haw. 580, 583–84, 723 P.2d 181, 184 (1986) (stating that if the specific provision in the lease regarding a landlord not unreasonably withholding consent to a proposed transfer is "a promise [then] upon its breach the other party will be entitled to all the remedies available for a breach of a promise including the right to terminate the lease") (quoting Restatement (Second) of Property Land. & Ten. § 15.2 (1977)); Restatement (Second) of Property Land. & Ten. § 15.2(2) (1977) ("[T]he landlord's consent to an alienation by the tenant cannot be withheld unreasonably, unless a freely negotiated provision in the lease gives the landlord an absolute right to withhold consent"; "A reason for refusing consent, in order for it to be reasonable, must be objectively sensible and of some significance and not be based on mere caprice or whim or personal prejudice."); Cohen v. Ratinoff, 195 Cal. Rptr. 84, 89 (Cal. Ct. App. 1983) ("The duty of good faith and fair dealing, which is implicit in the lease entered into between plaintiff and defendant, therefore, militates against the arbitrary or unreasonable withholding of consent to an assignment. A breach by the lessor of his duty constitutes a breach of the lease agreement."); Brigham Young Univ. v. Seman, 672 P.2d 15, 18 (Mont. 1983) (A provision in the lease that the lessor will not unreasonably withhold consent to an assignment "means that the lessor, in determining whether to withhold consent, will be governed by principles of fair dealing and commercial reasonableness." . . . "Arbitrary considerations of personal taste, sensibility or convenience are not proper criteria for the landlord's consent, nor is personal satisfaction the sole determining factor.") Speedway SuperAmerica, LLC v. Tropic Enters., Inc., 966 So. 2d 1, 4 (Fla. Dist. Ct. App. 2007) ("The implied obligation of good faith performance has been applied in the context of lease provisions requiring a landlord's consent to a tenant's assignment of a lease.").

In this instance, Board consent to a loan where the State's lessee has demonstrated that: (i) the loan-to-value is within industry standards, (ii) the Hotel revenues will generate sufficient income to make the loan payments, and (iii) the State is protected through a rate cap, interest reserve, and payment bond, is manifestly

Chairperson, Suzanne D. Case
June 22, 2022
Page 6

reasonable. This is especially true when considering the totality or of the circumstances, as the alternative scenario, foreclosure or bankruptcy, layoffs and potential closure, are unreasonable outcomes for WHR, the local families who may lose their jobs, and the entire Hilo business community, and is of benefit only to the lender who instigated the situation through its predatory and opportunistic exploitation of the Covid-19 pandemic effects on the economy.

Based on the foregoing, WHR believes that it has addressed all of the concerns raised in the Staff Report and Mr. Tsuji's email, and respectfully requests that the Board consent to the New Loan. Representatives of WHR and its counsel will be present at the June 24, 2022 hearing.

Very truly yours,

CASE LOMBARDI & PETTIT

/s/ Ted N. Pettit
TED N. PETTIT
DAVID G. BRITTIN

Enclosures
cc: client

TNP/DGB:2022-221

EXHIBIT A

Tower Hotels Hilo LLC
1050 Bishop Street, Unit 530
Honolulu, Hawaii 96813

June 21, 2022

State of Hawaii
Board of Land And Natural Resources
Chairperson, Suzanne D. Case
P.O. Box 621
Honolulu, Hawaii 96809

Via: Priority Mail Tracking
& Email: blnr.testimony@hawaii.gov

State of Hawaii
Board of Land And Natural Resources
Chairperson, Suzanne D. Case
Kalanimoku Building
1151 Punchbowl St. Room 132
Honolulu, Hawaii 96813

Via: Hand Delivery

RE: Lessee's Request for Consent to Mortgage with Estoppel Certificate, General Lease No. S-5844 ("**Lease**"), WHR LLC, Lessee; Waiakea, South Hilo, Hawaii, Tax Map Keys: 3rd/ 2-1-01:12 and 2-1-05:13, 16, 17, 27, 32, and 46

Dear Chairperson Case:

I write to you in support of WHR LLC's ("**WHR**"), Lessee under the above-referenced Lease and owner of the Grand Naniloa Hotel Doubletree by Hilton ("**Hotel**"), Request for Consent to Mortgage, which will refinance the existing \$50,000,000 loan ("**Existing Loan**") currently held by Wilmington Trust National Association, as Trustee for the Benefit of the Holders of Bank 2018-BNK-14, Commercial Mortgage Series 2018-BNK-14 ("**Existing Lender**") with a \$62,000,000 loan ("**New Loan**") from a special purpose entity affiliate of Sculptor Capital Management, Inc. ("**Sculptor**").

I believe the Board's consent to the refinancing will ultimately benefit the local community and the State of Hawaii as it will ensure the Hotel's continued success in serving the people of Hawaii.

A. My Background

In 1959, I was 17 years old and working on the docks of Hilo harbor. Since then, I built Hawaii's second largest locally owned hotel company, Aqua-Aston hospitality which is now part of Marriott Vacations. During this time, I operated 124 hotels on every island and never had one fail financially.

EXHIBIT A

In 1964, I created the "CondoTel Vacation" concept that gave rise to the "AirBNB" concept for vacation accommodations.

In 2007, Aqua was the first hospitality company to be owned by an Employees Stock Ownership Plan (ESOP), and was honored in 2014 as "Employer of the Year" by Pacific Business News.

I have also been actively involved in our community. I have served as the past Chair of the Hawaii Hotel & Lodging Association, and past Chair of PATA — Pacific Asia Travel Association - founded in Hawaii in 1951. PATA's members include 45 countries. I have also served as a past Trustee of Mid-Pacific Institute.

Currently, I am an investor in hotels on Oahu (2), Maui (2), and Big Island of Hawaii (1), the Hotel.

In addition, it is fortunate that we have many local residents who are owners in the Hotel, including Dr. Tyree Jenkins, a well-respected local ophthalmologist.

B. The Board's Consent to the New Loan Will Ultimately Benefit the Local Community and the State of Hawaii

As a member/partner in the ownership of the Hotel I am involved in the day to day asset management and oversight of the Hotel in consultation with Tower Development, Inc. the manager of WHR.

I am actively involved in working with the oversight of Hilton's franchise, including daily reviews of the Hotel's operations, monthly meetings devoted to marketing and revenue management, and establishing budgetary goals and guidelines.

I have reviewed the last 12 months financial statements received from Evolution Hospitality, the manager of the Hotel, and the June 2022 Daily Flashes prepared by Evolution. These financials are proprietary and confidential but they support the impressive, ongoing performance of the Hotel in terms of net revenues for the past 12 months, the high room occupancy rates, high average daily room rates and other financial data. These financials demonstrate that the Hotel's future revenues will support the proposed debt service under the proposed loan with Sculptor.

During the two plus years of Covid-19 pandemic limitations and restrictions, the Hotel took the initiative to stay open even though it suffered from losses. The fact that the Hotel stayed open during such difficult times demonstrates its commitment to the local community and the

State of Hawaii
Board of Land And Natural Resources
Chairperson, Suzanne D. Case
June 21, 2022
Page 3 of 7

people, especially the Hotel's employees. As a result of strategy and perseverance, the Hotel is currently performing better than at any time in its history.

Specifically, marketing and remaining open during the Covid pandemic was a strategic success by WHR as evidenced by the current operations and room contracts procured with Southwest, United, Hawaiian Airlines and, during the summer of 2021, Love Island TV Production crews. These significant contracts which would not have happened but for the local insights of WHR's local ownership. Love Island is a dating reality show and was filmed at the Hotel during the summer of 2021 resulting in promotion of the Hotel and Hawaii to a wide television and internet steaming audience.

Based on my experience as a hotel operator and familiarity with the hospitality industry in Hawaii, and, in particular, the recent revenues generated by the Hotel, if the loan with the Existing Lender is paid off, then the Hotel will continue its success in the future. The Hotel's revenues are also expected to increase substantially in the future as the eventual return of the Japanese, other Asian and Canadian tourist market will serve to further strengthen the Hotel's leadership position in Hilo.

I have reviewed the terms and conditions of the proposed Sculptor loan and believe that the loan, including the \$2 million interest reserve, is within the industry standards for refinancing loans of this kind to hotels in Hawaii. The loan is reasonable and will allow the Hotel to recover from its difficulties encountered during the pandemic. In turn, the local Hilo economy will benefit from the success of the Hotel and its customers and patrons who will provide an economic boost to the employees, local restaurants, tourist operators, retailers, and vendors of the Hotel.

I support the proposed financing with Sculptor, and humbly asks that the Board consent to the refinancing.

Thank you for your consideration.

Very truly yours,

A handwritten signature in black ink, appearing to read "M. Paulin", with a stylized flourish at the end.

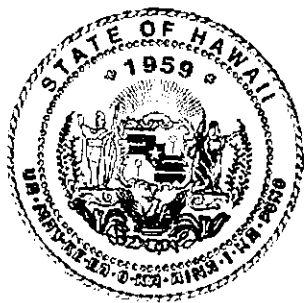
MICHAEL PAULIN

Cc: WHR LLC

EXHIBIT B

CON20
ADDL CT 145

DOUBLE SYSTEM



STATE OF HAWAII
OFFICE OF ASSISTANT REGISTRAR
RECORDED

September 05, 2018 8:01 AM

Doc No(s) T-10474134
on Cert(s) 106776, 108763
Issuance of Cert(s)



1 17/18 ZMA
B-33215798

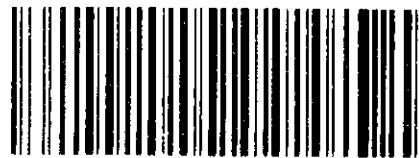
/s/ LESLIE T. KOBATA
ASSISTANT REGISTRAR



STATE OF HAWAII
BUREAU OF CONVEYANCES
RECORDED

September 05, 2018 8:01 AM

Doc No(s) A-68220553A thru A-68220553B



1 18/18 DYS
B-33215798

/s/ LESLIE T. KOBATA
REGISTRAR

2

LAND COURT SYSTEM

Return by Mail () Pickup ()
Holland & Knight LLP
101 S Tryon St., Ste 3600
Charlotte, North Carolina 28280
Attn: Chris Boothe, Esq.

REGULAR SYSTEM

To:

TGOH 201834122
TGES 210-18117535
BARBARA PAULO

DS

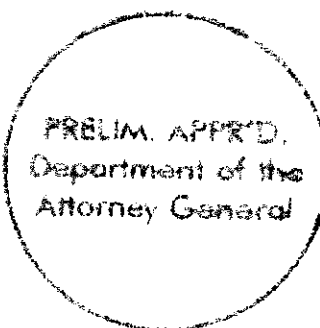
(14)

Total Number of Pages:

Tax Map Key Nos. (3) 2-1-005-
013, 016, 017, 027, 032, 046 and
(3) 2-1-001-012

CONSENT TO MORTGAGE OF GENERAL LEASE NO. S-5844 AND ESTOPPEL CERTIFICATE

CONSENT (this "Consent") is hereby given by the STATE OF HAWAII, by the Board of Land and Natural Resources (the "Lessor"), acting pursuant to Section 171-22, Hawaii Revised Statutes, as amended, in connection with that certain State of Hawaii Department of Land and Natural Resources General Lease No. S-5844 dated January 20, 2006, filed as Land Court Document No. 3385990 and as Regular System Document No. 2006-021241 (the "Lease"), leased by Lessor to WHR LLC, a Hawaii limited liability company ("Lessee"), as successor in interest to Hawaii Outdoor Tours, Inc., pursuant to that certain Quitclaim Assignment and Assumption of Ground Lease, executed by David Farmer, duly appointed Trustee of the Bankruptcy Estate of Hawaii Outdoor Tours, Inc., in the United States Bankruptcy Court for the District of Hawaii in that certain proceeding entitled "In re Hawaii Outdoor Tours, Inc." designated as Case No. 12-02279 (Chapter 11) filed in the Office of the Assistant Registrar of the Land Court as Document No. T-8751081 and recorded in the Bureau of Conveyances as Document No. A-50990611



and duly noted on Transfer Certificates of Title No. 108,763 and 106,776.

Lessor hereby consents to that certain Mortgage, Assignment of Leases and Rents, Security Agreement, and Fixture Filing dated August 31st, 2018, in substantially the form attached hereto and made a part hereof as Exhibit "A", and recorded concurrently herewith in the Bureau of Conveyances and the Office of the Assistant Registrar of the Land Court of the State of Hawaii, and duly noted on Transfer Certificates of Title No. 108,763 and 106,776 (the "Leasehold Mortgage"), executed by Lessee for the benefit of WELLS FARGO BANK, NATIONAL ASSOCIATION ("Lender"), which secures that certain loan (the "Loan") from Lender to Lessee, which Leasehold Mortgage encumbers the "Property" (as defined in the Leasehold Mortgage and which includes the Resort Site (as defined in the Lease), the Golf Course and Allied Facilities Site (as defined in the Lease), the buildings and the Improvements (as defined in the Leasehold Mortgage) located thereon). The Leasehold Mortgage is an "Authorized Mortgage" under the Lease and Lender is an "Authorized Mortgagee" under the Lease.

This Consent shall serve as evidence that Lessor has received a copy of the Leasehold Mortgage and the notice address for purposes of the notices under the Lease shall be sent to Wells Fargo Bank, National Association, Attention: Wells Fargo Commercial Mortgage Servicing, 401 South Tryon Street, 8th Floor, Charlotte, North Carolina 28202 or such other address as Lender may designate to Lessor.

