

State of Hawaii
Board of Land and Natural Resources
P.O. Box 621
Honolulu, HI 96809
via email: blnr.testimony@hawaii.gov

September 21, 2022

Re: Testimony for Item D-3 on Agenda for the September 23, 2022 Meeting of the
Board of Land and Natural Resources

We submit this testimony on behalf of our client 69 Railroad, LLC ("Lessee"), regarding Item D-3 on the agenda for the September 23, 2022 meeting of the Board of Land and Natural Resources ("Board"). We are frankly surprised and dismayed that we are appearing before the Board again, more than nine months after the Board provided final authorization for the Chairperson to approve and execute a Development Agreement and sign a thirty-year extension of General Lease No. S-3624 ("Lease") in its meeting of February 11, 2022. We object to the present proceeding before the Board, which violates concepts of estoppel and finality, and the Board's own rules on the timeframes for a party to request reconsideration and/or a contested case.¹

Following the Board's approval of the lease extension pursuant to Act 149 (2018), my client worked in good faith with the Department to agree to a form of Development Agreement that conformed with the State's standard form, was in the State's best interest, and was to be presented to the Chairperson for execution. Please see Enclosure A, the enclosed letter from Kevin Moore dated May 6, 2022 and subsequent email correspondence. Lessee received assurances from the Department and due to the rising costs of construction and deadline to complete substantial improvements, began to expend significant sums on improvements and bonded the improvements. Lessee received execution copies of the Development Agreement and Lease extension that were approved and executed by a Deputy Attorney General and returned copies of those documents also executed by Lessee to the Department on August 2, 2022. The execution copies signed by the Deputy Attorney General are enclosed herein as Enclosure B.

Lessee was expecting to receive copies of the Development Agreement and Lease extension

¹ HAR §13-1-39(b) states that a motion for reconsideration shall be made not later than five business days after the decision. HAR §13-1-29 provides that an oral request for a contested case needs to be made before the close of a meeting at which the subject matter of the request is scheduled for board disposition, with a subsequent written request made within ten days.

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executed by the Chairperson, which are required by Lessee's lender for financing to complete the substantial improvements. However, instead of receiving the executed copies, on August 17, 2022, Lessee received a letter from Mr. Tsuji stating that the Land Division was going to hold the documents pending the Land Division's request to the Board to require it to update the terms and conditions of the lease extension with a document used by the Department of the Attorney General. Mr. Tsuji acknowledged that the Board devoted significant attention to the issue and that it was addressed at the February 11, 2022 meeting which approved the Lease extension. Board members during this period will recall this discussion and the discussion on the issue at the prior January meeting- during those meeting the Department and Land Division unequivocally stated that the Board could not authorize changing the terms and conditions of the lease extension. However, Mr. Tsuji stated that after further consultation with the AG, it has been determined that the Board may require public auction leases be updated. Mr. Daniel A. Morris, a Deputy Attorney General, subsequently stated that his office had changed its interpretation of the *Kahua Ranch* case. Lessee has requested the Attorney General Opinion referenced by Mr. Tsuji and Mr. Morris, but has not received a response to that request or the opinion, which is supposed to be a public record pursuant to HRS § 28-3. Lessee has repeatedly stated that the terms and conditions of its lease extension pursuant to Act 149 cannot be amended except to satisfy a lender's conditions. We are enclosing copies of the correspondence with the Land Division and Attorney General's office which preceded the Land Division presenting the current agenda item as Enclosure C.

Lessee has filed a civil lawsuit in the Third Circuit Court of the State of Hawaii to protect its rights, a copy of this filed lawsuit is enclosed as Enclosure D.

In summary Lessee objects to the Board reconsidering and amending its February 11, 2022 approval because:

- The Board's approval of the Lease extension at its meeting on February 11, 2022, authorizing the Chairperson to execute a Development Agreement and Lease extension was the final authorization needed under Act 149 for the Chairperson to execute said Development Agreement and Lease extension and the Department did not request a contested case or reconsideration within the timeframes set forth in HAR §§ 13-1-29 and 13-1-39.
- The Department is estopped from requesting that the Board amend or reconsider its prior approval based on a position directly contrary to the Department's prior established position, particularly due to Lessee's expenditure of substantial funds and changes in position in reasonable reliance.
- The Chairperson should execute the Development Agreement and Lease extension immediately, consistent with the Board's prior approval and the Department and AG's approvals of those documents.
- The Legislature defined the public's best interest in Act 149 as the State fulfilling its fiduciary duties to enhance revenues and promote the public's social, environmental, and economic well-being through extending leases on public lands within the Hilo community economic district ("HCED") for lessees who commit to making

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substantial improvements, which the Land Division is not free to disregard or redefine with its own opinion.

- Irrespective of the AG's internally conflicting interpretations of *Kahua Ranch*, a case based on a predecessor statute to HRS Chapter 171 regarding public lands leased by auction, HRS § 171-192 only allows for amendments to the terms and conditions of a lease extension if required by a lessee's lender or if the Board had promulgated administrative rules mandating such amendments, which the Board has not, and as such any present effort to amend the terms of the Lease is arbitrary and capricious, and constitutes *ad hoc* rulemaking to be applied *ex post facto* in violation of applicable law, including HRS Chapter 91.

Thank you for considering this testimony and documentation.

Very truly yours,

LAW OFFICES OF YEH & KIM

A handwritten signature in black ink, appearing to read 'RONALD N.W. KIM', with a stylized, sweeping flourish at the end.

RONALD N.W. KIM

Cc: client, Rep. C. Todd, Rep. M. Nakashima, Rep. R. Onishi, Sen. L. Inouye

DAVID Y. IGE
GOVERNOR OF HAWAII



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

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

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

ROBERT K. MASUDA
FIRST DEPUTY

M. KALEO MANUEL
DEPUTY DIRECTOR - WATER

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

May 6, 2022

GL S-3624

Via Electronic Mail [rkim@yehandkim.com]

Ron Kim, Esq.
Law Offices of Yeh & Kim
505 Kilauea Ave. #B
Hilo, Hawai'i 96720-2830

Subject: Draft Development Agreement for 69 Railroad, LLC, Lessee, General Lease Nos. S-3624, Waiakea, South Hilo, Hawaii; Tax Map Key (3) 2-1-012:026

Dear Mr. Kim:

We have received a copy of a draft development agreement for the extension of General Lease No. S-3624, 69 Railroad, LLC, Lessee, that we understand was prepared by your office. We ran a redline of your draft against our version so that we could see where changes had been made to our standard form. A copy of the redline is enclosed for your reference.

It is clear from the redline that 69 Railroad, LLC (Lessee) is seeking a number of substantive changes to Land Division's standard development agreement, including the striking of provisions relating to hazardous materials, indemnity, bonding, and publication of notice of completion. We find that these proposed deletions are not in the best interests of the State and therefore are unable to recommend that the Chairperson approve the version of the development agreement that you provided. Enclosed is a second redline showing the changes Land Division would need to include in the agreement before submitting to the Chairperson for approval.

If you have any questions, please feel free to contact me at (808) 587-0426 or by email at kevin.e.moore@hawaii.gov. Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Kevin E. Moore".

Kevin E. Moore
Assistant Administrator

Enclosure A

Ron Kim, Esq.
Law Offices of Yeh & Kim
May 6, 2022
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Enclosures

C: James McCully via electronic mail [jwmccully54@gmail.com]
HDLO

Enclosure A

Subject: Re: [EXTERNAL] Re: Draft Development Agreement for GL S-3624, 69 Railroad, LLC
From: Ron Kim <rkim@yehandkim.com>
Date: 6/2/2022, 9:23 AM
To: "Moore, Kevin E" <kevin.e.moore@hawaii.gov>
CC: "jwmccully54@gmail.com" <jwmccully54@gmail.com>, "Tsuji, Russell Y" <Russell.Y.Tsuji@hawaii.gov>, "Heit, Gordon C" <gordon.c.heit@hawaii.gov>

Thank you Kevin!

On 6/2/2022 9:01 AM, Moore, Kevin E wrote:

Hi Ron – We will request the Department of the Attorney General to prepare the execution copies. Thanks.

Kevin

From: Ron Kim <rkim@yehandkim.com>
Sent: Thursday, June 2, 2022 8:44 AM
To: Moore, Kevin E <kevin.e.moore@hawaii.gov>
Cc: jwmccully54@gmail.com; Tsuji, Russell Y <Russell.Y.Tsuji@hawaii.gov>; Heit, Gordon C <gordon.c.heit@hawaii.gov>
Subject: Re: [EXTERNAL] Re: Draft Development Agreement for GL S-3624, 69 Railroad, LLC

Hi Kevin,

Thanks for providing this revised version- my client approves of the form of this development agreement.

Thanks again,

Ron

On 6/1/2022 2:11 PM, Moore, Kevin E wrote:

Hi Ron – We accepted your edits in the last draft of the development agreement you sent and made a couple of minor changes shown in the attached fresh redline. Please let me know if we can finalize this. Thanks.

Kevin

From: Ron Kim <rkim@yehandkim.com>
Sent: Tuesday, May 10, 2022 12:58 PM
To: Moore, Kevin E <kevin.e.moore@hawaii.gov>
Cc: jwmccully54@gmail.com; Tsuji, Russell Y <Russell.Y.Tsuji@hawaii.gov>; Heit, Gordon C <gordon.c.heit@hawaii.gov>
Subject: [EXTERNAL] Re: Draft Development Agreement for GL S-3624, 69 Railroad, LLC

Enclosure A

Hi Kevin,

We are agreeable to most of the revisions- we are proposing a few more revisions for consistency and to revise paragraph 6 on hazardous materials. There is a concern that the language initially proposed could impair ongoing operations such as mechanics' which use and store materials that may be classified as hazardous on the property (in accordance with the law) in the ordinary course of their business.

Thank you,

Ron

On 5/7/2022 1:41 PM, Ron Kim wrote:

Thank you Kevin,

We are reviewing the revised agreement and will get back to you as soon as possible.

Thanks again,

Ron

On 5/6/2022 1:56 PM, Moore, Kevin E wrote:

Hi Ron,

Attached please find a pdf of my letter to you of today's date with enclosures. Thank you.

Kevin

Enclosure A

DEVELOPMENT AGREEMENT

FOR

69 RAILROAD, LLC

* * *

**Department of Land and Natural Resources
Land Division**

State of Hawaii



Enclosure B

DEVELOPMENT AGREEMENT

THIS DEVELOPMENT AGREEMENT is made as of this _____ day of _____, 2022, by and between the **STATE OF HAWAII**, by its Chairperson ("Chairperson") by the authority of the Board ("Board") at its meeting held on February 1, 2022, at the Department of Land and Natural Resources, Land Division, 1151 Punchbowl Street, Room 220, Honolulu, Hawaii 96813, and **69 RAILROAD, LLC**, a Hawaii limited liability company ("Lessee").

PLEASE DO NOT
DATE DOCUMENT

is made and dated effective as of the date of execution ("Effective Date"), by and between the State of Hawaii, by and between the Department of Land and Natural Resources, Land Division, 1151 Punchbowl Street, Room 220, Honolulu, Hawaii 96813, and **69 RAILROAD, LLC**, a Hawaii limited liability company ("Lessee").

RECITALS:

- A. The State owns in fee simple that certain parcel of land, a portion of government lands, situated at Kanoelehua Industrial Lots, Waiakea, South Hilo, Hawaii, shown as the shaded area on **Exhibit A** attached hereto, incorporated herein and made a part hereof. The parcel consists of approximately 4.499 acres and is identified by Tax Map Key No. (3) 2-1-012:026 ("**Subject Property**").
- B. The parcel is currently leased to Lessee under General Lease No. S-3624, as amended, for a term of fifty-five (55) years from March 6, 1961 to March 5, 2016, which was extended for ten (10) years through March 5, 2026 ("**Lease**").
- C. Session Laws of Hawaii 2018 ("**Act 149**"), and Sections 171-191 and 171-192(a), Hawaii Revised Statutes ("**HRS**"), as amended, create the Hilo community economic district which includes the Subject Property. The purpose for creating the district was to allow the State to "facilitate efficient and effective improvement, and economic opportunity, in the area for lessees who commit to making substantial improvements to the existing improvements or constructing new substantial improvements".
- D. Act 149 authorizes the Board to extend the term of leases for public lands within the Hilo community economic district for lessees who commit to substantial improvements to the existing improvements or to new substantial improvements so long as the length of the extension granted does not extend the original lease term by more than forty (40) years, and/or to extend the terms of such leases to the extent needed to qualify the lessee for loans or to amortize the cost of substantial improvements to the premises paid for by the lessee without institutional financing.
- E. Act 149 allows the Lessee to present a development agreement to the Board for its approval showing the renovations, rehabilitation, reconstruction or construction for off and on-site improvements that would allow the Lessee to qualify for a lease extension under this act, which must be "substantial improvements". Substantial improvements are renovations, rehabilitation, reconstruction, or construction with a total cost which equals or exceeds 30% of the "Market

PRELIM. APPROV.
Department of the
Attorney General

Value” of the existing improvements.

- F. The development agreement and plans and specifications therein are presented to the Board as evidence of the planned substantial improvements along with the amortization Lessee needs to complete those improvements to allow the Board to approve the development agreement and lease extension. This approval is based upon the following statutory considerations, each of which are satisfied by the exhibits referred to below:
1. Whether the development proposed in the development agreement is of sufficient worth and value to justify the extension of the lease;
 - a. Attached hereto as Exhibit B is an appraisal showing the existing leasehold value of the improvements, and Exhibit B also shows the contracts and the cost of the planned substantial improvements.
 2. The estimated period of time to complete the improvements and expected date of completion of the improvements; and
 - a. Attached as Exhibit B is the contractor’s estimate for completion of the project.
 3. The minimum revised annual rent based on the fair market value of the lands to be developed, as determined by an appraiser for the board, and the percentage of rent where gross receipts exceed a specified amount.
 - a. The parties have reached a mediated agreement on fair market rental value.
- G. A summary appraisal report prepared for the Lessee determined the market value of the leasehold improvements on the Subject Property to be \$1,575,000 as of 11/9/2018. Thirty percent of this amount is \$472,500.00.
- H. Lessee has requested that the term of the lease be extended to March 5, 2056, has been performing improvements to the existing improvements, and is planning to make additional improvements to the land and existing improvements to exceed the minimum required for substantial improvements, as the total cost of Lessee’s improvements will be approximately \$533,904.00.
- I. The Development Agreement sets forth the terms and conditions that Lessee must satisfy and successfully perform in order for the requested lease extension to be issued, and for Lessee to retain the benefit of the requested extension of the term of the Lease by the State for the Subject Property pursuant to Act 149.
- J. On February 11, 2022, under Agenda Item D-2, the Board agreed in concept to Lessee’s request to extend the term of the Lease pursuant to Act 149 and approved the Chairperson entering into this Agreement.



AGREEMENT:

In consideration of the recitals and the mutual covenants, obligations and conditions set forth in this Agreement, the State and Lessee hereby mutually agree as follows:

1. Term. The term of this Agreement shall commence on the Effective Date and terminate on the Completion Date as defined in Paragraph 8 herein, unless terminated sooner pursuant to the terms of this Agreement.

2. Continuation of the Payment of Lease Rental. Lessee shall continue to pay to the State, throughout the term of this Agreement, all rent and other charges due by Lessee under the Lease pursuant to the terms and conditions of the Lease. Upon the execution of the instrument extending the Lease (the "**Extended Lease**"), Lessee shall pay to the State the Revised Annual Rent as defined in Paragraph 3.A.3) herein, and all other rent and other charges due by Lessee under the Extended Lease pursuant to its terms and conditions.

3. Development Plan.

A. Pursuant to Act 149, prior to entering into a development agreement, Lessee prepared and submitted to the Board the plans and specifications of its proposed development plan for the substantial upgrades to the existing improvements on the Subject Property dated January 28, 2022, a copy of which is attached hereto as **Exhibit B** incorporated herein and made a part hereof (such plans and specifications are collectively referred to as the "**Development Plan**"). All such plans and specifications of the Development Plan shall meet the requirements of and be in full compliance with this Agreement and all applicable municipal, county, state and federal regulations, rules, codes and ordinances. The Board reviewed the Development Plan at its meeting held on February 11, 2022, Item D-2, and determined that:

(i) The Development Plan proposed in this Agreement is of sufficient worth and value to justify the extension of the term of the Lease to March 5, 2056;

(ii) The estimated period of time to complete the Development Plan shall be ten and one-half (10 1/2) months, which is reasonable;

(iii) The minimum revised annual rent to be paid by Lessee shall be based on the fair market value of the lands comprising the Subject Property to be developed, as agreed to by the parties in mediation, as the annual rent for the period from 2026-2036 would be set at \$155,000, rent for the period from 2036-2046 would be set at \$195,000, and rent will be re-opened and negotiated for the period from 2046-2056 ("**Revised Annual Rent**"); and,

(iv) The economic life of the improvements which are included in the Development Plan is in excess of March 5, 2056;

B. The State granted final approval of the Development Plan and this Agreement at its meeting held on February 11, 2022, Item D-2.