Lessor hereby confirms that:

(a) Lessor shall not agree to any mutual termination or cancellation or accept any surrender of the Lease, except upon the expiration of the term of the Lease or its termination pursuant to any express provision of the Lease, nor shall any material amendment, alteration or modification of the Lease (including, without limitation, any amendment or other modification to the economic terms of the Lease, any provisions addressed in this Consent, any provisions relating to Lender's rights under the Lease, the term of the Lease and/or any material increase in Lessee's obligations or material decrease in Lessee's rights under the Lease) be binding upon Lender or any purchaser in foreclosure from Lender, unless Lender has given its prior written consent to such amendment or modification, which consent shall not be unreasonably withheld and shall be deemed given if a written refusal to consent

together with a written explanation of the reasons for such refusal to consent is not received from Lender within ten (10) days after receipt by Lender of a written request for Lender's consent to a proposed amendment, alteration or modification;

(b) The Loan may be transferred or assigned without the consent of Lessor and any such transferee or assignee shall also be deemed an "Authorized Mortgagee" under the Lease;

(c) Until the Loan has been paid in full, Lessor will not exercise any lien rights it may have pursuant to Section 19 of the Lease on any buildings and improvements owned or placed on the Property by Lessee, any property kept or used on the Property, or any sublease rents of the improvements and buildings located on the Property; provided, however, that the foregoing shall in no way affect Lessor's reversionary interest in the Property as a result of, among other things, expiration of the lease term or earlier termination of the lease;

(d) With respect to Section 20.d. of the Lease, any new ground lease entered into between Lessor and any successor Lessee, Lessor shall assign to the successor Lessee all space leases and subleases under which the tenants have attorned to Lessor (if any), with the consent of Lender, within 10 days following execution of the new ground lease; and

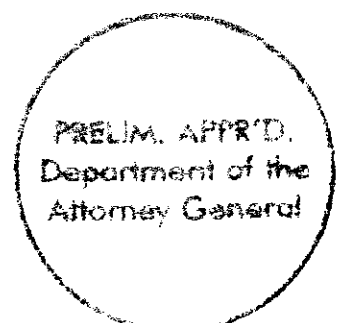
(e) The renting of rooms in the ordinary course of Lessee's business does not constitute renting or subletting for purposes of Section 14 of the Lease.

Lessor hereby certifies that, to the best of its knowledge, the following statements are true and correct, recognizing that Lender and its successors and assigns will rely on such statements:

(1) As of the date of execution of this document, Lessee is the current lessee under the Lease;

(2) As of the Effective Date, the following events have occurred which with the passage of time or the giving of notice may constitute a default:

a. An application for Mechanic's Lien No. 16-1-003 filed October 7, 2016, by Lincoln Builders LLC, as claimant, in the amount of \$754,743.00 plus reasonable attorneys' fees and costs, and interest.



(3) Except as set forth in Paragraph (2) above, as far as Lessor is aware, the Lessee is not in default in any respect as of this date nor has any event occurred which with the passage of time or the giving of notice would constitute a default;

(4) Except as set forth in Paragraph (2) above, there are no claims for damages, rents due, or other liability which Lessor is aware of against Lessee arising out of the Lease or performance of the terms, covenants or conditions of the Lease;

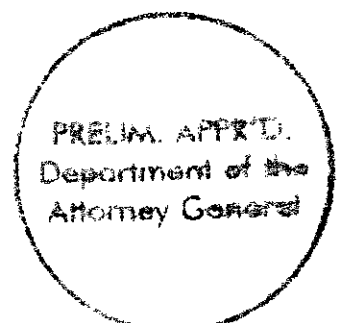
(5) Lessor hereby agrees notwithstanding the potential defaults identified in Paragraph (2) above, that the same shall not be deemed a default under the Lease and Lessor will forbear from exercising any remedies under the Lease in connection therewith as long as the existing Performance and Payment Bond No. 800014335 naming Lessor as additional obligee in an amount no less than \$1,000,000 and the surety bond equal to two times the annual rental then payable pursuant to Section 18. of the Lease remain available to pay the referenced claims;

(6) The Lease is in full force and effect and has not been modified, supplemented, extended or amended as of this date;

(7) As of the date hereof, no Base Rent is due from Lessee under the Lease. The Base Rent currently payable by Lessee under the Lease is \$580,270.44 per annum. Base Rent due under the Lease has been paid through January 31, 2019; and

(8) The term of the Lease commenced on February 1, 2006, and expires on January 31, 2071, unless sooner terminated as provided in the Lease.

[Signature Page to Follow]

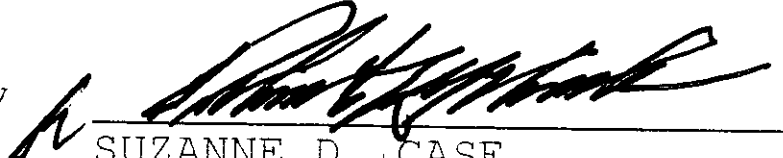


IN WITNESS WHEREOF, the STATE OF HAWAII, by the Board of Land and Natural Resources, has caused the seal of the Department of Land and Natural Resources to be hereunto affixed and these presents to be duly executed this 31st day of August, 2018.


STATE OF HAWAII

Approved by the Board
of Land and Natural
Resources at its meeting
held on August 10, 2018.

By


SUZANNE D. CASE
Chairperson
Board of Land and
Natural Resources

APPROVED AS TO FORM:


JULIE H. CHINA
Deputy Attorney General

Dated: August 27, 2018

EXHIBIT "A"

FORM OF LEASEHOLD MORTGAGE

LAND COURT SYSTEM

REGULAR SYSTEM

AFTER RECORDATION, RETURN BY MAIL () PICKUP ()

Holland & Knight LLP
101 S. Tryon Street, Suite 3600
Charlotte, North Carolina 28280
Attention: Chris Boothe, Esq.
Loan No. 31-0946337

Pages _____

Tax Map Key: (3) 2-1-001: 012

Loan No. 31-0946337

(3) 2-1-005: 013, 016, 017, 032, 046 & 027

TCT Nos.: 106,776 & 108,763

**LEASEHOLD MORTGAGE, ASSIGNMENT OF LEASES AND
RENTS, SECURITY AGREEMENT AND FIXTURE FILING**

MORTGAGOR:

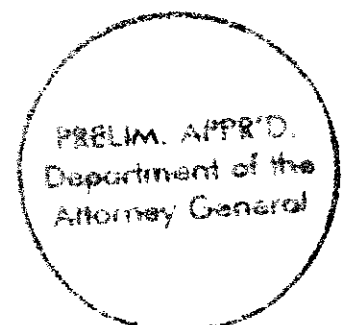
WHR LLC, a Hawaii limited liability company, with a mailing
address at 1050 Bishop, Suite 530, Honolulu, Hawaii 96813

MORTGAGEE:

WELLS FARGO BANK, NATIONAL ASSOCIATION, a national
banking association, with a mailing address at c/o Wells Fargo
Commercial Mortgage Servicing, 401 South Tryon Street, 8th Floor,
Charlotte, North Carolina

PROPERTY:

93 Banyan Drive and 1713 Kamehameha Avenue, Hilo, Hawaii
96720 (TMK Nos. (3) 2-1-001: 012 and (3) 2-1-005: 013, 016, 017,
032, 046 & 027), more particularly described in the attached
Exhibit "A"



THIS LEASEHOLD MORTGAGE, ASSIGNMENT OF LEASES AND RENTS, SECURITY AGREEMENT AND FIXTURE FILING (this "Security Instrument") is made as of this ____ day of _____, 2018, by WHR LLC, a Hawaii limited liability company, with a mailing address at 1050 Bishop, Suite 530, Honolulu, Hawaii 96813, as mortgagor (together with its permitted successors and assigns, "Borrower") to WELLS FARGO BANK, NATIONAL ASSOCIATION, a national banking association, with a mailing address at c/o Wells Fargo Commercial Mortgage Servicing, 401 South Tryon Street, 8th Floor, Charlotte, North Carolina 28202, as mortgagee (together with its successors and assigns, "Lender"). All capitalized terms not defined herein shall have the respective meanings set forth in the Loan Agreement (defined below).

RECITALS:

This Security Instrument is given to Lender to secure a certain loan (the "Loan") advanced pursuant to a certain loan agreement between Borrower and Lender (as the same may have been or may be amended, restated, replaced, supplemented or otherwise modified from time to time, the "Loan Agreement"), which such Loan is evidenced by, among other things, a certain Promissory Note in the aggregate principal amount of \$50,000,000.00 executed in connection with the Loan Agreement (together with all extensions, renewals, replacements, restatements or other modifications thereof, whether one or more being hereinafter collectively referred to as the "Note");

Borrower desires to secure the payment of the outstanding principal amount set forth in, and evidenced by, the Loan Agreement and the Note together with all interest accrued and unpaid thereon and all other sums due to Lender in respect of the Loan under the Note, the Loan Agreement, this Security Instrument or any of the other Loan Documents (defined below) (collectively, the "Debt") and the performance of all of the obligations due under the Note, the Loan Agreement and all other documents, agreements and certificates executed and/or delivered in connection with the Loan (as the same may be amended, restated, replaced, supplemented or otherwise modified from time to time, collectively, the "Loan Documents"); and

This Security Instrument is given pursuant to the Loan Agreement, and payment, fulfillment, and performance of the obligations due thereunder and under the other Loan Documents are secured hereby in accordance with the terms hereof.

Article 1 – GRANTS OF SECURITY

Section 1.1. PROPERTY MORTGAGED. Borrower does hereby irrevocably mortgage, grant, bargain, sell, pledge, assign, warrant, transfer, convey and grant a security interest to Lender and its successors and assigns in and to the following property, rights, interests and estates, to the extent now owned, or hereafter acquired by Borrower (collectively, the "Property"):

(a) Land. The real property described in Exhibit A attached hereto and made a part hereof, being the premises demised by the Ground Lease (collectively, the "Land");

(b) Additional Land. All additional lands, estates and development rights hereafter acquired by Borrower for use in connection with the Land and the development of the Land and

all additional lands and estates therein which may, from time to time, by supplemental mortgage or otherwise be expressly made subject to the lien of this Security Instrument;

(c) Ground Lease. That certain State of Hawaii Department of Land and Natural Resources General Lease No. S-5844, dated January 20, 2006, and recorded on February 1, 2006 in the Office of the Assistant Registrar of the Land Court of the State of Hawaii (the "**Land Court**") as Document No. 3385990 and noted on Transfer Certificate of Title Nos. 106,776 and 108,763, and in the Bureau of Conveyances of the State of Hawaii (the "**Bureau**") as Document No. 2006-021241, as assigned to Borrower pursuant to that certain Quitclaim Assignment and Assumption of Ground Lease dated December 17, 2013, recorded in the Land Court as Document No. T-8751081, noted on said certificates of title, and in the Bureau as Document No. A-50990611 (the "**Ground Lease**") and the leasehold estate created thereby (the "**Leasehold Estate**");

(d) Assignments/Modifications. All assignments, modifications, extensions and renewals of the Ground Lease and all credits, deposits, options, privileges and rights of Borrower as tenant under the Ground Lease, including, but not limited to, rights of first refusal, if any, and the right, if any, to renew or extend the Ground Lease for a succeeding term or terms, and also including all the right, title, claim or demand whatsoever of Borrower either in law or in equity, in possession or expectancy, of, in and to Borrower's right, as tenant under the Ground Lease, to elect under Section 365(h)(1) of the Bankruptcy Code to terminate or treat the Ground Lease as terminated in the event (i) of the bankruptcy, reorganization or insolvency of the landlord under the Ground Lease (the "**Ground Lessor**"), and (ii) the rejection of the Ground Lease by Ground Lessor, as debtor in possession, or by a trustee for Ground Lessor, pursuant to Section 365 of the Bankruptcy Code;

(e) Improvements. The buildings, structures, fixtures, additions, enlargements, extensions, modifications, repairs, replacements and improvements now or hereafter erected or located on the Land (collectively, the "**Improvements**");

(f) Easements. All easements, rights-of-way or use, rights, strips and gores of land, streets, ways, alleys, passages, sewer rights, water, water courses, water rights and powers, air rights and development rights, and all estates, rights, titles, interests, privileges, liberties, servitudes, tenements, hereditaments and appurtenances of any nature whatsoever, in any way now or hereafter belonging, relating or pertaining to the Land and the Improvements, including, but not limited to, those arising under and by virtue of the Ground Lease, and the reversions and remainders, and all land lying in the bed of any street, road or avenue, opened or proposed, in front of or adjoining the Land, to the center line thereof and all the estates, rights, titles, interests, rights of dower, rights of curtesy, property, possession, claim and demand whatsoever, both at law and in equity, of Borrower of, in and to the Land and the Improvements, including, but not limited to, those arising under and by virtue of the Ground Lease, and every part and parcel thereof, with the appurtenances thereto;