C. Lessee shall have submitted evidence reasonably satisfactory to the Chairperson that Lessee has adequate funding and/or financing to fully develop the Subject Property in accordance with the approved Development Plan.

D. Notwithstanding anything contained in this Agreement to the contrary, no such final approval of the Development Plan by the State shall be deemed a warranty or other representation on its part that (1) Lessee will be able to obtain all necessary federal, state and county entitlements, permits or other approvals required to enable Lessee to develop the Subject Property in accordance with the approved Development Plan; or (2) such approved Development Plan by the State and the plans and specifications of substantial improvements to the existing improvements on the Subject Property described therein are legal or structurally safe or sound.

4. Condition of the Subject Property. The State makes no representations regarding the condition or suitability of the Subject Property and of the existing structures and improvements at the Subject Property for the approved Development Plan. Lessee shall, at its sole cost and expense, be responsible for conducting its own investigations and due diligence regarding the Subject Property and the existing structures and improvements at the Subject Property, and any site work necessary to implement the approved Development Agreement, including but not limited to the removal of hazardous materials, if any. Lessee acknowledges and agrees that it assumes all risks of development at the Subject Property.

5. Construction Period. Lessee shall have ten and one-half (10 ½) months from the Effective Date to complete the substantial upgrades to the existing improvements on the Subject Property in accordance with the approved Development Plan and provide notice of completion to the State in accordance with Paragraph 8, below ("**Construction Period**").

Lessee shall, at Lessee's sole cost and expense, expeditiously and diligently seek to obtain all necessary and appropriate permits and/or other regulatory approvals from the Federal Government, State of Hawaii (including the State Legislature if applicable), and/or County of Hawaii ("**County**") so as to enable Lessee to complete the substantial upgrades to the existing improvements on the Subject Property in accordance with the approved Development Plan. Lessee shall use diligent and all commercially reasonable efforts to obtain all required permits and/or other regulatory approvals from the Federal Government, State of Hawaii and/or County.

6. Hazardous Materials. Lessee shall not cause or permit the escape, use, storage, disposal or release of any hazardous material in completing the approved Development Plan at the Subject Property, except as permitted by law. In completing the Development Plan, Lessee shall not allow the storage or use of such materials in any manner not sanctioned by law or by the highest standards prevailing in the industry for the storage and use of such materials, nor allow to be brought onto the Subject Property any such materials except to use in the ordinary course of business and to the extent stored and used in compliance with applicable federal, State and County of Hawaii rules and laws or, in the absence of such rules or laws, in accordance with the highest standards prevailing in the industry, and then only after written notice is given to the

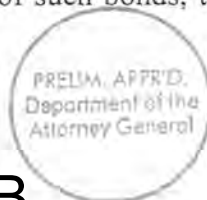


State of the identity of such materials and upon the State's consent, which consent may be withheld at the State's sole and absolute discretion. If any lender or governmental agency shall ever require testing to ascertain whether or not there has been any release of hazardous materials by the Lessee, then the Lessee shall be responsible for the reasonable costs thereof. In addition, Lessee shall execute affidavits, representations and the like from time to time at the State's request concerning Lessee's best knowledge and belief regarding the presence of hazardous materials on the Subject Property placed or released by Lessee. The parties acknowledge that petroleum-based materials and products will be used in the ordinary course of paving for the improvements. The State hereby consents to the storage and use of such petroleum-based materials and products to the extent stored and used in compliance with applicable federal, State and County of Hawaii rules and laws or, in the absence of such rules or laws, in accordance with the highest standards prevailing in the industry.

Lessee agrees to indemnify, defend, and hold the State harmless, from any damages and claims resulting from the release of hazardous materials on the Subject Property occurring while Lessee is in possession, or elsewhere if caused by the Lessee or persons acting under the Lessee. These covenants shall survive the expiration or earlier termination of this Agreement.

For the purpose of this Agreement, "hazardous material" shall mean any pollutant, toxic substance, hazardous waste, hazardous material, hazardous substance, or oil as defined in or pursuant to the Resource Conservation and Recovery Act, as amended, the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, the Federal Clean Water Act, or any other federal, state, or local environmental law, regulation, ordinance, rule, or by-law, whether existing as of the date ordinance, rule, or by-law, whether existing as of the date hereof, previously enforced, or subsequently enacted.

7. Bonds. Lessee shall not commence construction of the improvements until Lessee has filed with the State sufficient bonds conditioned upon the full and faithful performance of all the terms and conditions of this Agreement, including a completion bond for the fully, faithful and timely completion of this Agreement, free from all liens and claims, including the completion of the substantial improvements to described in this Agreement, and a labor and materialmen's bond in the amount of \$533,904.00, in such form and upon such terms and conditions as may be approved by the State. The Lessee shall, at its own cost and expense, within fifteen (15) days from the Effective Date of this Agreement, procure and deposit with the State and thereafter keep in full force and effect during the term of this Agreement, such bonds acceptable to the State in the amount of \$533,904.00 as aforesaid, which bonds shall name the State as obligee, conditioned upon the full and faithful observance and performance by Lessee of all the terms, conditions and covenants of this Agreement, including, but not limited to, the completion of the substantial improvements requirement in accordance with the approved Development Plan at the Subject Property on or before the date of completion, free from all liens and claims, pursuant to the approved Development Plan. Lessee shall indemnify, defend, and hold the State harmless from all liens, suits, actions or damages arising out of, caused from or attributable to the work performed pursuant to the substantial improvements requirement in accordance with the approved Development Plan at the Subject Property incorporated herein this Agreement. These bonds shall provide that in case of a breach or default of any of the terms of this Agreement, covenants, conditions and agreements of such bonds, the full amounts payable



pursuant to the terms and conditions of such bonds shall be paid to the State as liquidated and ascertained damages and not as a penalty.

8. Completion of Construction; Inspection. Upon Lessee's completion of the substantial improvements on the Subject Property in accordance with the approved Development Plan, Lessee shall provide written notice to the State acknowledging and confirming the same. Representatives of the State and Lessee shall then conduct a final inspection and walk through of the Subject Property within fourteen (14) days of such written notice, and a "punchlist" shall be mutually prepared and agreed upon by representatives of the State and Lessee within seven (7) days of such inspection and walk through of the Subject Property. Such punchlist shall itemize any areas of construction that were not in accordance with the approved Development Plan, or any unauthorized construction or work not acceptable to the State or any other governmental agency having jurisdiction over such work. Lessee, at Lessee's sole cost and expense, shall immediately repair all deficiencies identified as potential safety hazards on the punchlist, and all other deficiencies on the punch list shall be remedied, or the work to remedy has commenced if a remedy may not reasonably be completed within the timeframe specified herein, within fourteen (14) days of the preparation of the same.

If the State is satisfied that completion of the substantial improvements to the existing improvements on the Subject Property has been performed in accordance with the approved Development Plan by Lessee, including any and all punch list items, and forty-five (45) days have elapsed after the filing and publication of the Notice of Final or Substantial Completion by Lessee without any applications for mechanic's or materialmen's liens, or other suits or claims relating to such substantial improvements, being filed against the Subject Property, then the State shall confirm and notify Lessee of the same in writing ("**Completion Date**"), at which time Lessee shall have the right to terminate the bonds posted by Lessee pursuant to Paragraph 7 hereof.

9. Justification of Sureties. Any bonds required by this Agreement shall be supported by the obligation of a corporate surety organized for the purpose of being a surety and qualified to do business in the State of Hawaii, or by not less than two (2) personal sureties, corporate or individual, for which justifications shall be filed as provided in Section 78-20, HRS; provided, however, the Lessee may furnish a bond in like amount, conditioned as aforesaid, executed by it alone as obligor, if, in lieu of any surety or sureties, it shall also furnish and at all times thereafter keep and maintain on deposit with the State security in certified checks, certificates of deposit (payable on demand or after a period the State may stipulate), bonds, stocks or other negotiable securities properly endorsed, or execute and deliver to the State a deed or deeds of trust of real property, all of a character which is satisfactory to State and valued in the aggregate at not less than the principal amount of the bond. It is agreed that the value of any securities which may be accepted and at any time thereafter held by the State shall be determined by the State, and that the Lessee may, with the approval of the State, exchange other securities or money for any of the deposited securities if in the judgment of the State the substitute securities or money shall be at least equal in value to those withdrawn. It is further agreed that substitution of sureties or the substitution of a deposit of security for the obligation of a surety or sureties may be made by the Lessee, but only upon the written consent of the State and that until this consent is granted, which shall be discretionary with the State, no surety shall

be released or relieved from any obligation, except for any bonds terminated by Lessee after the Completion Date pursuant to the terms of Paragraph 8 hereinabove.

10. Waiver, Modification, Reimposition of Bond and Liability Insurance Provisions. Upon substantial completion of the improvements contemplated herein and after forty-five (45) days after the filing and publication of the Notice of Final or Substantial Completion by Lessee without any applications for mechanic's or materialmen's liens, or other suits or claims relating to such substantial improvements, being filed against the Subject Property, and upon substantial compliance by the Lessee with the terms, covenants, and conditions contained in this Agreement on its part to be observed or performed, the State at its discretion may in writing, waive or suspend the performance bond or improvement bond requirements or both or may, in writing, modify the particular bond(s) or liability insurance requirements by reducing its amount; provided, however, that except for any bonds terminated by Lessee after the Completion Date pursuant to the terms of Paragraph 8 hereinabove, the State reserves the right to reactivate the bonds or reimpose the bond(s) or liability insurance in and to their original tenor and form at any time throughout the term of this Agreement.

11. Modifications to the Development Plan. Lessee shall be entitled to make changes or modifications to the approved Development Plan as may be required to address and satisfy any comments made or issues raised by the appropriate agencies of the Federal Government, State of Hawaii and/or County without the further consent or approval by the State, provided that: (a) Lessee provides advance written notice to the State of such changes or modifications, including a reasonably specific explanation as to why such changes or modifications are being undertaken and their anticipated effect; and (b) such changes or modifications: (i) do not materially alter or change the Development Plan as approved by the State; (ii) do not reduce the rents and all other charges to be paid by Lessee under the Lease or the Extended Lease; (iii) do not provide for uses that are not permitted by applicable laws or ordinances; or (iv) do not adversely affect or delay the Construction Period for more than one hundred and eighty (180) days.

In addition, the State recognizes that from time to time the approved Development Plan may require changes or modifications initiated by Lessee. Lessee may make any such changes or modifications to said approved Development Plan with the prior written consent of the State, which consent shall not be unreasonably withheld, provided that such changes or modifications: (a) do not materially alter or change the Development Plan as approved by the State; (b) do not reduce the rents and all other charges to be paid by Lessee under the Lease or Extended Lease; (c) do not provide for uses that are not permitted by applicable laws or ordinances; or (d) do not adversely affect or delay the Construction Period for more than one hundred and eighty (180) days.

12. Agreement to Issue Extension of Term of Lease. Upon execution of this Agreement, the State will request the Department of the Attorney General to prepare the Extended Lease. Pursuant to Act 149, the Extended Lease shall reflect an extension term of thirty (30) years. The Extended Lease will cover the aggregate extended term between March 6, 2026 through March 5, 2056, and will provide that in the event that the Lessee fails to successfully perform, timely satisfy or fully comply with any of the terms and conditions of this Agreement



and/or approved Development Plan, the Extended Lease term will be rescinded and the Lease, together with its current termination date of March 5, 2026, will be reinstated. The State and Lessee will promptly sign the Extended Lease when the form thereof is approved by the Department of the Attorney General and Lessee.

13. Default: State's Right to Terminate Agreement and/or Rescind Lease Extension. The State may, at its option and in its sole and absolute discretion, upon written notice to Lessee without prejudice to any other remedy or right of action, terminate this Agreement and/or rescind the Extended Lease at any time for any one of the following reasons:

A. If Lessee fails to pay rent or any part thereof or any other charge, payment or amount it is obligated to pay or that is due by Lessee under the Lease or the Extended Lease, and this failure continues for a period of more than thirty (30) days after delivery by the State of a written notice of such breach or default and demand for cure, by personal service, registered mail or certified mail to Lessee that the same is past due;

B. If Lessee fails to observe or perform any of the material covenants, terms and conditions contained in this Agreement, including but not limited to, those listed in subparagraphs (i) through (iv) herein, the Lease or the Extended Lease on the Lessee's part to be observed and performed, and such breach or default continues for a period of more than sixty (60) days after delivery by the State of a written notice of such breach or default and demand for cure, by personal service, registered mail or certified mail to Lessee of such breach or default, or if such breach or default in observance and performance of such other covenants cannot reasonably be cured within said sixty (60)-day period, then such longer time as may be required, provided that Lessee shall within said period commence such cure and thereafter diligently prosecute the same to completion within sixty (60) days thereafter;

(i) If Lessee fails to obtain any and all Federal Government, State of Hawaii (including the State Legislature if applicable), and County permits and approvals required and necessary for the completion of the approved Development Plan;

(ii) If Lessee becomes bankrupt or insolvent, or seeks protection under any provision of any bankruptcy or insolvency law or any similar law providing for the relief of debtors, or abandons the project contemplated under the approved Development Plan, or if any assignment is made of Lessee's rights hereunder for the benefit of creditors;

(iii) If the Subject Property or any part of the Subject Property, appurtenances or improvements are used, or intended to be used in any manner to commit or to facilitate the commission of a crime; or

(iv) If the Lessee is not in compliance with Section 171-192, HRS.

Any default under this Agreement, the Lease, or Extended Lease by the Lessee which has not been cured within the applicable time period shall be cause by the State to terminate this Agreement and rescind the Extended Lease, and the State shall have all other rights and remedies provided herein, in the Lease or the Extended Lease, as applicable, or as otherwise provided by law with respect to a default by the Lessee under this Agreement, the

Lease or Extended Lease. Provided further, a default under this Agreement shall cause the Extended Lease to be void ab initio.

Upon any early termination by the State under this Agreement, this Agreement shall terminate on the date as provided for in the State's written notice and shall become null and void except as to any provisions which expressly survive termination in this Agreement. The Extended Lease shall be rescinded and Lessee shall not be entitled to an extension of the term of the Lease for the Subject Property pursuant to Act 149. Upon the effective date of termination and without waiving any other remedies to which it may be entitled, the State shall be entitled to: (1) prosecute any claim against Lessee for fees, costs or other payments or charges that accrued prior to the effective date of termination, including the interest thereon; and (2) assert any claim that it may have against Lessee for any damages, costs, or expenses, suffered or incurred by the State, which obligations shall survive termination of this Agreement, the Lease and/or Extended Lease.

14. Non-Waiver. The waiver by the State of any breach by the Lessee of any term, covenant, or condition of this Agreement or the Lease, nor of the State's right of re-entry for breach of covenant, nor of the State's right to declare and enforce a forfeiture for any breach, nor of the failure of the State to insist upon strict performance of any term, covenant, or condition, or to exercise any option conferred, in any one or more instances, shall not be construed as a waiver or relinquishment of any such term, covenant, condition or option.

15. Liens. Lessee will not commit or suffer any act or neglect whereby the Subject Property or any improvements thereon or the estate or interest of the State therein shall at any time during the term of this Agreement become subject to any attachment, judgment, lien, charge or encumbrance whatsoever, and will indemnify, defend and hold the State harmless from and against all loss, cost or expense with respect thereto (including reasonable attorney's fees). If any lien for work, labor, services or materials done for or supplied to the Subject Property by, on behalf of, or through Lessee is filed against the Subject Property, Lessee shall have sixty (60) days from the date of filing in which to cause such lien to be discharged of record by payment, deposit, bond or other reasonably satisfactory alternative approved by the State, as the case may be. The foregoing covenants of Lessee shall survive expiration or any early termination of this Agreement.

16. Expenses to be Paid by Lessee. Pursuant to Act 149, Lessee shall pay all costs and expenses incurred by the State in connection with the processing, analyzing and negotiating of any request for a lease term extension and document, and the development agreement.

17. Observance of Laws, Ordinances and Regulations. Each party hereto, and their respective officers, agents, assigns, employees, consultants and/or contractors, or persons acting for or on its behalf, shall at all times observe and comply with all applicable laws, ordinances, rules and regulations of the federal, state, county and municipal governments, now in force or which may be in force.