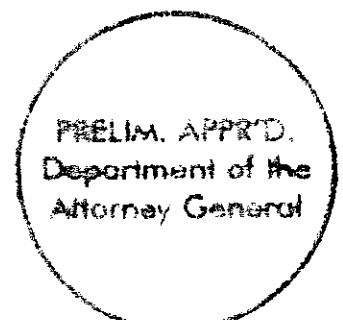
(g) Fixtures and Personal Property. All machinery, equipment, fixtures (including, but not limited to, all heating, air conditioning, plumbing, lighting, communications and elevator fixtures), furniture, software used in or to operate any of the foregoing and other property of every kind and nature whatsoever owned by Borrower, or in which Borrower has or shall have

an interest, now or hereafter located upon the Land and the Improvements, or appurtenant thereto, and usable in connection with the present or future operation and occupancy of the Land and the Improvements and all building equipment, materials and supplies of any nature whatsoever owned by Borrower, or in which Borrower has or shall have an interest, now or hereafter located upon the Land and the Improvements, or appurtenant thereto, or usable in connection with the present or future operation and occupancy of the Land and the Improvements (collectively, the "**Personal Property**"), and the right, title and interest of Borrower in and to any of the Personal Property which may be subject to any security interests, as defined in the Uniform Commercial Code, as adopted and enacted by the state or states where any of the Property is located (the "**Uniform Commercial Code**"), and all proceeds and products of the above;

(h) Leases and Rents. All leases, subleases, subsubleases, lettings, licenses, concessions or other agreements (whether written or oral) pursuant to which any Person is granted a possessory interest in, or right to use or occupy all or any portion of the Land and the Improvements, and every modification, amendment or other agreement relating to such leases, subleases, subsubleases, or other agreements entered into in connection with such leases, subleases, subsubleases, or other agreements and every guarantee of the performance and observance of the covenants, conditions and agreements to be performed and observed by the other party thereto, heretofore or hereafter entered into, whether before or after the filing by or against Borrower of any petition for relief under any Creditors Rights Laws (collectively, the "**Leases**") and all right, title and interest of Borrower, its successors and assigns therein and thereunder, including, without limitation, cash or securities deposited thereunder to secure the performance by the lessees of their obligations thereunder and all rents, additional rents, rent equivalents, moneys payable as damages or in lieu of rent or rent equivalents, royalties (including, without limitation, all oil and gas or other mineral royalties and bonuses), income, receivables, receipts, revenues, deposits (including, without limitation, security, utility and other deposits), accounts, cash, issues, profits, charges for services rendered, and other consideration of whatever form or nature received by or paid to or for the account of or benefit of Borrower or its agents or employees from any and all sources arising from or attributable to the Property, including, all receivables, customer obligations, installment payment obligations and other obligations now existing or hereafter arising or created out of the sale, lease, sublease, license, concession or other grant of the right of the use and occupancy of property or rendering of services by Borrower or Manager and proceeds, if any, from business interruption or other loss of income insurance whether paid or accruing before or after the filing by or against Borrower of any petition for relief under any Creditors Rights Laws (collectively, the "**Rents**") and all proceeds from the sale or other disposition of the Leases and the right to receive and apply the Rents to the payment of the Debt;

(i) Insurance Proceeds. Subject to the obligations of Borrower and the rights of the lessor under the Ground Lease, all insurance proceeds in respect of the Property under any insurance policies covering the Property, including, without limitation, the right to receive and apply the proceeds of any insurance, judgments, or settlements made in lieu thereof, for damage to the Property (collectively, the "**Insurance Proceeds**");

(j) Condemnation Awards. Subject to the obligations of Borrower and the rights of the lessor under the Ground Lease, all condemnation awards, including interest thereon, which



may heretofore and hereafter be made with respect to the Property by reason of any taking or condemnation, whether from the exercise of the right of eminent domain (including, but not limited to, any transfer made in lieu of or in anticipation of the exercise of the right), or for a change of grade, or for any other injury to or decrease in the value of the Property (collectively, the "**Awards**");

(k) Tax Certiorari. All refunds, rebates or credits in connection with reduction in real estate taxes and assessments charged against the Property as a result of tax certiorari or any applications or proceedings for reduction;

(l) Rights. The right, in the name and on behalf of Borrower, to appear in and defend any action or proceeding brought with respect to the Property and to commence any action or proceeding to protect the interest of Lender in the Property;

(m) Agreements. All agreements, contracts, certificates, instruments, franchises, permits, licenses, plans, specifications and other documents (including, without limitation, to the extent assignable, the Franchise Agreement), now or hereafter entered into, and all rights therein and thereto, respecting or pertaining to the use, occupation, construction, management or operation of the Land and any part thereof and any Improvements or any business or activity conducted on the Land and any part thereof and all right, title and interest of Borrower therein and thereunder, including, without limitation, the right, upon the happening of any Event of Default hereunder, to receive and collect any sums payable to Borrower thereunder;

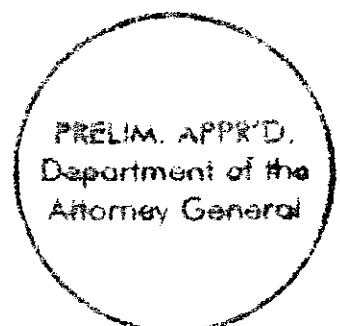
(n) Intangibles. All tradenames, trademarks, servicemarks, logos, copyrights, goodwill, books and records and all other general intangibles relating to or used in connection with the operation of the Property;

(o) Accounts. All reserves, escrows and deposit accounts maintained by Borrower with respect to the Property, including without limitation, the Accounts and all cash, checks, drafts, certificates, securities, investment property, financial assets, instruments and other property held therein from time to time and all proceeds, products, distributions or dividends or substitutions thereon and thereof;

(p) Proceeds. All proceeds of any of the foregoing items set forth in subsections (a) through (o) including, without limitation, Insurance Proceeds and Awards (subject to the obligations of Borrower and the rights of the lessor under the Ground Lease), into cash or liquidation claims; and

(q) Other Rights. Any and all other rights of Borrower in and to the items set forth in subsections (a) through (p) above.

Section 1.2. ASSIGNMENT OF RENTS. Borrower hereby absolutely and unconditionally assigns to Lender all of Borrower's right, title and interest in and to all current and future Leases and Rents; it being intended by Borrower that this assignment constitutes a present, absolute assignment and not an assignment for additional security only. Nevertheless, subject to the terms of the Loan Agreement and Section 8.1(h) of this Security Instrument, Lender grants to Borrower a revocable license to (i) collect, receive, use and enjoy the Rents and Borrower shall hold the



Rents, or a portion thereof sufficient to discharge all current sums due on the Debt, for use in the payment of such sums, and (ii) enforce the terms of the Leases.

Section 1.3. SECURITY AGREEMENT. This Security Instrument is both a real property mortgage and a "security agreement" within the meaning of the Uniform Commercial Code. The Property includes both real and personal property and all other rights and interests, whether tangible or intangible in nature, of Borrower in the Property. By executing and delivering this Security Instrument, Borrower hereby grants to Lender, as security for the Obligations (hereinafter defined), a security interest in the Property to the full extent that the Property may be subject to the Uniform Commercial Code.

Section 1.4. FIXTURE FILING. Certain of the Property is or will become "fixtures" (as that term is defined in the Uniform Commercial Code) on the Land, and this Security Instrument, upon being filed for record in the real estate records of the city or county wherein such fixtures are situated, shall operate also as a financing statement filed as a fixture filing in accordance with the applicable provisions of said Uniform Commercial Code upon such of the Property that is or may become fixtures.

Section 1.5. CONDITIONS TO GRANT. TO HAVE AND TO HOLD the above granted and described Property unto and to the use and benefit of Lender and its successors and assigns; PROVIDED, HOWEVER, these presents are upon the express condition that, if Lender shall be well and truly paid the Debt at the time and in the manner provided in the Note, the Loan Agreement and this Security Instrument, if Borrower shall well and truly perform the Other Obligations as set forth in this Security Instrument and shall well and truly abide by and comply with each and every covenant and condition set forth herein and in the Note, the Loan Agreement and the other Loan Documents, these presents and the estate hereby granted shall cease, terminate and be void.

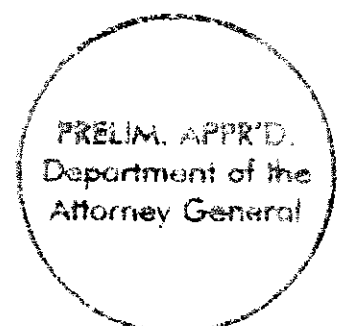
Article 2 – DEBT AND OBLIGATIONS SECURED

Section 2.1. DEBT. This Security Instrument and the grants, assignments and transfers made in Article 1 are given for the purpose of securing the Debt.

Section 2.2. OTHER OBLIGATIONS. This Security Instrument and the grants, assignments and transfers made in Article 1 are also given for the purpose of securing the performance of the following (the "**Other Obligations**"): (a) all other obligations of Borrower contained herein; (b) each obligation of Borrower contained in the Loan Agreement and any other Loan Document; and (c) each obligation of Borrower contained in any renewal, extension, amendment, modification, consolidation, change of, or substitution or replacement for, all or any part of the Note, the Loan Agreement or any other Loan Document.

Section 2.3. DEBT AND OTHER OBLIGATIONS. Borrower's obligations for the payment of the Debt and the performance of the Other Obligations shall be referred to collectively herein as the "**Obligations.**"

Section 2.4. PAYMENT OF DEBT. Borrower will pay the Debt at the time and in the manner provided in the Loan Agreement, the Note and this Security Instrument.



Section 2.5. INCORPORATION BY REFERENCE. All the covenants, conditions and agreements contained in (a) the Loan Agreement, (b) the Note and (c) all and any of the other Loan Documents, are hereby made a part of this Security Instrument to the same extent and with the same force as if fully set forth herein.

Article 3 – PROPERTY COVENANTS

Borrower covenants and agrees that:

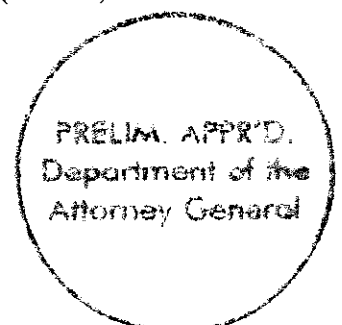
Section 3.1. INSURANCE. Borrower shall obtain and maintain, or cause to be obtained and maintained, in full force and effect at all times insurance with respect to Borrower and the Property as required pursuant to the Loan Agreement.

Section 3.2. TAXES AND OTHER CHARGES. Borrower shall pay all real estate and personal property taxes, assessments, water rates or sewer rents (collectively “**Taxes**”), ground rents, maintenance charges, impositions (other than Taxes), and any other charges, including, without limitation, vault charges and license fees for the use of vaults, chutes and similar areas adjoining the Property (collectively, “**Other Charges**”), now or hereafter levied or assessed or imposed against the Property or any part thereof in accordance with the Loan Agreement.

Section 3.3. LEASES. Borrower shall not (and shall not permit any other applicable Person to) enter in any Leases for all or any portion of the Property unless in accordance with the provisions of the Loan Agreement.

Section 3.4. WARRANTY OF TITLE. Borrower has good, indefeasible, marketable and insurable title to the Property and has the right to mortgage, grant, bargain, sell, pledge, assign, warrant, transfer and convey the same. Borrower possesses an unencumbered Leasehold Estate in the Land and the Improvements except for the Permitted Encumbrances, such other liens as are permitted pursuant to the Loan Documents, the liens created by the Loan Documents, and the encumbrances (the “**Title Encumbrances**”), if any, described in Exhibit A attached hereto and incorporated herein. This Security Instrument, when properly recorded in the appropriate records, together with any Uniform Commercial Code financing statements required to be filed in connection therewith, will create (a) a legal, valid, and perfected first priority lien on the Property, subject only to Permitted Encumbrances, the liens created by the Loan Documents, and the Title Encumbrances and (b) a legal, valid, and perfected first priority security interests in and to, and legal, valid, and perfected collateral assignments of, all personalty (including the Leases), all in accordance with the terms thereof, in each case subject only to any applicable Permitted Encumbrances, such other liens as are permitted pursuant to the Loan Documents, the liens created by the Loan Documents, and the Title Encumbrances. Borrower shall forever warrant, defend and preserve the title and the validity and priority of the lien of this Security Instrument and shall forever warrant and defend the same to Lender against the claims of all Persons whomsoever.

Section 3.5. PAYMENT FOR LABOR AND MATERIALS. Subject to Borrower’s right to contest any Work Charge (defined herein) pursuant to the terms of the Loan Agreement, Borrower will promptly pay (or cause to be paid) when due all bills and costs for labor, materials, and specifically fabricated materials incurred in connection with the Property (each, a



“**Work Charge**”) and never permit to exist beyond the due date thereof in respect of the Property or any part thereof any lien or security interest, even though inferior to the liens and the security interests hereof, and in any event never permit to be created or exist in respect of the Property or any part thereof any other or additional lien or security interest other than the liens or security interests hereof except for the Permitted Encumbrances and the Title Encumbrances. Borrower represents there are no claims for payment for work, labor or materials affecting the Property which are or may become a lien prior to, or of equal priority with, the liens created by the Loan Documents.

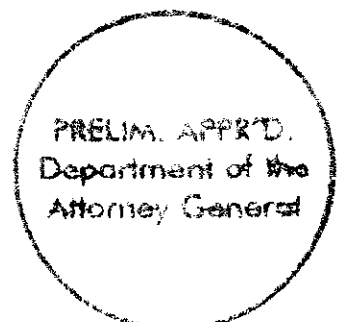
Article 4 – FURTHER ASSURANCES

Section 4.1. COMPLIANCE WITH LOAN AGREEMENT. Borrower shall comply with all covenants set forth in the Loan Agreement relating to acts or other further assurances to be made on the part of Borrower in order to protect and perfect the lien or security interest hereof upon, and in the interest of Lender in, the Property.