18. Archaeology: Historic Preservation. Lessee, including any agent or contractor, upon encountering any previously unidentified archaeological resources such as artifacts, shell,



bone or charcoal deposits, human remains, or any historic properties or burials, on the Subject Property, will immediately stop all work and contact the State DLNR Historic Preservation Division in compliance with Chapter 6E, HRS.

19. Recordation. This Agreement shall not be recorded. However, upon request by either the State or Lessee, a short form memorandum of this Agreement shall be prepared by the State and shall be duly executed and acknowledged in proper form and may be placed of record so as to give public notice as to the existence of this Agreement.

20. Notices. Any notice or demand to the State or Lessee provided for or permitted by this Agreement shall be given in writing and: (a) mailed as registered or certified U.S. mail, return receipt requested, postage prepaid, addressed to such party at its post office address herein specified or the last such address designated by such party in writing to the other; or (b) delivered personally within the respective County as applicable, the State or to any officer of Lessee, or (c) sent by facsimile transmission (herein "Fax") to the Fax number, if any, of such party as specified herein or such other Fax number designated by such party in writing to the other. Any such written notice shall be deemed conclusively to have been received at the time of such personal delivery, or receipt of Fax, or at 4:00 p.m. on the third business day after being deposited with the United States mail as aforesaid, as follows:

If to the State:

Board and Department of Land and Natural
Resources
1151 Punchbowl Street, Room 220
Honolulu, Hawaii 96813
Attention: Chairperson
Fax No.: (808) 587-0390

And a copy to:

Department of the Attorney General
Attention: Land/Transportation Division
Kekuanaoa Building
465 South King Street, Suite 300
Honolulu, Hawaii 96813
Fax No.: (808) 587-2999

If to Lessee:

69 Railroad, LLC
40 Kamehameha Avenue
Hilo, Hawaii 96720
Attention: James McCully
Fax No.: (808) 933-7001

21. Status Reports; Lessee Cooperation. Lessee acknowledges that the State's staff may be required to periodically report to the Board during the term of this Agreement on the status of Lessee's progress of the approved Development Plan incorporated in this Agreement. Lessee agrees to reasonably assist and meet with the State's staff in making such reports, including without limitation, upon commercially reasonable advance written notice, having a



representative available to answer questions at any meetings of the Board at which such reports are given, providing information that State's staff reasonably requests for the purposes of making such reports, and being available to meet with the State's staff prior to the time such reports are made.

22. Costs and Attorney's Fees. Lessee shall pay all costs, including reasonable attorney's fees, and expenses which may be incurred by or paid by the State in enforcing the covenants, terms and conditions of this Agreement, including, but not limited to, recovering possession of the Subject Property, or in the collection of delinquent fees, taxes, assessments, and any and all other amounts or charges. In case the State shall, without any fault on its part, be made a party to any litigation commenced by or against the State, the Lessee shall pay all costs, including reasonable attorney's fees, and expenses incurred by or imposed on the State.

23. Construction and Amendment. This Agreement has been negotiated extensively by Lessee and the State with and upon the advice of their respective counsel, all of whom have participated in the drafting hereof. Consequently, the usual rule of construction shall not be applicable, which provides that the document is to be interpreted against the interests of the party who has primarily drafted the language in an agreement. No amendment or modification of this Agreement or any Exhibit attached hereto shall be effective unless incorporated in a written instrument executed by and between the State and Lessee; provided however, this Agreement may only be amended or modified with the approval of the Chairperson. The State and Lessee agree to execute such other documents and instruments as may be reasonably requested by the other party and as may be necessary to effectuate the terms and conditions of this Agreement.

24. Governing Law. This Agreement shall be construed, interpreted, and governed by the laws of the State of Hawaii.

25. Ratification. To the extent of any conflict or inconsistency between the terms of this Agreement and the terms of the Lease, the terms of this Agreement shall govern and control to the extent only where there is any conflict or inconsistency with regard to the terms and conditions that Lessee must satisfy and successfully perform in order for it to be issued an extension of the term of the Lease by the State for the Subject Property pursuant to Act 149.

26. Headings. The article and paragraph headings herein are inserted only for convenience and reference and shall in no way define, describe or limit the scope or intent of any provision of this Agreement.

27. Partial Invalidity. In case any one or more of the provisions contained herein shall, for any reason, be held to be invalid, illegal or unenforceable in any respect which is not material to the transactions contemplated hereunder, such invalidity, illegality or unenforceability shall not affect any other provisions of this Agreement, but this Agreement shall be construed as if such invalid, illegal or unenforceable provision or provisions had never been contained herein.

28. Assignment. Any and all rights under this Agreement granted to Lessee may not be sold, assigned, conveyed or transferred in any manner by Lessee to any other person or entity.



Notwithstanding the foregoing, however, Lessee may assign this entire Agreement and the development rights provided for herein to an institutional lender or lenders providing financing for the development of all or any portion of the Subject Property as security for the repayment of such loan or loans, with the prior written consent of the State.

29. State's Right to Assign. It is specifically understood and agreed that the State (through the Board) may convey or otherwise transfer the Subject Property subject to the terms and conditions of this Agreement, and assign this entire Agreement (including, but not limited to the assignment of any lease issued or to be issued under this Agreement) to any other department or agency of the State of Hawaii, subject to such department or agency affirmatively agreeing to accept such Subject Property subject to the terms and conditions of this Agreement and assuming all undertakings and obligations under this Agreement and/or the extension of the term of the Lease issued or to be issued under this Agreement. Upon any such assignment, Lessee agrees to attorn to the assignee on the terms and conditions of this Agreement, the lease, or any other lease that is part of this Agreement.

30. Development Rights. Upon the expiration or any early termination of this Agreement by the State for whatever reason, all development rights, permits, approvals, plans, specifications, etc. prepared by or for Lessee in connection with Lessee's efforts relating to the proposed development and improvements to be constructed at the Subject Property or under this Agreement shall, to the extent owned by and/or assignable by Lessee, vest with and become a part of the Subject Property of the State. At the request of the State, Lessee shall do all things reasonably necessary to assign to the State, all such development rights, permits, approvals, plans, specifications, etc.

31. DLNR. Notwithstanding anything herein to the contrary, it is specifically understood and agreed by the parties that: (a) the "State" as used herein means the Department of Land and Natural Resources, State of Hawaii, and the "Chairperson" as used herein means the Chairperson of the Board of Land and Natural Resources; (b) whenever action is taken, or required to be taken by the "State" under this Agreement (e.g., approve, disapprove, consent or otherwise), it shall be deemed to be an act of only the Board of Land and Natural Resources, and shall not be construed to be the act of any other department or agency of the State of Hawaii. Lessee acknowledges and accepts the responsibility for obtaining all entitlements and governmental approvals from the other applicable governing boards, agencies and departments of the State, County and Federal Government.

32. No Third-Party Beneficiaries. No third-party beneficiaries are intended by this Agreement, and the terms and provisions of this Agreement shall not give rise to any right in third parties to enforce the provisions of this Agreement.

33. Nondiscrimination. The use of the Subject Property shall not be in support of any policy which discriminates against anyone based upon race, creed, color, national origin or a physical handicap.

34. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original and all of which taken together shall constitute one and the same instrument.



35. Time is of the Essence. Time is of the essence in all provisions of this Agreement.

36. Exhibits. The following exhibits are attached to this Agreement and deemed incorporated herein this Agreement by reference:

Exhibit A: Map of Subject Property

Exhibit B: Lessee's Development Plan dated January 28, 2022.

[THE NEXT PAGE IS THE SIGNATURE PAGE.]



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


Approved and Executed by the Chairperson pursuant to authority granted by the Board of Land and Natural Resources at its meeting held on February 11, 2022.

STATE OF HAWAII

By _____
SUZANNE D. CASE
Chairperson of the Board of Land and
Natural Resources

Board

APPROVED AS TO FORM:




Name: J. Chua

Deputy Attorney General

Dated: July 15, 2022

69 RAILROAD, LLC
a Hawaii limited liability company

By 

Name: Michael Sheumaker
Title: Managing Member

Lessee



STATE OF HAWAII)
) SS.
COUNTY OF HAWAII)

On this 1ST day of AUGUST, 2022, before me personally appeared MICHAEL SHENMAKER to me personally known, who, being by me duly sworn, did say that he/she is the MANAGING MEMBER of **69 RAILROAD, LLC** a Hawaii limited liability company, and that the foregoing instrument was signed in behalf of said company by authority of its OPERATING AGREEMENT, and the said MICHAEL SHENMAKER acknowledged said instrument to be the free act and deed of said company.



Lei S. Kaniunmoe
Notary Public, State of Hawaii

LEI S. KANIUNMOE

My commission expires: 8/15/2025

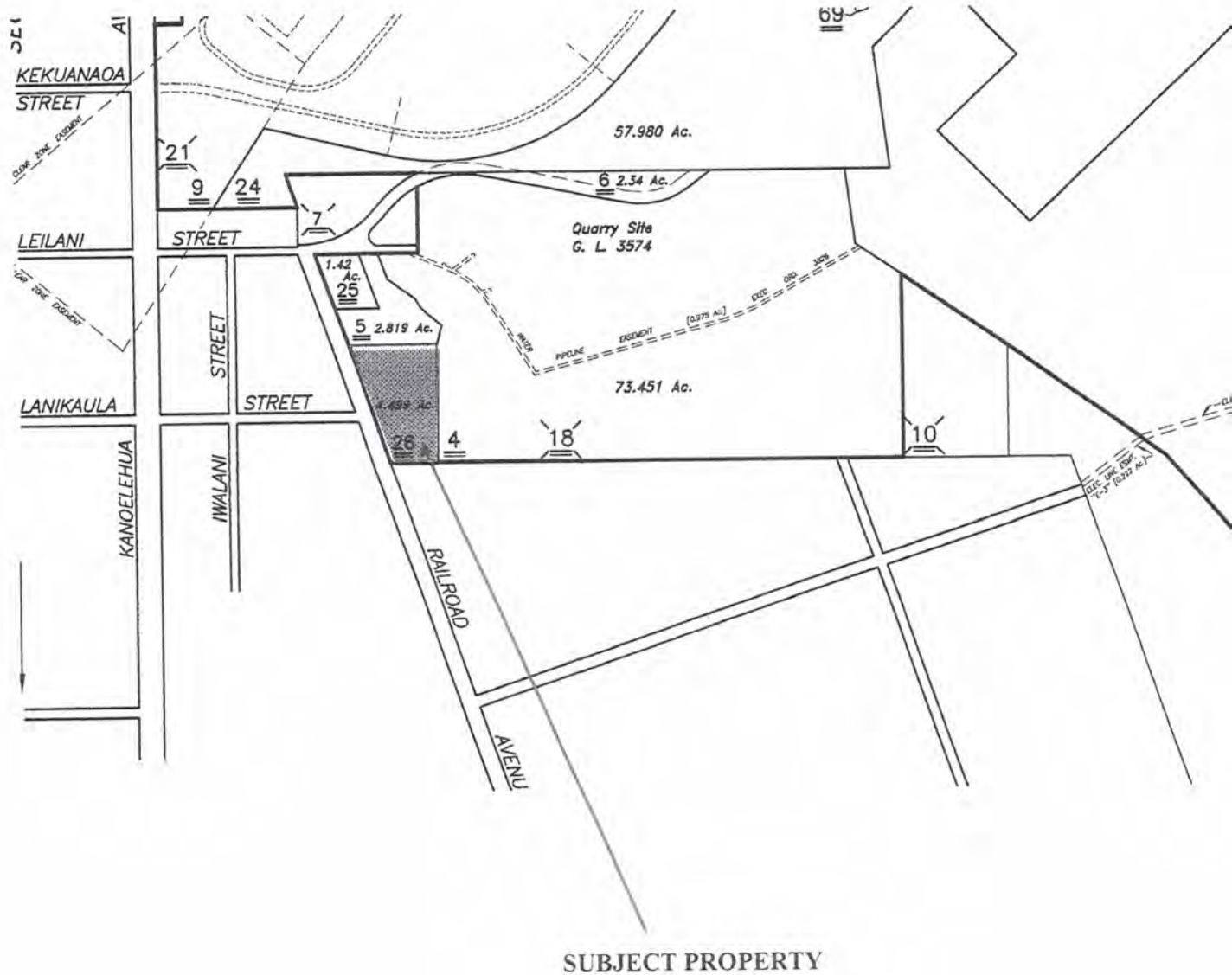


Doc. Date: UNDATED # Pages: 35
Notary Name: Lei S. Kaniunmoe Third Circuit
Doc. Description: DEVELOPMENT AGREEMENT FOR 69 RAILROAD LLC
Lei S. Kaniunmoe 8/1/2022
Notary Signature Date
NOTARY CERTIFICATION



EXHIBIT A

TMK: (3) 2-1-012:026



PRELIM. APPR'D.
Department of the
Attorney General

Development Agreement 2022

69 Railroad, LLC

Enclosure B

EXHIBIT B
LESSEE'S DEVELOPMENT PLAN DATED JANUARY 28, 2022



Revised 1/28/2022

TO: STATE OF HAWAII/DLNR

FROM: 69 RAILROAD LLC (General Lease #3624)

PROPERTY: 69 RAILROAD AVENUE, HILO, HAWAII

LIST OF SUBSTANTIAL IMPROVEMENT for Ground Lease Extension

			Expected Completion date
Asphalt repave A/F area	Loeffler Construction, Inc.	\$78,281.50	12/31/2022
Asphalt repave Bldg A	Loeffler Construction, Inc.	\$91,040.40	12/31/2022
Asphalt repave Bldg. B - front	Loeffler Construction, Inc.	\$75,612.90	12/31/2022
Asphalt repave Bldg A – end including paving gravel parking area	Loeffler Construction, Inc.	\$26,625.50	12/31/2022
New rain gutters	Big Aina Gutter	\$10,998.00	5/31/2022
Solar Panels	Provision Solar, Inc.	\$35,998.00 (House) \$109,998.00 (Wagner/HBH) \$61,998.00 (Tracey/Lamar) \$40,998.00 (Jim/James)	3/31/2022 3/31/2022 3/31/2022 3/31/2022
Wastewater Improve	Loeffler Construction, Inc.	\$62,868.30	12/31/2022
Fencing	Island wide fencing	\$32,420.00	5/31/2022
	Total Improvements	\$626,838.60	

EXHIBIT B



Enclosure B

LOEFFLER CONSTRUCTION, INC.

License # AC-12017

General Engineering Contractor

PROPOSAL

1451 Kinoole Street, Hilo, HI 96720

Ph: (808) 935-4422 Fax: (808) 961-5588

Hanna Wilson (hanna@McCullyworks.com)

Date: November 13 2016

Project: 69 Railroad Ave
Affordable Storage

We hereby submit specifications and estimates for:

Description	COST
see photos 1 thru 11 for area to be paved Parking area fronting Affordable storage office grade area prep for new 2 1/2" thick asphalt pavement approx 2529 sqft pave mix #4 asphalt @ 2 1/2" thick	\$26,625.00
grade for new asphalt pavement between storage lockers pave @ 2" thick mix #4 total area 10898 sqft see photos	\$36,780.00
total	\$63,405.00

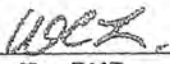
Terms of Payment: in full upon completion of job

NET 15 DAYS

A finance charge of 1.5% per month (18% per annum) will be charged on all past due accounts.

Submitted by

Accepted by


William C. Loeffler-RME

Ronald W. Loeffler

Dated: _____

Quote is based on the prices of materials today. Quote is good for 30 days.

PRELIM. APPR'D.
Department of the
Attorney General

Enclosure B

License # AC-18017

Ph: (808) 935-4422 Fax: (808) 961-5588

PROPOSAL

Hanna Wilson (hanna@mccullyworks.com)

Date: November 13 2018

Project; 69 railroad ave
Hamakua warehouse (pro vision)

We hereby submit specifications and estimates for:

Description	COST
Pavement is in average crack fill and saw cut bad areas see photos 12,13,15,16,17,18, remove bad spots of asphalt repave and compact pressure wash and clean pavement apply two coats of liquid road seal master sealer restripe parking stalls photo 14 remove asphalt regrade and compact repave with 2" asphalt area from Big island tomy Ramos has been resurfaced before with a 1" overlay it is falling apart recommended to remove this area and repave with 2" asphalt seal coat with two coats and restripe 12320 sqft of pavement to be removed and replace 55940 sqft of seal coat and <u>restripe</u>	 \$46,200.00 \$27,970.00
tax	\$3,090.00
total	\$77,260.00

Terms of Payment: in full upon completion of job

NET 15 DAYS

A finance charge of 1.5% per month (18% per annum) will be charged on all past due accounts.