Section 4.2. AUTHORIZATION TO FILE FINANCING STATEMENTS; POWER OF ATTORNEY. Borrower hereby authorizes Lender at any time and from time to time to file any initial financing statements, amendments thereto and continuation statements as authorized by applicable law, as applicable to all or part of the Personal Property and as necessary or required in connection herewith. For purposes of such filings, Borrower agrees to furnish any information requested by Lender promptly upon request by Lender. Borrower also ratifies its authorization for Lender to have filed any like initial financing statements, amendments thereto or continuation statements, if filed prior to the date of this Security Instrument. Borrower hereby irrevocably constitutes and appoints Lender and any officer or agent of Lender, with full power of substitution, as its true and lawful attorneys-in-fact with full irrevocable power and authority in the place and stead of Borrower or in Borrower’s own name to execute in Borrower’s name any such documents and otherwise to carry out the purposes of this Section 4.2, to the extent that Borrower’s authorization above is not sufficient and Borrower fails or refuses to promptly execute such documents. To the extent permitted by law, Borrower hereby ratifies all acts said attorneys-in-fact have lawfully done in the past or shall lawfully do or cause to be done in the future by virtue hereof. This power of attorney is a power coupled with an interest and shall be irrevocable.

Article 5 – DUE ON SALE/ENCUMBRANCE

Section 5.1. NO SALE/ENCUMBRANCE. Except in accordance with the express terms and conditions contained in the Loan Agreement, Borrower shall not cause or permit a sale, conveyance, mortgage, grant, bargain, encumbrance, pledge, assignment, or grant of any options with respect to, or any other transfer or disposition (directly or indirectly, voluntarily or involuntarily, by operation of law or otherwise, and whether or not for consideration or of record) of a legal or beneficial interest in the Property or any part thereof, Borrower, any constituent owner or other holder of a direct or indirect equity interest in Borrower, any indemnitor or other guarantor of the Loan, any constituent owner or other holder of a direct or indirect equity interest in such indemnitor or guarantor, any manager or operating lessee of the Property that is affiliated with Borrower or any constituent owner or other holder of a direct or indirect equity interest in such manager or such operating lessee.



Article 6 – PREPAYMENT; RELEASE OF PROPERTY

Section 6.1. PREPAYMENT. The Debt may not be prepaid in whole or in part except in strict accordance with the express terms and conditions of the Note and the Loan Agreement.

Section 6.2. RELEASE OF PROPERTY. Borrower shall not be entitled to a release of any portion of the Property from the lien of this Security Instrument except in accordance with terms and conditions of the Loan Agreement.

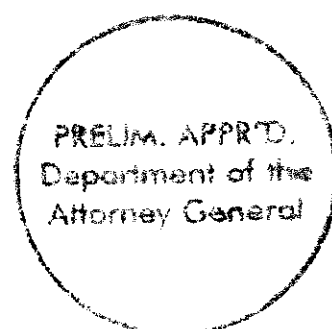
Article 7 – DEFAULT

Section 7.1. EVENT OF DEFAULT. The term “**Event of Default**” as used in this Security Instrument shall have the meaning assigned to such term in the Loan Agreement.

Article 8 – RIGHTS AND REMEDIES UPON DEFAULT

Section 8.1. REMEDIES. Upon the occurrence and during the continuance of any Event of Default, Borrower agrees that Lender may take such action, without notice or demand, as it deems advisable to protect and enforce its rights against Borrower and in and to the Property, including, but not limited to, the following actions, each of which may be pursued concurrently or otherwise, at such time and in such order as Lender may determine, in its sole discretion, without impairing or otherwise affecting the other rights and remedies of Lender:

- (a) declare the entire unpaid Debt to be immediately due and payable;
- (b) institute proceedings, judicial or otherwise, for the complete foreclosure of this Security Instrument under any applicable provision of law, in which case the Property or any interest therein may be sold for cash or upon credit in one or more parcels or in several interests or portions and in any order or manner;
- (c) with or without entry, to the extent permitted and pursuant to the procedures provided by applicable law, institute proceedings for the partial foreclosure of this Security Instrument for the portion of the Debt then due and payable, subject to the continuing lien and security interest of this Security Instrument for the balance of the Debt not then due, unimpaired and without loss of priority;
- (d) sell for cash or upon credit the Property or any part thereof and all estate, claim, demand, right, title and interest of Borrower therein and rights of redemption thereof, pursuant to power of sale or otherwise, at one or more sales, as an entirety or in parcels, at such time and place, upon such terms and after such notice thereof as may be required or permitted by law;
- (e) institute an action, suit or proceeding in equity for the specific performance of any covenant, condition or agreement contained herein, in the Note, the Loan Agreement or in the other Loan Documents;
- (f) recover judgment on the Note either before, during or after any proceedings for the enforcement of this Security Instrument or the other Loan Documents;

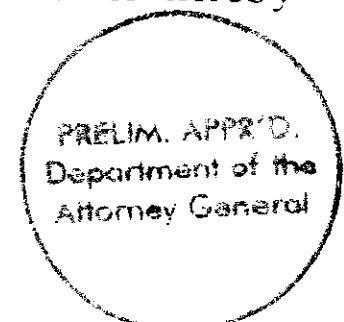


(g) apply for the appointment of a receiver, trustee, liquidator or conservator of the Property, without notice to Borrower, which notice Borrower expressly waives, and without regard for the adequacy of the security for the Debt and without regard for the solvency of Borrower, any guarantor or indemnitor under the Loan or any other Person liable for the payment of the Debt and whose appointment Borrower expressly consents to take possession of and to operate the Property and to collect the Rents and to otherwise protect and preserve the Property;

(h) the license granted to Borrower under Section 1.2 hereof shall automatically be revoked and Lender may enter into or upon the Property, either personally or by its agents, nominees or attorneys and dispossess Borrower and its agents and servants therefrom, without liability for trespass, damages or otherwise and exclude Borrower and its agents or servants wholly therefrom, and take possession of all books, records and accounts relating thereto and Borrower agrees to surrender possession of the Property and of such books, records and accounts to Lender upon demand, and thereupon Lender may (i) use, operate, manage, control, insure, maintain, repair, restore and otherwise deal with all and every part of the Property and conduct the business thereat; (ii) subject to the terms of the Ground Lease, complete any construction on the Property in such manner and form as Lender deems advisable; (iii) subject to the terms of the Ground Lease, make alterations, additions, renewals, replacements and improvements to or on the Property; (iv) exercise all rights and powers of Borrower with respect to the Property, whether in the name of Borrower or otherwise, including, without limitation, the right to make, cancel, enforce or modify Leases, obtain and evict tenants, and demand, sue for, collect and receive all Rents of the Property and every part thereof; (v) require Borrower to pay monthly in advance to Lender, or any receiver appointed to collect the Rents, the fair and reasonable rental value for the use and occupation of such part of the Property as may be occupied by Borrower; (vi) require Borrower to vacate and surrender possession of the Property to Lender or to such receiver and, in default thereof, Borrower may be evicted by summary proceedings or otherwise; and (vii) except as otherwise provided in the Loan Agreement, apply the receipts from the Property to the payment of the Debt, in such order, priority and proportions as Lender shall deem appropriate in its sole discretion after deducting therefrom all expenses (including reasonable attorneys' fees) incurred in connection with the aforesaid operations and all amounts necessary to pay the Taxes, Other Charges, insurance and other expenses in connection with the Property, as well as just and reasonable compensation for the services of Lender, its counsel, agents and employees;

(i) apply any sums then deposited or held in escrow or otherwise by or on behalf of Lender in accordance with the terms of the Loan Agreement, this Security Instrument or any other Loan Document to the payment of the following items in any order in its sole discretion: (i) Taxes and Other Charges; (ii) insurance premiums; (iii) interest on the unpaid principal balance of the Note; (iv) amortization of the unpaid principal balance of the Note; (v) all other sums payable pursuant to the Note, the Loan Agreement, this Security Instrument and the other Loan Documents, including without limitation advances made by Lender pursuant to the terms of this Security Instrument;

(j) subject to the terms of the Ground Lease, surrender the insurance policies maintained pursuant to the Loan Agreement, collect the unearned insurance premiums for such insurance policies and apply such sums as a credit on the Debt in such priority and proportion as Lender in its discretion shall deem proper. and in connection therewith, Borrower hereby



appoints Lender as agent and attorney-in-fact (which is coupled with an interest and is therefore irrevocable) for Borrower to collect such insurance premiums;

(k) apply the undisbursed balance of any deposit made by Borrower with Lender in connection with the restoration of the Property after a casualty thereto or condemnation thereof, together with interest thereon, to the payment of the Debt in such order, priority and proportions as Lender shall deem to be appropriate in its discretion; and/or

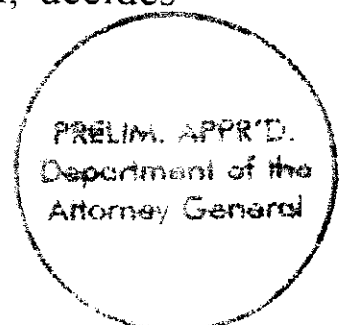
(l) pursue such other remedies as Lender may have under Applicable Law.

In the event of a sale, by foreclosure, power of sale or otherwise, of less than all of the Property, this Security Instrument shall continue as a lien and security interest on the remaining portion of the Property unimpaired and without loss of priority. Notwithstanding the provisions of this Section to the contrary, if any Event of Default as described in Section 10.1(g) of the Loan Agreement shall occur (with respect to Borrower and SPE Component Entity only), the entire unpaid Debt shall be automatically due and payable, without any further notice, demand or other action by Lender.

Section 8.2. APPLICATION OF PROCEEDS. The purchase money, proceeds and avails of any disposition of the Property, and or any part thereof, or any other sums collected by Lender pursuant to the Note, this Security Instrument or the other Loan Documents, may be applied by Lender to the payment of the Debt in such priority and proportions as Lender in its discretion shall deem proper to the extent consistent with Applicable Law.

Section 8.3. RIGHT TO CURE DEFAULTS. Upon the occurrence and during the continuance of any Event of Default, Lender may, but without any obligation to do so and without notice to or demand on Borrower and without releasing Borrower from any obligation hereunder, make any payment or do any act required of Borrower hereunder in such manner and to such extent as Lender may deem necessary to protect the security hereof. Lender is authorized to enter upon the Property for such purposes, or appear in, defend, or bring any action or proceeding to protect its interest in the Property or to foreclose this Security Instrument or collect the Debt, and the actual, out of pocket cost and expense thereof (including reasonable attorneys' fees to the extent permitted by law), with interest as provided in this Section 8.3, shall constitute a portion of the Debt and shall be due and payable to Lender upon demand. All such actual, out of pocket costs and expenses incurred by Lender in remedying such Event of Default or such failed payment or act or in appearing in, defending, or bringing any such action or proceeding shall bear interest at any default rate specified in the Loan Agreement, if any (the "**Default Rate**"), for the period after notice from Lender that such cost or expense was incurred to the date of payment to Lender. All such actual, out of pocket costs and expenses incurred by Lender together with interest thereon calculated at the Default Rate shall be deemed to constitute a portion of the Debt and be secured by this Security Instrument and the other Loan Documents and shall be immediately due and payable upon demand by Lender therefor.

Section 8.4. ACTIONS AND PROCEEDINGS. Lender has the right to appear in and defend any action or proceeding brought with respect to the Property and to bring any action or proceeding, in the name and on behalf of Borrower, which Lender, in its discretion, decides should be brought to protect its interest in the Property.



Section 8.5. RECOVERY OF SUMS REQUIRED TO BE PAID. Lender shall have the right from time to time to take action to recover any sum or sums which constitute a part of the Debt as the same become due, without regard to whether or not the balance of the Debt shall be due, and without prejudice to the right of Lender thereafter to bring an action of foreclosure, or any other action, for a default or defaults by Borrower existing at the time such earlier action was commenced.

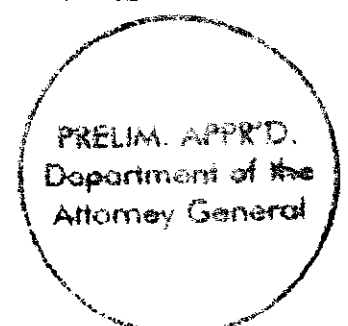
Section 8.6. OTHER RIGHTS, ETC. (a) The failure of Lender to insist upon strict performance of any term hereof shall not be deemed to be a waiver of any term of this Security Instrument. Borrower shall not be relieved of Borrower's obligations hereunder by reason of (i) the failure of Lender to comply with any request of Borrower or any guarantor or indemnitor with respect to the Loan to take any action to foreclose this Security Instrument or otherwise enforce any of the provisions hereof or of the Note or the other Loan Documents, (ii) the release, regardless of consideration, of the whole or any part of the Property, or of any Person liable for the Debt or any portion thereof, or (iii) any agreement or stipulation by Lender extending the time of payment or otherwise modifying or supplementing the terms of the Note, this Security Instrument or the other Loan Documents.

(b) It is agreed that the risk of loss or damage to the Property is on Borrower, and Lender shall have no liability whatsoever for decline in the value of the Property, for failure to maintain the insurance policies required to be maintained pursuant to the Loan Agreement, or for failure to determine whether insurance in force is adequate as to the amount of risks insured. Possession by Lender shall not be deemed an election of judicial relief if any such possession is requested or obtained with respect to any Property or collateral not in Lender's possession.