Submitted by

Accepted by

William C. Loeffler-RME

Ronald W. Loeffler

Dated:

Quote is based on the prices of materials today. Quote is good for 30 days.



Enclosure B

LOEFFLER CONSTRUCTION, INC.
License # AC-18017
General Engineering Contractor

PROPOSAL

1451 Kinoole Street, Hilo, HI 96720
Ph: (808) 935-4422 Fax: (808) 961-5588

Hanna Wilson (hanna@mcculirworks.com)

Date: November 13 2018

Project; Fronting Big Island Moving Bldg

We hereby submit specifications and estimates for:

Description	COST
recommended to remove all asphalt fronting bldg aprox 11680 sqft regrade and pave with 2 1/2" asphalt restripe for parking stalls	\$43,800.00
recommend to install two shallow sumps 6' dia by 8' deep with cover help move water off pavement in to a drainage sump (none on site) Hamakua side driveway approach will be included regrade parking lot to new shallow sumps (puna and back side of warehouse are in good shape)	\$16,000.00
tax	\$2,491.00
total	\$62,291.00

Terms of Payment: in full upon completion of job

NET 15 DAYS

A finance charge of 1.5% per month (18% per annum) will be charged on
all past due accounts.

Submitted by

Accepted by

William C. Loeffler-RME
Ronald W. Loeffler

Dated: _____

Quote is based on the prices of materials today. Quote is good for 30 days.

PRELIM. APPR'D.
Department of the
Attorney General

Enclosure B

LOEFFLER CONSTRUCTION, INC.
License # AC-18017
General Engineering Contractor

PROPOSAL

1451 Kinoole Street, Hilo, HI 96720
Ph: (808) 935-4422 Fax: (808) 961-5588

Hanna Wilson (hanna@mccullyworks.com)

Date: November 13 2018

Project: 69 railroad ave
Gravel area behind Pacific island floo

We hereby submit specifications and estimates for:

Description	COST
Photo 17 gravel area behind Pacific Island Floors regrade area for new asphalt parking lot pave with 2" asphalt mix #4 install parking stalls as needed total area to be paved 7005 sqft	\$21,015.00
tax	\$875.00
total	\$21,890.00

Terms of Payment: in full upon completion of job

NET 15 DAYS

A finance charge of 1.5% per month (18% per annum) will be charged on
all past due accounts.

Submitted by

Accepted by

Wol 2-
William C. Loeffler-RME

Ronald W. Loeffler

Dated: _____

Quote is based on the prices of materials today. Quote is good for 30 days.

PRELIM. APPR'D
Department of the
Attorney General

Enclosure B

ROBERT L. DUYAO
DBA BIG AINA GUTTER
HCR 2 BOX 6632
KEAAU, HI 96749

PHONE: 938-2717

LIC# c-20145

Proposal

PROPOSAL NO. 1766		DATE 10/26/18
BID NO.		ARCHITECT
TO McCULLY WORKS	WORK TO BE PERFORMED AT: 69 RAILROAD AVE.	
ADDRESS 40 KAMEHAMEHA AVE.	ADDRESS	
CITY, STATE HILO, HI 96720	CITY, STATE	
PHONE NO 936-8942	DATE OF PLANS	

We hereby propose to furnish the materials and perform the labor necessary for the completion of Installation of 6" O.G.
seamless aluminum pre-painted rain gutters & 4" PVC downspouts.

Area below for additional description and/or drawings:

All material is guaranteed to be as specified, and the above work to be performed in accordance with the drawings and specifications submitted for above work and completed in a substantial workmanlike manner for the sum of *****EIGHT THOUSAND SIX HUNDRED FOURTY
& 00/100*****Dollars (\$ 8,640.00) with payments to be made as follows: Net due upon completion
(unless previous arrangements have been made). 1 1/2% interest per month will
be charged on over due accounts.

Any alteration or deviation from above specifications involving extra costs will be executed only upon written order and will become an extra charge over and above the estimate. All agreements contingent upon strikes, accidents or delays beyond our control.

Respectfully submitted

Per

Note - This proposal may be withdrawn by us if not accepted within _____ days.

ACCEPTANCE OF PROPOSAL

The above prices, specifications, and conditions are satisfactory and are hereby accepted. You are authorized to do the work as specified. Payments will be made as outlined above.

Signature _____

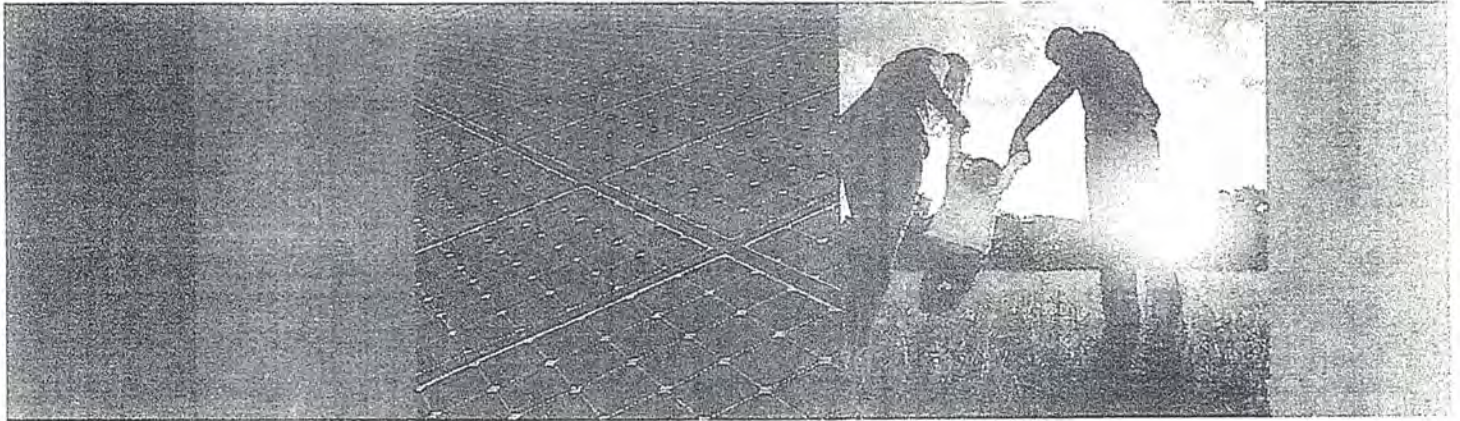
Date _____

Signature _____

By edarr 9450

FREEMAN APP'D
Department of the
Attorney General

Enclosure B



Jim McCully
69 Railroad Ave, LLC
Solar Electric System Proposal with Tesla Powerwall
Batteries

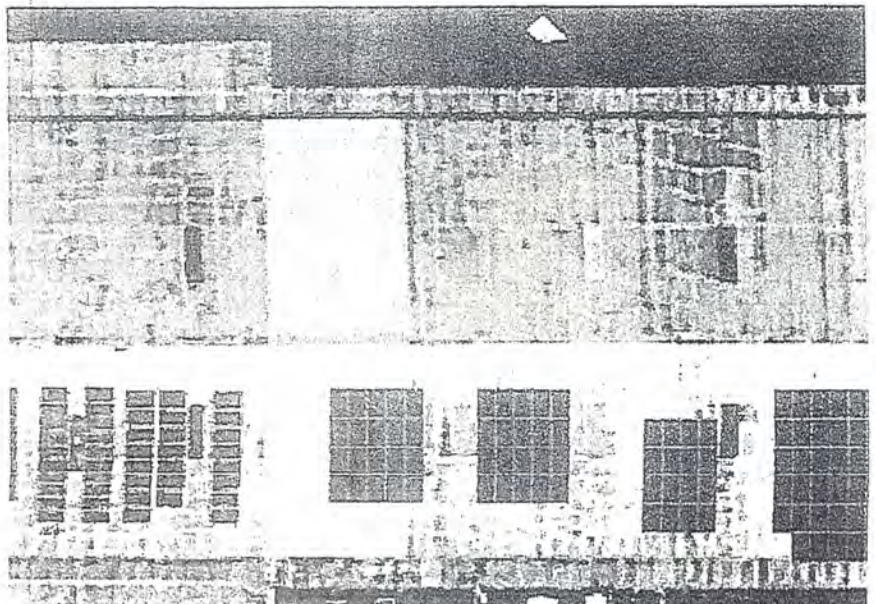
Dec 13, 2018

Prepared For:
Jim McCully

jwmccully54@gmail.com

Project Site:
69 Railroad Ave.
Hilo, HI 96720

Prepared By:
Kim Keahiolalo
(808) 969-3281
kim@pvthawaii.com



PRELIM. APPR'D.
Department of the
Attorney General

Enclosure B

Introduction

Problem:
Costly,
Polluting
Energy

Based on your recent history of electricity use, we estimate that over the next 20 yrs, you will:

- PURCHASE & CONSUME 1,500,560 kWhs of electricity
- PAY \$885,430 to Hawaii Electric Light Co Inc¹
- EMIT 2,594,479 lbs of climate changing CO₂²

Our Proposed Solution...