(c) Lender may resort for the payment of the Debt to any other security held by Lender in such order and manner as Lender, in its discretion, may elect. Lender may take action to recover the Debt, or any portion thereof, or to enforce any covenant hereof without prejudice to the right of Lender thereafter to foreclose this Security Instrument. The rights of Lender under this Security Instrument shall be separate, distinct and cumulative and none shall be given effect to the exclusion of the others. No act of Lender shall be construed as an election to proceed under any one provision herein to the exclusion of any other provision. Lender shall not be limited exclusively to the rights and remedies herein stated but shall be entitled to every right and remedy now or hereafter afforded at law or in equity.

Section 8.7. RIGHT TO RELEASE ANY PORTION OF THE PROPERTY. Lender may release any portion of the Property for such consideration as Lender may require without, as to the remainder of the Property, in any way impairing or affecting the lien or priority of this Security Instrument, or improving the position of any subordinate lienholder with respect thereto, except to the extent that the obligations hereunder shall have been reduced by the actual monetary consideration, if any, received by Lender for such release, and may accept by assignment, pledge or otherwise any other property in place thereof as Lender may require without being accountable for so doing to any other lienholder. This Security Instrument shall continue as a lien and security interest in the remaining portion of the Property.

Section 8.8. RIGHT OF ENTRY. Upon reasonable notice to Borrower, Lender and its agents shall have the right to enter and inspect the Property at all reasonable times.



Section 8.9. BANKRUPTCY. (a) Upon the occurrence and during the continuance of an Event of Default, Lender shall have the right to proceed in its own name or in the name of Borrower in respect of any claim, suit, action or proceeding relating to the rejection of any Lease, including, without limitation, the right to file and prosecute, to the exclusion of Borrower, any proofs of claim, complaints, motions, applications, notices and other documents, in any case in respect of the lessee under such Lease under the Bankruptcy Code.

(b) If there shall be filed by or against Borrower a petition under the Bankruptcy Code and Borrower, as lessor under any Lease, shall determine to reject such Lease pursuant to Section 365(a) of the Bankruptcy Code, then Borrower shall give Lender not less than ten (10) days' prior notice of the date on which Borrower shall apply to the bankruptcy court for authority to reject the Lease. Lender shall have the right, but not the obligation, to serve upon Borrower within such ten-day period a notice stating that (i) Lender demands that Borrower assume and assign the Lease to Lender pursuant to Section 365 of the Bankruptcy Code and (ii) Lender covenants to cure or provide adequate assurance of future performance under the Lease. If Lender serves upon Borrower the notice described in the preceding sentence, Borrower shall not seek to reject the Lease and shall comply with the demand provided for in clause (i) of the preceding sentence within thirty (30) days after the notice shall have been given, subject to the performance by Lender of the covenant provided for in clause (ii) of the preceding sentence.

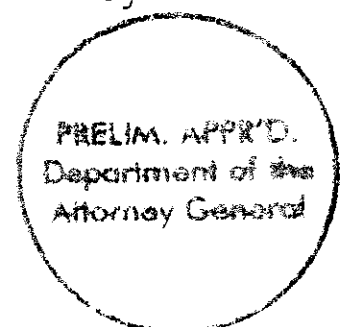
Section 8.10. SUBROGATION. If any or all of the proceeds of the Note have been used to extinguish, extend or renew any indebtedness heretofore existing against the Property, then, to the extent of the funds so used, Lender shall be subrogated to all of the rights, claims, liens, titles, and interests existing against the Property heretofore held by, or in favor of, the holder of such indebtedness and such former rights, claims, liens, titles, and interests, if any, are not waived but rather are continued in full force and effect in favor of Lender and are merged with the lien and security interest created herein as cumulative security for the repayment of the Debt, the performance and discharge of the Other Obligations.

Article 9 – ENVIRONMENTAL HAZARDS

Section 9.1. ENVIRONMENTAL COVENANTS. Borrower has provided representations, warranties and covenants regarding environmental matters set forth in the Environmental Indemnity and Borrower shall comply with the aforesaid covenants regarding environmental matters.

Article 10 – WAIVERS

Section 10.1. MARSHALLING AND OTHER MATTERS. Borrower hereby waives, to the extent permitted by law, the benefit of all Applicable Law now or hereafter in force regarding appraisement, valuation, stay, extension, reinstatement and redemption and all rights of marshalling in the event of any sale hereunder of the Property or any part thereof or any interest therein. Further, Borrower hereby expressly waives any and all rights of redemption from sale under any order or decree of foreclosure of this Security Instrument on behalf of Borrower, and on behalf of each and every Person acquiring any interest in or title to the Property subsequent to the date of this Security Instrument and on behalf of all Persons to the extent permitted by Applicable Law.



Section 10.2. WAIVER OF NOTICE. Borrower shall not be entitled to any notices of any nature whatsoever from Lender except with respect to matters for which this Security Instrument or the Loan Agreement specifically and expressly provides for the giving of notice by Lender to Borrower and except with respect to matters for which Borrower is not permitted by Applicable Law to waive its right to receive notice, and Borrower hereby expressly waives the right to receive any notice from Lender with respect to any matter for which this Security Instrument does not specifically and expressly provide for the giving of notice by Lender to Borrower.

Section 10.3. INTENTIONALLY OMITTED.

Section 10.4. SOLE DISCRETION OF LENDER. Whenever pursuant to this Security Instrument, Lender exercises any right given to it to approve or disapprove, or any arrangement or term is to be satisfactory to Lender, the decision of Lender to approve or disapprove or to decide whether arrangements or terms are satisfactory or not satisfactory shall (except as is otherwise specifically herein provided) be in the sole discretion of Lender and shall be final and conclusive.

Section 10.5. WAIVER OF TRIAL BY JURY. BORROWER AND LENDER EACH HEREBY AGREES NOT TO ELECT A TRIAL BY JURY OF ANY ISSUE TRIABLE OF RIGHT BY JURY, AND WAIVES ANY RIGHT TO TRIAL BY JURY FULLY TO THE EXTENT THAT ANY SUCH RIGHT SHALL NOW OR HEREAFTER EXIST WITH REGARD TO THE LOAN DOCUMENTS, OR ANY CLAIM, COUNTERCLAIM OR OTHER ACTION ARISING IN CONNECTION THEREWITH. THIS WAIVER OF RIGHT TO TRIAL BY JURY IS GIVEN KNOWINGLY AND VOLUNTARILY BY BORROWER AND LENDER, AND IS INTENDED TO ENCOMPASS INDIVIDUALLY EACH INSTANCE AND EACH ISSUE AS TO WHICH THE RIGHT TO A TRIAL BY JURY WOULD OTHERWISE ACCRUE. EACH OF LENDER AND BORROWER IS HEREBY AUTHORIZED TO FILE A COPY OF THIS PARAGRAPH IN ANY PROCEEDING AS CONCLUSIVE EVIDENCE OF THIS WAIVER BY BORROWER AND LENDER.

Section 10.6. WAIVER OF FORECLOSURE DEFENSE. Borrower hereby waives any defense Borrower might assert or have by reason of Lender's failure to make any tenant or lessee of the Property a party defendant in any foreclosure proceeding or action instituted by Lender.

Article 11 – INTENTIONALLY OMITTED

Article 12 – NOTICES

Section 12.1. NOTICES. All notices or other written communications hereunder shall be delivered in accordance with the applicable terms and conditions of the Loan Agreement.

Article 13 – APPLICABLE LAW

Section 13.1. GOVERNING LAW. (A) THIS SECURITY INSTRUMENT WAS NEGOTIATED IN THE STATE OF NEW YORK, AND MADE BY BORROWER AND ACCEPTED BY LENDER IN THE STATE OF NEW YORK, WHICH STATE THE PARTIES AGREE HAS A SUBSTANTIAL RELATIONSHIP TO THE PARTIES AND

TO THE UNDERLYING TRANSACTION EMBODIED HEREBY, AND IN ALL RESPECTS, INCLUDING, WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, MATTERS OF CONSTRUCTION, VALIDITY AND PERFORMANCE, THIS SECURITY INSTRUMENT AND THE OBLIGATIONS ARISING HEREUNDER SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF NEW YORK APPLICABLE TO CONTRACTS MADE AND PERFORMED IN SUCH STATE (WITHOUT REGARD TO PRINCIPLES OF CONFLICT OF LAWS) AND ANY APPLICABLE LAW OF THE UNITED STATES OF AMERICA, EXCEPT THAT AT ALL TIMES (I) THE PROVISIONS FOR THE CREATION, PERFECTION, PRIORITY AND ENFORCEMENT OF THE LIENS AND SECURITY INTERESTS CREATED PURSUANT HERETO AND PURSUANT TO THE OTHER LOAN DOCUMENTS WITH RESPECT TO THE PROPERTY (OTHER THAN THAT DESCRIBED IN SUBPARAGRAPH II BELOW) SHALL BE GOVERNED BY AND CONSTRUED ACCORDING TO THE LAW OF THE STATE IN WHICH THE PROPERTY AND FIXTURES ARE LOCATED AND (II) WITH RESPECT TO THE PERFECTION, PRIORITY AND ENFORCEMENT OF THE LIENS AND SECURITY INTERESTS CREATED BY THIS SECURITY INSTRUMENT AND THE OTHER LOAN DOCUMENTS IN PROPERTY WHOSE PERFECTION AND PRIORITY IS COVERED BY ARTICLE 9 OF THE UCC (INCLUDING, WITHOUT LIMITATION, THE ACCOUNTS), THE LAW OF THE JURISDICTION APPLICABLE IN ACCORDANCE WITH SECTIONS 9-301 THROUGH 9-307 OF THE UCC AS IN EFFECT IN THE STATE OF NEW YORK SHALL GOVERN. TO THE FULLEST EXTENT PERMITTED BY LAW, BORROWER HEREBY UNCONDITIONALLY AND IRREVOCABLY WAIVES ANY CLAIM TO ASSERT THAT THE LAW OF ANY OTHER JURISDICTION GOVERNS THIS SECURITY INSTRUMENT AND THE NOTE, AND THIS SECURITY INSTRUMENT AND THE NOTE SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK PURSUANT TO SECTION 5-1401 OF THE NEW YORK GENERAL OBLIGATIONS LAW EXCEPT AS SPECIFICALLY SET FORTH ABOVE. (B) ANY LEGAL SUIT, ACTION OR PROCEEDING AGAINST LENDER OR BORROWER ARISING OUT OF OR RELATING TO THIS SECURITY INSTRUMENT MAY AT LENDER'S OPTION BE INSTITUTED IN ANY FEDERAL OR STATE COURT IN THE CITY OF NEW YORK, COUNTY OF NEW YORK, PURSUANT TO SECTION 5-1402 OF THE NEW YORK GENERAL OBLIGATIONS LAW, AND BORROWER WAIVES ANY OBJECTIONS WHICH IT MAY NOW OR HEREAFTER HAVE BASED ON VENUE AND/OR FORUM NON CONVENIENS OF ANY SUCH SUIT, ACTION OR PROCEEDING, AND BORROWER HEREBY IRREVOCABLY SUBMITS TO THE JURISDICTION OF ANY SUCH COURT IN ANY SUIT, ACTION OR PROCEEDING. BORROWER DOES HEREBY DESIGNATE AND APPOINT

AS ITS AUTHORIZED AGENT TO ACCEPT AND ACKNOWLEDGE ON ITS BEHALF SERVICE OF ANY AND ALL PROCESS WHICH MAY BE SERVED IN ANY SUCH SUIT, ACTION OR PROCEEDING IN ANY FEDERAL OR STATE COURT IN NEW

YORK, NEW YORK, AND AGREES THAT SERVICE OF PROCESS UPON SAID AGENT AT SAID ADDRESS AND WRITTEN NOTICE OF SAID SERVICE MAILED OR DELIVERED TO BORROWER IN THE MANNER PROVIDED HEREIN SHALL BE DEEMED IN EVERY RESPECT EFFECTIVE SERVICE OF PROCESS UPON BORROWER IN ANY SUCH SUIT, ACTION OR PROCEEDING IN THE STATE OF NEW YORK. BORROWER (I) SHALL GIVE PROMPT NOTICE TO LENDER OF ANY CHANGED ADDRESS OF ITS AUTHORIZED AGENT HEREUNDER, (II) MAY AT ANY TIME AND FROM TIME TO TIME DESIGNATE A SUBSTITUTE AUTHORIZED AGENT WITH AN OFFICE IN NEW YORK, NEW YORK (WHICH SUBSTITUTE AGENT AND OFFICE SHALL BE DESIGNATED AS THE PERSON AND ADDRESS FOR SERVICE OF PROCESS), AND (III) SHALL PROMPTLY DESIGNATE SUCH A SUBSTITUTE IF ITS AUTHORIZED AGENT CEASES TO HAVE AN OFFICE IN NEW YORK, NEW YORK OR IS DISSOLVED WITHOUT LEAVING A SUCCESSOR.

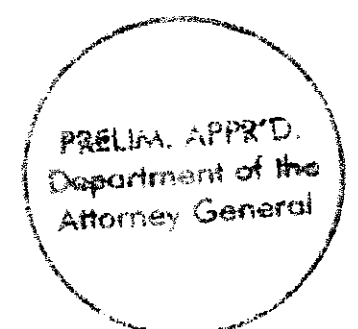
Section 13.2. PROVISIONS SUBJECT TO APPLICABLE LAW. All rights, powers and remedies provided in this Security Instrument may be exercised only to the extent that the exercise thereof does not violate any applicable provisions of law and are intended to be limited to the extent necessary so that they will not render this Security Instrument invalid, unenforceable or not entitled to be recorded, registered or filed under the provisions of any applicable law. If any term of this Security Instrument or any application thereof shall be invalid or unenforceable, the remainder of this Security Instrument and any other application of the term shall not be affected thereby.

Article 14 – DEFINITIONS

Section 14.1. GENERAL DEFINITIONS. Unless the context clearly indicates a contrary intent or unless otherwise specifically provided herein, words used in this Security Instrument may be used interchangeably in singular or plural form and the word “Borrower” shall mean “each Borrower and any subsequent owner or owners of the Property or any part thereof or any interest therein,” the word “Lender” shall mean “Lender and any of Lender’s successors and assigns,” the word “Note” shall mean “the Note and any other evidence of indebtedness secured by this Security Instrument,” the word “Property” shall include any portion of the Property and any interest therein, and the phrases “attorneys’ fees”, “legal fees” and “counsel fees” shall include any and all attorneys’, paralegal and law clerk fees and disbursements, including, but not limited to, fees and disbursements at the pre-trial, trial and appellate levels incurred or paid by Lender in protecting its interest in the Property, the Leases and the Rents and enforcing its rights hereunder.

Article 15 – MISCELLANEOUS PROVISIONS

Section 15.1. NO ORAL CHANGE. This Security Instrument, and any provisions hereof, may not be modified, amended, waived, extended, changed, discharged or terminated orally or by any act or failure to act on the part of Borrower or Lender, but only by an agreement in writing signed by the party against whom enforcement of any modification, amendment, waiver, extension, change, discharge or termination is sought.



Section 15.2. SUCCESSORS AND ASSIGNS. This Security Instrument shall be binding upon and inure to the benefit of Borrower, Lender and their respective successors and assigns forever.

Section 15.3. INAPPLICABLE PROVISIONS. If any term, covenant or condition of the Loan Agreement, the Note or this Security Instrument is held to be invalid, illegal or unenforceable in any respect, the Loan Agreement, the Note and this Security Instrument shall be construed without such provision.

Section 15.4. HEADINGS, ETC. The headings and captions of various Sections of this Security Instrument are for convenience of reference only and are not to be construed as defining or limiting, in any way, the scope or intent of the provisions hereof.

Section 15.5. NUMBER AND GENDER. Whenever the context may require, any pronouns used herein shall include the corresponding masculine, feminine or neuter forms, and the singular form of nouns and pronouns shall include the plural and vice versa.

Section 15.6. ENTIRE AGREEMENT. This Security Instrument and the other Loan Documents contain the entire agreement of the parties hereto and thereto in respect of the transactions contemplated hereby and thereby, and all prior agreements among or between such parties, whether oral or written, are superseded by the terms of this Security Instrument and the other Loan Documents.

Section 15.7. LIMITATION ON LENDER'S RESPONSIBILITY. No provision of this Security Instrument shall operate to place any obligation or liability for the control, care, management or repair of the Property upon Lender, nor shall it operate to make Lender responsible or liable for any waste committed on the Property by the tenants or any other Person, or for any dangerous or defective condition of the Property, or for any negligence in the management, upkeep, repair or control of the Property resulting in loss or injury or death to any tenant, licensee, employee or stranger. Nothing herein contained shall be construed as constituting Lender a "mortgagee in possession." If more than one Person has executed this Security Instrument as "Borrower," the representations, covenants, warranties and obligations of all such Persons hereunder shall be joint and several.

Section 15.8. SOLAR LEASE ALLOWANCE. Notwithstanding anything herein to the contrary, Lender hereby acknowledges that it has consented to Borrower entering into the [Phase II Solar Lease Documents] (as defined in the Loan Agreement) in accordance with the terms of the Loan Agreement.

Article 16 – INTENTIONALLY OMITTED

Article 17 - GROUND LEASE PROVISIONS

Section 17.1. NO MERGER OF FEE AND LEASEHOLD ESTATES; RELEASES. So long as any portion of the Debt shall remain unpaid, unless Lender shall otherwise consent, the fee title to the Land and the Leasehold Estate shall not merge but shall always be kept separate and distinct.

notwithstanding the union of such estates in Borrower, Ground Lessor or in any other Person by purchase, operation of law or otherwise. Lender reserves the right, at any time, to release portions of the Property, including, but not limited to, the Leasehold Estate, with or without consideration, at Lender's election, without waiving or affecting any of its rights hereunder or under the Note or the other Loan Documents and any such release shall not affect Lender's rights in connection with the portion of the Property not so released.

Section 17.2. BORROWER'S ACQUISITION OF FEE ESTATE. In the event that Borrower, so long as any portion of the Debt remains unpaid, shall become the owner and holder of Ground Lessor's fee interest in the portion of the Property demised pursuant to the Ground Lease, the lien of this Security Instrument shall be spread to cover such interest and such interest shall be deemed to be included in the Property. Borrower agrees, at its sole cost and expense, including without limitation, Lender's reasonable attorney's fees, to (i) execute any and all documents or instruments necessary to subject the foregoing interest to the lien of this Security Instrument; and (ii) provide a title insurance policy which shall insure that the lien of this Security Instrument is a first lien on such interest. The foregoing shall not be construed to permit Borrower to acquire the aforesaid fee interest and Borrower rights to acquire additional property shall remain subject to the restrictions relating thereto contained in the Loan Agreement and the other Loan Documents.

Section 17.3. REJECTION OF THE GROUND LEASE.

(a) If the Ground Lease is terminated by Ground Lessor for any reason in the event of the rejection or disaffirmance of the Ground Lease by Ground Lessor pursuant to the Bankruptcy Code or any other law affecting creditor's rights, (i) Borrower, immediately after obtaining notice thereof, shall give notice thereof to Lender, (ii) Borrower, without the prior written consent of Lender, shall not elect to treat the Ground Lease as terminated pursuant to Section 365(h) of the Bankruptcy Code or any comparable federal or state statute or law, and any election by Borrower made without such consent shall be void and (iii) this Security Instrument and all the liens, terms, covenants and conditions of this Security Instrument shall extend to and cover Borrower's possessory rights under Section 365(h) of the Bankruptcy Code and to any claim for damages due to the rejection of the Ground Lease or other termination of the Ground Lease. In addition, Borrower hereby assigns irrevocably to Lender Borrower's rights to treat the Ground Lease as terminated pursuant to Section 365(h) of the Bankruptcy Code and to offset rents under the Ground Lease in the event any case, proceeding or other action is commenced by or against Ground Lessor under the Bankruptcy Code or any comparable federal or state statute or law, provided that Lender shall not exercise such rights and shall permit Borrower to exercise such rights with the prior written consent of Lender, not to be unreasonably withheld or delayed, unless an Event of Default shall have occurred and be continuing.

(b) Borrower hereby assigns to Lender Borrower's right to reject the Ground Lease under Section 365 of the Bankruptcy Code or any comparable federal or state statute or law with respect to any case, proceeding or other action commenced by or against Borrower under the Bankruptcy Code or comparable federal or state statute or law, provided Lender shall not exercise such right, and shall permit Borrower to exercise such right with the prior written consent of Lender, not to be unreasonably withheld or delayed, unless an Event of Default shall have occurred and be continuing. Further, if Borrower shall desire to so reject the Ground Lease, at Lender's request, to the extent not prohibited by the terms of the Ground Lease and applicable

law, Borrower shall assign its interest in the Ground Lease to Lender in lieu of rejecting the Ground Lease as described above, upon receipt by Borrower of written notice from Lender of such request together with Lender's agreement to cure any existing defaults of Borrower under the Ground Lease and to provide adequate assurance of future performance of Borrower's obligations thereunder.

(c) Borrower hereby assigns to Lender Borrower's right to seek an extension of the 60-day period within which Borrower must accept or reject the Ground Lease under Section 365 of the Bankruptcy Code or any comparable federal or state statute or law with respect to any case, proceeding or other action commenced by or against Borrower under the Bankruptcy Code or comparable federal or state statute or law, provided Lender shall not exercise such right, and shall permit Borrower to exercise such right with the prior written consent of Lender, not to be unreasonably withheld or delayed, unless an Event of Default shall have occurred and be continuing. Further, if Borrower shall desire to so reject the Ground Lease, at Lender's request, to the extent not prohibited by the terms of the Ground Lease and applicable law, Borrower shall assign its interest in the Ground Lease to Lender in lieu of rejecting such Ground Lease as described above, upon receipt by Borrower of written notice from Lender of such request together with Lender's agreement to cure any existing defaults of Borrower under the Ground Lease and to provide adequate assurance of future performance of the applicable Borrower's obligations thereunder.

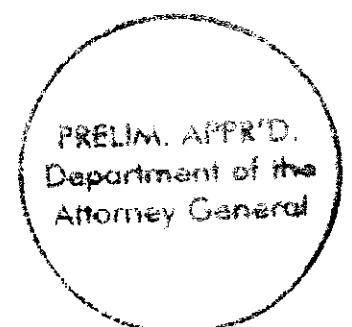
(d) Borrower hereby agrees that if the Ground Lease is terminated for any reason in the event of the rejection or disaffirmance of the Ground Lease pursuant to the Bankruptcy Code or any other law affecting creditor's rights, any Personal Property of Borrower not removed from the Property by Borrower as permitted or required by the Ground Lease, shall at the option of Lender be deemed abandoned by Borrower, provided that Lender may remove any such Personal Property required to be removed by Borrower pursuant to the Ground Lease and all reasonable out-of-pocket costs and expenses associated with such removal shall be paid by Borrower within five (5) days of receipt by Borrower of an invoice for such removal costs and expenses.

Article 18 – STATE-SPECIFIC PROVISIONS

Section 18.1. PRINCIPLES OF CONSTRUCTION. In the event of any inconsistencies between the terms and conditions of this Article 18 and the terms and conditions of this Security Instrument, the terms and conditions of this Article 18 shall control and be binding.

Section 18.2. BUSINESS LOAN TRANSACTION. The Loan evidenced by the Note is made for commercial purposes and the Loan is neither a consumer credit transaction nor a home business loan, as defined in Section 478-1, Hawaii Revised Statutes, as amended.

Section 18.3. SECURED OBLIGATIONS. With respect to the Property, the obligations secured by this Security Instrument shall include all amounts payable under this Security Instrument and the other Loan Documents including, without limitation, the repayment of all future advances or costs in an amount not to exceed \$100,000,000.00 (which future advances shall include, without limitation, advances to pay for such items as real property taxes, insurance premiums, ground lease rents, attorneys' fees, or any other sums) which Lender may, but is not

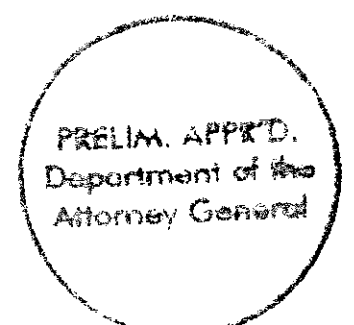


obligated to, make or incur in accordance with the terms of this Security Instrument or any of the other Loan Documents.

Section 18.4. REMEDIES. Without limiting any other remedies available under this Security Instrument, under any of the other Loan Documents or under applicable law, following an Event of Default hereunder, Lender shall be entitled to exercise any remedies available under Hawaii Revised Statutes Chapter 667, including, without limitation, a power of sale foreclosure pursuant to such Chapter 667.

Section 18.5. NOTICE REGARDING INSURANCE COMPANIES. This Security Instrument constitutes, and Borrower hereby acknowledges written notice from Lender that, LENDER MAY NOT MAKE THE GRANTING OF THE LOAN EVIDENCED BY THE NOTE CONTINGENT ON BORROWER PROCURING ANY REQUIRED INSURANCE WITH AN INSURANCE COMPANY DESIGNATED BY LENDER.

[NO FURTHER TEXT ON THIS PAGE]



IN WITNESS WHEREOF, this Security Instrument has been executed by the undersigned as of the day and year first above written.

BORROWER:

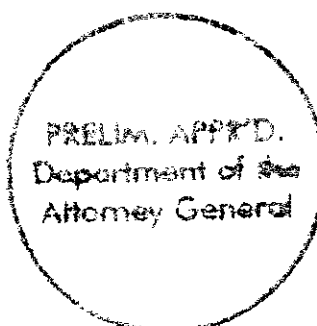
WHR LLC, a Hawaii limited liability company

By: Tower Development, Inc., a Hawaii
corporation, its co-manager

By:

Name: Stuart L. Miller

Title: President



ACKNOWLEDGMENT

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

On this _____ day of _____, 20____, before me personally appeared STUART L. MILLER, to me personally known, who, being by me duly sworn or affirmed, did say that such person executed the foregoing instrument as the free act and deed of such person, and if applicable in the capacity shown, having been duly authorized to execute such instrument in such capacity.

Notary Public, State of Hawaii

Printed Name: _____

My commission expires: _____

(Official Stamp or Seal)

NOTARY CERTIFICATION STATEMENT

Document Identification or Description: Leasehold Mortgage,
Assignment of Leases and Rents, Security Agreement and Fixture Filing
by WHR LLC in favor of Wells Fargo Bank, National Association

Doc. Date: _____ or ☐ Undated at time of notarization.

No. of Pages: _____ Jurisdiction: _____ Circuit
(in which notarial act is performed)

Signature of Notary

Date of Notarization and
Certification Statement

Printed Name of Notary

(Official Stamp or Seal)

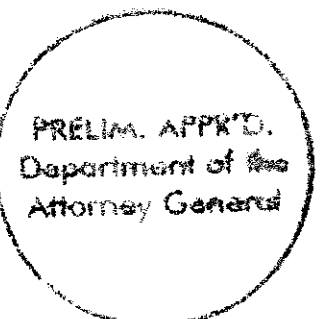


EXHIBIT A

LEGAL DESCRIPTION

(attached hereto)

[Insert legal description with encumbrances]

PRELIM. APPR'D.
Department of the
Attorney General

EXHIBIT C

PAUL ALSTON 1126

DENTONS US LLP

1001 Bishop Street, Suite 1800
Honolulu, Hawaii 96813
Telephone: (808) 524-1800
Facsimile: (808) 524-4591
Email: paul.alston@dentons.com

Attorney for Plaintiff
OLSON/NANILOA LLC

Electronically Filed
THIRD CIRCUIT
3CCV-21-0000279
13-JUN-2022
04:30 PM
Dkt. 36 DISM

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

OLSON/NANILOA LLC,

Plaintiff,

vs.

EDWARD L. BUSHOR, STUART L.
MILLER; DOES 1-10,

Defendants.

CIVIL NO. 3CCV-21-0000279
(Contract Dispute)

**AMENDED NOTICE OF DISMISSAL
WITHOUT PREJUDICE OF ALL
CLAIMS AND ALL PARTIES**

No Trial Date.
Judge: Honorable Henry T. Nakamoto

**AMENDED NOTICE OF DISMISSAL WITHOUT PREJUDICE
OF ALL CLAIMS AND ALL PARTIES**

NOTICE IS HEREBY GIVEN that Plaintiff OLSON/NANILOA LLC ("Plaintiff"), by and through its attorneys, DENTONS US LLP, hereby dismisses without prejudice, as moot, the claims asserted against Defendants EDWARD L. BUSHOR and STUART L. MILLER (collectively "Defendants") as set forth in the First Amended Complaint filed herein on September 23, 2021 [Dkt 9] (the "FAC") in accordance with Rules 41(a)(1)(A) and 41.1 of the Hawaii Rules of Civil Procedure.

Defendants were not served with the FAC and did not answer or otherwise respond.

No trial date has been set herein.

Each party shall bear their own respective attorneys' fees and costs incurred in connection with this dismissal without prejudice.

DATED: Honolulu, Hawaii, June 13, 2022.

/s/ PAUL ALSTON
PAUL ALSTON

Attorney for Plaintiff
OLSON/NANILOA LLC

NOTICE OF ELECTRONIC FILING

Electronically Filed
THIRD CIRCUIT
3CCV-21-0000279
13-JUN-2022
04:30 PM
Dkt. 37 NEF

An electronic filing was submitted in Case Number 3CCV-21-0000279. You may review the filing through the Judiciary Electronic Filing System. Please monitor your email for future notifications.

Case ID: 3CCV-21-0000279

Title: Olson/Nanihoa LLC vs. Edward L. Bushor, Stewart L. Miller

Filing Date / Time: MONDAY, JUNE 13, 2022 04:30:47 PM

Filing Parties: Paul Alston

Case Type: Circuit Court Civil

Lead Document(s): 36-Notice of Dismissal

Supporting Document(s):

Document Name: 36-Amended Notice of Dismissal Without Prejudice of All Claims and All Parties

If the filing noted above includes a document, this Notice of Electronic Filing is service of the document under the Hawai'i Electronic Filing and Service Rules.

This notification is being electronically mailed to:

Paul Alston (*Paul.Alston@dentons.com*)

The following parties need to be conventionally served:

Stewart L. Miller

Edward L. Bushor

PAUL ALSTON 1126

DENTONS US LLP

1001 Bishop Street, Suite 1800
Honolulu, Hawaii 96813
Telephone: (808) 524-1800
Facsimile: (808) 524-4591
Email: paul.alston@dentons.com

Attorney for Plaintiff
OLSON/NANILOA LLC

DISPUTE PREVENTION & RESOLUTION

STATE OF HAWAI'I

OLSON/NANILOA LLC,

Claimant,

vs.

TOWER DEVELOPMENT, INC.

Respondent.

DPR NO. 21-0512-M
(Contract Dispute)

**AMENDED NOTICE OF DISMISSAL
WITHOUT PREJUDICE OF ALL
CLAIMS AND ALL PARTIES**

Mediator: Keith Hunter
No Mediation Date Set

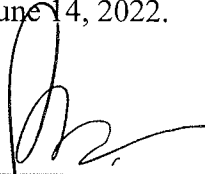
**AMENDED NOTICE OF DISMISSAL WITHOUT PREJUDICE
OF ALL CLAIMS AND ALL PARTIES**

NOTICE IS HEREBY GIVEN that Claimant OLSON/NANILOA LLC ("Claimant"), by and through its attorneys, DENTONS US LLP, hereby dismisses without prejudice as moot the claims asserted against Respondent TOWER DEVELOPMENT, INC. ("Respondent") as set forth in the First Amended Demand for Mediation filed herein on September 23, 2021 (the "Demand").

Respondent was not served with the Demand and did not answer or otherwise respond. No mediation date has been set herein.

Each party shall bear their own respective attorneys' fees and costs incurred in connection with this dismissal without prejudice.

DATED: Honolulu, Hawaii, June 14, 2022.

A handwritten signature in black ink, appearing to read 'Paul Alston', is written over a horizontal line.

PAUL ALSTON

Attorney for Claimant
OLSON/NANILOA LLC

May 26, 2022

David F. E. Banks
1000 Bishop Street, Suite 1200
Honolulu, Hawai'i 96813-4212
Direct Line: (808) 521-9265
Direct Fax: (808) 540-9210
Email: dbanks@ca des .com

VIA EMAIL suzanne.case@hawaii.gov

Suzanne D. Case
Chairperson
Board of Land and Natural Resources
P.O. Box 621
Honolulu, Hawaii 96809

Re: Lessee's Request for Consent to Mortgage with Estoppel Certificate and Pledge and Security Agreement, General Lease No. S-5844, WHR LLC, Lessee

Dear Ms. Case:

This law firm represents WHR LLC ("Lessee") in connection with the Grand Naniloa Resort, a DoubleTree by Hilton located at 93 Banyan Drive, Hilo, Hawaii 96720 ("Hotel") and the above referenced request (the "Request"). This letter is further to Mr. Ed Bushor's zoom meeting with Russell Y. Tsuji and Kevin Moore yesterday.

On May 27, 2022, Mr. Tsuji submitted written recommendations to the Board of Land and Natural Resources ("BLNR") that the BLNR (a) deny the request for Consent to Mortgage, and (b) deny the request for the Estoppel Certificate and Pledge and Security Agreement. You approved the submittal of Mr. Tsuji's recommendations to the BLNR.

In response to the remarks set forth in Mr. Tsuji's recommendations supporting denial of the request for Consent to Mortgage, please note the following:

1. \$62 million is a very reasonable loan amount given the impact of the Covid-19 pandemic and the current state of affairs of Lessee and the Hotel. Moreover, the loan amount is not too much for the Hotel property based on the current and projected post-pandemic revenues at the Hotel. At its current operating level, the Hotel should generate over \$6 million in net revenues per year, which more than supports the loan as determined by the current market and the lender's due diligence. In approving the loan, the lender has estimated that the \$62 million loan amount is adequately supported by the Hotel security and revenues and is well within the current market for loan to value ratios for hotel properties in Hawaii. If the Hotel property was privately-owned, as compared to owned by the State/DLNR, this loan would be approved in the free lending market without hesitation as being reasonable.

2. WHR LLC will use 100% of the loan proceeds to pay off the existing Wells Fargo loan and to clear up the current foreclosure proceedings that was triggered solely by Covid-19

pandemic. The need for the loan and the amount of the loan are based solely on the Covid19 pandemic and not the misfeasance or malfeasance of WHR, LLC. The pandemic is the only reason that WHR LLC has had to refinance the property as currently proposed and for the increased costs of servicing that debt.

3. No funds from the loan will flow to WHR LLC or its investors; and all proceeds will be paid to the existing lender and costs of the new lender relating to expenses related to the procurement and closing of the new loan.

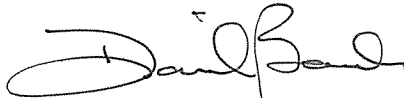
4. There is no reasonable alternative available to WHR LLC to enable it to retain the Hotel property, other than securing this loan. If DLNR does not consent to the Mortgage, WHR LLC will not be able to pay off Wells Fargo and clear up the foreclosure proceedings in an expeditious manner. Moreover, if the Chair does not consent to the Mortgage, WHR LLC could be forced to declare bankruptcy. Bankruptcy proceedings could potentially result in millions of dollars in losses in terms of the value of the Hotel property, as well as the loss of significant lease rent payments to DLNR/BLNR.

In response to the remarks set forth in Mr. Tsuji's recommendations supporting the denial of the request for the Pledge and Security Agreement ("Pledge"), and as a condition to the Chair's consent to the request for the Pledge, WHR LLC will require the lender to agree to remove any reference to the Pledge in the Consent to Mortgage consistent with legal requirements of DLNR.

On behalf of WHR LLC, and in order for WHR LLC to close the proposed loan in a timely manner, we respectfully request the following: (a) that you withdraw your approval of the submittal of Mr. Tsuji's recommendations to the BLNR; (b) that Mr. Tsuji revise his recommendations and instead support the Consent to Mortgage as modified above; and (b) that the Chair/BLNR consent to the Mortgage and the Pledge as soon as reasonably practicable in accordance with Section 20.a of the Lease (General Lease S-5844).¹

Thank you in advance for your prompt consideration of this matter.

Very truly yours,



David F. E. Banks

for

CADES SCHUTTE

A Limited Liability Law Partnership

cc: Mr. Ed Bushor (via email)
Mr. Tsuji Russell (via email)
Mr. Kevin Moore (via email)

¹ Section 20.a of the Lease (General Lease S-5844) requires that the BLNR not unreasonably withhold such consent.

From: Ed Bushor
Sent: Friday, June 17, 2022 9:52 AM
To: Case, Suzanne D
Subject: [EXTERNAL] June BLNR Agenda Request

Aloha Chair Case,

Our loan is scheduled to close June 30 or be terminated. We are pleading to be heard in the last June BLNR hearing.

1. We all can work positively as I have always committed. You have my personal commitment to always do right for the people of Hawaii, Hilo, and Big Island. My 20 years in Hawaii has proven this.
2. We are all able to work together to get through this Covid pandemic with this new Loan. Under the Lease, only the Chair is required to reasonably consent to the new Loan, and of course, I need your support. But I also need your support to advise Russell and staff to have us heard on the next agenda for all we have done, and the fair chance to be heard to clear all of the inaccurate statements made by staff to the BLNR. First, WHR has never caused 800K in Hilton payables, and we are current on all payables for Hilton and implying in testimony otherwise is trying to move a decision against Tower when there should only be truths in the testimony of staff.
3. You should know that the new Loan is supported by Hilton, the New Lender, Tower all of which are industry leaders and feel the loan is reasonable given all the current economic circumstances and Covid-pandemic losses incurred
4. I do want to personally express how disappointed I am that Russell doesn't acknowledge to the Board the amazing commitments and accomplishments of Tower through this pandemic. Personally, we have made huge contributions to remain open for the employees and for Hilo. We have supported Merrie Monarch at levels not seen by other owners along Banyan Drive. It was painful how Tower and WHR had to lose millions through Covid for staying open for the employees and Hilo. It seems that Russell has no appreciation for our current Naniloa success and the small miracle that we have \$500K+ in revenues averaging per month. Instead, he speaks negatively to the Board about Tower and the project. We had to listen to untruthful statements made and implied by Russell in both hearing in reviewing his testimony. He

obviously is biased and we are concerned that he is unable to be impartial to what is best for DLNR and Hilo and the Hotel. Not only did he misrepresent and imply inaccurate facts, but misstated BK legal conclusions as a basis to send false alarms to the BLNR. Not fair to shed negative light when everything is positive right now after all we have done.

5. I plead to you that the Hotel's, WHR's and Tower's commitments over the years for Hilo and this State deserves to have the opportunity to be heard on this June next BLNR meeting, as we face a positive future with this New Loan and catastrophic outcomes without it--both to employees and Hilo.

Aloha and blessings,

Ed "Z" Bushor

CEO

Tower Development, Inc.

1050 Bishop Street 530

Honolulu, Hawaii 96813

808.268.1903 (M)

ed@towerdevcon.com

www.towerdevcon.com

Testimony of
Pacific Resource Partnership

State of Hawaii
Board of Land and Natural Resources
Suzanne D. Case, Chairperson

Agenda Items No. D(9)—Deny Lessee's Request for Consent to Mortgage with Estoppel Certificate and Pledge and Security Agreement, General Lease S-5844, WHR LLC, Lessee
Friday, June 24, 2022
9:00 A.M.

Aloha Chairperson Case and BLNR Members:

Pacific Resource Partnership (PRP) **strongly supports** the Department of Land and Natural Resources' recommendation that the Board of Land and Natural Resources (BLNR) **deny** Lessee's Request for Consent to Mortgage with Estoppel Certification and Pledge and Security Agreement regarding General Lease No. S-5844 for the following reasons:

WHR LLC, Lessee, went into default under the lease multiple times and is involved in lawsuits with its investors.

WHR LLC was served a Notice of Default at least four times for failure to keep rent current and maintain a performance bond.

Additionally, major investors into the Grand Naniloa Hotel filed separate lawsuits against management, including breach of fiduciary duty, breach of contract, loan acceleration and foreclosure. For instance, on December 6, 2021, Wilmington Trust National Association filed foreclosure action against WHR for default on the loan.

On September 23, 2021, The Hawaii Tribune Herald reported that the Edmund C. Olson Trust filed a lawsuit against Ed Bushor and Steward Miller, who are the CEO and president of Tower Development Inc. respectively, stating that they violated an agreement with Olson/Naniloa LLC. (See Hawaii Tribune Herald, September 23, 2021, as an attachment) According to the suit, Tower and Olson/Naniloa partnered to form WHR LLC, which owns the Grand Naniloa.

Allegations against Tower Development indicate a lack of oversight and control over its projects.

PRP is concerned with Tower Development and their history at the Grand Naniloa Hotel on Banyan Drive.

Workers on this project alleged potential violations concerning misclassification of employees as independent contractors, employment and labor law violations, safety and health violations, and unlicensed



(Continued From Page 1)

activities occurring on the jobsite. These allegations are a reflection of Tower Development's apparent lack of oversight and control over its projects and its subcontractors. PRP believes that contractors who do not follow industry laws and regulations and participate in unlawful and unsafe business practices create an unfair competitive environment, depress local workforce and wages, and promote a dangerous working environment for our local trades. The following are some of the allegations brought to our attention by workers who were involved with the Grand Naniloa Hotel renovation in 2016.

Workers informed us of alleged employment, labor, and health and safety violations occurring at the Grand Naniloa Hotel renovation project. The general contractor and developer of the \$16 million renovation was Tower Construction/Tower Development. PRP received information that Lincoln Builders LLC, a subcontractor of Tower Construction, may have intentionally misclassified its employees as independent contractors. A worker on the project said he was hired at a wage of \$23/hour and filled out a W-2 form and other company documents at the time of his hiring. But upon receiving his first paycheck, the worker was handed a 1099 form, told he needed to obtain his own general excise and contractor's licenses, and would need to pay his own taxes. A complaint was filed with the U.S. Department of Labor—Wage and Hour Division; and the Department of Labor and Industrial Relations—Disability Compensation Division and Unemployment Insurance Division.

We are also aware of a lawsuit filed on January 16, 2018 by a subcontractor, Lincoln Builders LLC, who worked on the Grand Naniloa Hotel construction project suing the hotel, its developer, and project's general contractor, claiming nonpayment of \$754,000 for work it performed on the Grand Naniloa Hotel. Tower Development Inc, the managing partner of WHR LLC; several related entities under the Tower name; Tower Development CEO Edward Bushor were some of the defendants named in the lawsuit. (see Hawaii Tribune Herald, January 25, 2018 article as an attachment)

Additionally, PRP was also informed of safety concerns regarding Protex Painting, another Tower Construction subcontractor working on the Grand Naniloa Hotel. Workers complained that they were not provided the appropriate personal protective equipment as they worked in an environment filled with noxious fumes. Workers also complained about alcohol being consumed on the project as nearly every floor was littered with empty beer cans. There were also reports of alcohol and drug use by workers on the project site. A complaint was filed with Hawaii Occupational Safety and Health.

In 2016, PRP was also informed about allegations related to an unlicensed contractor, "Hui's Drywall", hired by Tower Construction. Concerns were raised to the Regulated Industries Complaint Office (RICO) about this unlicensed activity occurring under Tower Construction's oversight of the project. Concerns were also raised that since Tower Construction hired an unlicensed contractor on this project, they may have been aiding or abetting an unlicensed person to evade the contractor licensing laws. Based on our research, we were unable to locate any tax, business registration, or licensing information for "Hui's Drywall".

PRP is also aware of other alleged labor, wage, safety, and licensing violations at the Grand Naniloa Hotel by a subcontractor, C.R. Construction, hired by Tower Construction/Tower Development. Workers informed us that they were flown in from Maui and worked on the project for nearly 3 weeks. We were told that the

(Continued From Page 2)

crew worked 11 to 12-hour days, seven days a week, at a wage rate of \$35/hour. A worker also informed us that the crew was living on the 3rd floor of the hotel and were instructed that they were not able to leave the hotel grounds under any circumstance.

With regards to licensing violations, we were informed that Tower Construction employees may have operated outside of their scope of their B general building contractor license. We were told that Tower Construction employees were laying floor and bathroom tiles throughout the renovated rooms. It is our understanding that a C-51 license is required to do tile work and it is not one of the specialty licenses that are automatically granted as a licensed B general building contractor. We were also informed that C.R. Construction was operating outside of the scope of the B general contractor's license when their employees were laying floor and bathroom tiles. Several employees informed us that they were performing some plumbing work which would have required C.R. Construction to have a C-37 license. At that time, according to the Professional and Vocational Licensing, C.R. Construction only held a B general contractor's license. A complaint was filed with the U.S. Department of Labor—Wage and Hour Division; and the Department of Labor and Industrial Relations—Disability Compensation Division, Unemployment Insurance Division, and Hawaii Occupational Safety and Health; and RICO.

It should also be noted that C.R. Construction was subject to a Federal Department of Labor Investigation in 2020 for a project in Maui where workers allegedly were again misclassified as independent contractors and not paid appropriate wages including overtime and holiday pay. Hawaii's State RICO also opened an investigation looking into allegations of C.R. Construction aiding and abetting unlicensed contractors on that job.

Given the above, we respectfully request that the BLNR deny the request for consent to the mortgage between WHR LLC, Lessee/Mortgagor, and Hilo Hotel Funding LLC, Mortgagee, and deny the request for Estoppel Certificate and Pledge and Security Agreement.

Olson Trust lawsuit alleges Tower Development execs violated noncompete agreement

By [MICHAEL BRESTOVANSKY Hawaii Tribune-Herald](#) | Thursday, September 23, 2021, 12:05 a.m.



KELSEY WALLING/Tribune-Herald Brush grows Wednesday on the roof of the defunct Uncle Billy's on Banyan Drive. Tower Development has submitted proposals for redevelopment projects on Uncle Billy's and the former Country Club Condominium Hotel.

The Edmund C. Olson Trust has filed a lawsuit against two corporate officers of Tower Development Inc. for pursuing redevelopment projects on Banyan Drive.

A lawsuit filed Tuesday in the Third Circuit Court alleges that Ed Bushor and Stewart Miller, respectively the CEO and president of Tower Development Inc. — and a partner of the corporate entity that owns the Grand Naniloa Hotel on Banyan Drive — pursued a pair of redevelopment projects in violation of an agreement with Olson/Naniloa LLC.

According to the suit, Tower and Olson/Naniloa partnered to form WHR LLC, which owns the Grand Naniloa. In doing so, Bushor and Miller signed an agreement prohibiting Tower from acquiring, developing or owning any potential competitive properties — defined as “a hotel project of more than 50 rooms within a 30-mile radius of the Naniloa.”

However, last year, Tower submitted to the state Department of Land and Natural Resources two proposals for redevelopment projects on Banyan Drive — one, to

partially demolish and replace the defunct Uncle Billy's Hilo Bay Hotel and the other to renovate the former Country Club Condominium Hotel.

Both proposals would replace the two sites with Hilton franchises, which would, under the terms of the agreement, directly compete with the Grand Naniloa.

Emails submitted with the lawsuit indicate that Olson Trust President Ed Olson expressly gave disapproval for Tower's potential interest in Uncle Billy's and the Country Club as early as 2016.

The lawsuit alleges Tower submitted the development plans to the DLNR without providing any notice to Olson/Naniloa, which only discovered the plans from a newspaper article earlier this month about a DLNR committee's decision to recommend that the Board of Land and Natural Resources approve Tower's proposals for the Uncle Billy's and Country Club properties.

"The idea of Tower becoming involved in the redevelopment of Uncle Billy's has been floated for years," read a letter sent Sept. 16 to Bushor and Miller on behalf of Olson/Naniloa. "At every point, Mr. Olson has clearly stated his objections. He thought it was a dead issue until recent newspaper articles revealed that you have been pursuing this project without disclosing your plans to the members of WHR. To make matters worse, the documents found on the DLNR website reveal that you are using WHR's assets to enhance Tower's bids. The entire situation is outrageous, for it reflects a blatant and inexcusable disregard for your fiduciary duties toward the members of WHR."

The letter went on to criticize Bushor and Miller's general management of Tower, noting that WHR came within days of defaulting on its Grand Naniloa lease with the state earlier this year.

"As we all know, WHR is insolvent and teetering on the edge of a bankruptcy filing and/or a foreclosure," the letter read. "You have done your best to keep the investors apart, uninformed, and divided in their views about your leadership. The fact that WHR came within days, not just weeks, of a fatal lease default is inexcusable.

"Aside from demonstrating an unsurpassed ability to wheedle money from investors with false budgets, misleading projections and plans, and sweet talk, you have done nothing worthy of note," the letter went on.

The letter concluded by demanding that Bushor and Miller withdraw their proposals by this past Monday. After the two evidently failed to do so, Olson/Naniloa filed the suit Tuesday — three days before the BLNR is scheduled to discuss proposals for the two properties, including Tower's, on Friday

Based on these complaints, Olson/Naniloa accused Bushor and Miller of breach of fiduciary duty and tortious interference with a contract. The suit calls for the court to order the defendants to halt their redevelopment projects and seeks additional damages to be proven at trial.

Email Michael Brestovansky at mbrestovansky@hawaiitribune-herald.com.

<https://www.hawaiitribune-herald.com/2021/09/23/hawaii-news/olson-trust-lawsuit-alleges-tower-development-execs-violated-noncompete-agreement/>

Subcontractor sues Naniloa's general contractor, developer



By JOHN BURNETT Hawaii Tribune-Herald | Thursday, January 25, 2018, 12:05 a.m.

HOLLYN JOHNSON/Tribune-Herald The Mauna Loa Tower stands tall at the right Wednesday at the Grand Naniloa Hotel in Hilo.

A subcontractor who worked on the Grand Naniloa Hotel construction project is suing the hotel, its developer and the project's general contractor, claiming nonpayment of \$754,000 for work it performed during the Banyan Drive property's makeover.

The civil lawsuit was filed Jan. 16 in Hilo Circuit Court by Lincoln Builders LLC, a Honolulu construction firm.

The defendants include WHR LLC, the hotel's owner; Tower Development Inc., the managing partner of WHR LLC; several related entities under the Tower name; Tower Development CEO Edward Bushor, President Stuart Miller, Vice President Noel Ross and Secretary-Treasurer Lynn Bushor.

Also named as defendants are general contractor Tower Construction Hawaii Inc.; Aaron Molinar, president of Tower Construction and CEO of Molinar Construction, which is also named; Chris Molinar, vice president of Tower Construction Hawaii and president of Molinar Construction; and Mark Mansheim, vice president of Molinar Construction, which is located in San Diego.

The complaint accuses all defendants of breach of contract, breach of good faith and fair dealing, conversion, fraud, intentional interference with business relations, and unjust enrichment. Lincoln Builders is seeking compensatory and special damages,

triple damages under Hawaii contract law, punitive damages, and attorneys' fees and court costs.

According to the lawsuit, the original contract agreed to on Aug. 27, 2015, called for Lincoln Builders to be paid \$460,000 for remodeling work to rooms in the hotel's Mauna Loa Tower. The original job was "augmented with additional work described in verbal and written change orders," which "provided for payment of additional monies to plaintiff."

The suit claims change orders brought the final total of work performed by Lincoln Builders to \$754,000.

The suit claims defendants "had no intention of paying plaintiff for all of the services, labor, equipment and materials it provided" and falsely asserted "their intent of fulfilling their contractual duties, in order to induce plaintiff to provide services, labor, equipment and materials ... for which defendants knew they would not pay."

The complaint also alleges the defendants hired or attempted to hire Lincoln Builders' laborers and independent contractors by "falsely advising the independent contractors and/or laborers that they would not continue to have secure jobs unless they breached their obligations to plaintiff and began working directly with defendants."

Also claimed is the defendants "failed to provide accurate plans and specifications for the work to be performed under the subcontractor agreement" and that Lincoln was "provided ... with defective plans and specifications."

In addition, the lawsuit claims the defendants delayed required inspections and "removed materials necessary for the completion of plaintiff's work."

Lincoln Builders also has a mechanic's lien pending against WHR LLC, Tower Construction Hawaii Inc., Tower Development, Tower Hotels Hilo LLC, Tower Hotels LLC and Molinar Construction. According to court records, trial is set in that case at 8 a.m. May 25 before Hilo Circuit Judge Henry Nakamoto.

Bushor said in a Wednesday text message the hotel and Tower Development "have no ownership of Tower Construction entity," and that he had "no contract or ever had dealings with" Lincoln Builders.

Bushor said there is “no basis” for the suit against the him, the hotel or Tower Development, and referred questions to Aaron Molinar, who didn’t return a phone call by press time.

Sheri Tanaka, Lincoln Builders’ attorney, also didn’t return a call seeking comment.

Email John Burnett at jburnett@hawaiitribune-herald.com.

<https://www.hawaiitribune-herald.com/2018/01/25/hawaii-news/subcontractor-sues-naniloas-general-contractor-developer/>