Install a 37.950 DC kW (STC) Solar PV system to cleanly generate 70 % of the electricity you consume.

Install a 54.0 kWh electric energy storage system to enhance the value of your solar system and optionally provide back-up power.

See following pages for solution details.

About Us

**ProVision
Solar, Inc.**
Electrical Contractor C-26351

"The smartest investment we ever made and we have ProVision Solar and their excellent staff to thank for it." Bob Williams, Pepe'ekeo, HI

Estimated Solution Results

As a result of the proposed project, we estimate that over the next 20 yrs you will:

- PURCHASE & CONSUME 23,141 kWh per year from Hawaii Electric Light Co Inc
- SAVE \$461,850 in electric utility costs.
- ELIMINATE 1,701,325 lbs of climate changing CO₂ emissions

Your utility savings will pay for the project AND provide long term investment returns.



This proposal is valid for 30 days. The next step is signing the necessary agreements so we can begin the engineering and permitting processes. Contact me with any questions you may have about this proposal or the process ahead. As your personal representative, your complete satisfaction is my only goal. Sincerely,

Kim Keahiolalo
(808) 969-3281 | kim@pvthawaii.com

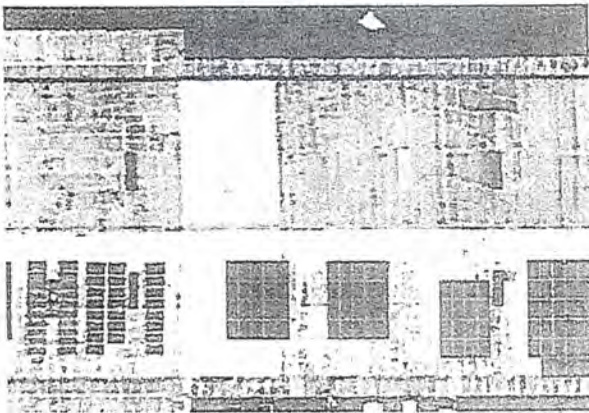
¹ Estimate based on your reported electric use and current utility rates, with an assumed annual bill inflation rate of 5.0 % applied.

² EPA's Home Electricity Use

Your Custom Solar Electric System

ProVision Solar, Inc. will install a complete, turn-key solar electric (PV) system at your site. All engineering, materials, and installation labor are included. ProVision Solar, Inc. will coordinate and procure all necessary building permits, and administer the system's interconnection to the utility grid. We back our work with a 5 year warranty on workmanship. We've selected high quality equipment from reputable manufacturers who provide both material and performance warranties. Your system also comes with monitoring, allowing you to see how your system is performing.

PV System Specifications



Primary System Components

138 REC Solar REC275TP PV Module
 1 SolarEdge Technologies SE6000H-US (240V) Inverter
 2 SolarEdge Technologies SE3800H-US (240V) Inverter
 2 SolarEdge Technologies SE7600H-US (240V) Inverter
 138 SolarEdge Technologies P300 DC Optimizer

Rated Size of Proposed System

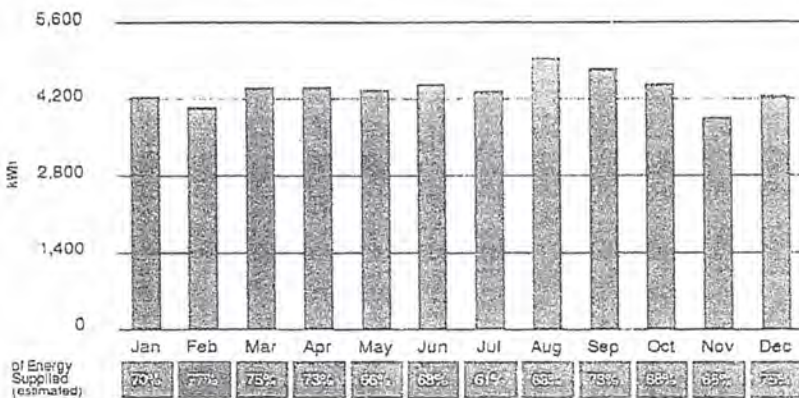
Nameplate: 37.950 DC kW (STC)
 AC Rating: 34.510 AC kW (CEC)

Estimated Energy Production

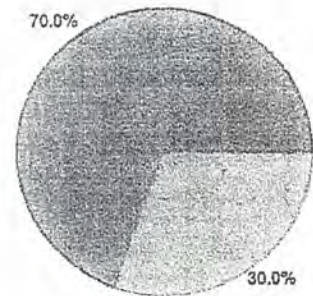
First Year: 52,829 kWh
 Lifetime: 1,007,864 kWh

System Performance

Solar Electricity Generated (estimated)



Post Solar Energy Mix



Enhance and Protect Your Solar Investment with Energy Storage

Solar's Vulnerability

Adding a solar photovoltaic system to a home or business is a great way to lower one's energy costs over decades of electricity usage. However, solar buyers are vulnerable to changes in net-metering policies that reduce the savings of going solar. Wide adoption of solar power over the past several years has caused utilities to see significant reductions to the loads they serve during the day. As the sun goes down, demand for electricity skyrockets. Hawaii Electric Light Co Inc has modified net-metering, encouraging you to consume all the solar electricity you produce. One way to do this is to install batteries with your PV system.

Your Energy Storage System

Battery Components

4 Tesla POWERWALL-2-AC

Storage Capacity: 54.0 kWh

Available Power: 20.000 kW

Energy Stored and Discharged

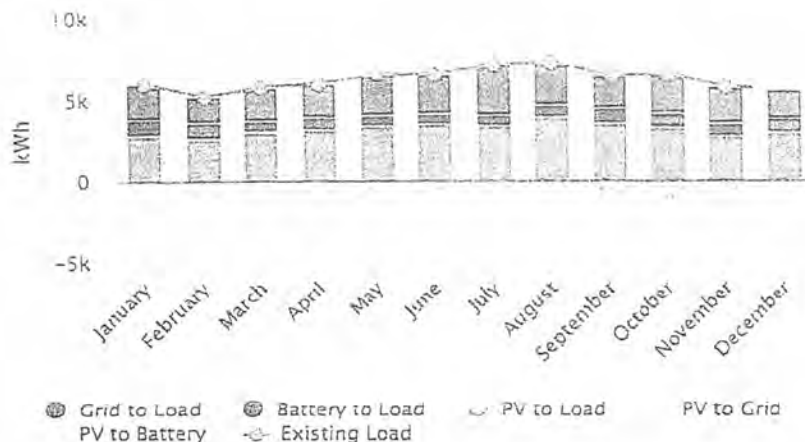
Year 1: 9,819 kWh

Lifetime: 192,487 kWh

Predicted Lifetime: 10 years

The Energy Storage Solution

While state and utility policies can reduce the economic benefits of going solar, they also provide economic drivers for adopting energy storage systems. An energy storage system allows one to store surplus solar energy during the day and use it on demand to decouple your PV system from any of the policies that utilities may implement. Today's energy storage systems are more like modern appliances – sleek and powered by smart electronics and software. These batteries are safe, reliable, durable, efficient, and maintenance-free for long periods of heavy use. Additional benefits may include backup power for critical loads when the grid fails – giving you clean, quiet, no-maintenance backup power as an alternative to a gas generator.



System Operation

Store & Discharge Strategy: Load Shifting - Maximize Self-Consumption

Storage system is used to maximize the amount of solar energy that's directly consumed on site. The battery charges whenever PV production exceeds consumption and discharges to meet load whenever consumption exceeds production.

Utility Savings and Project Costs

Utility bill savings are the primary benefit of the proposed solar PV system. Your first year savings (shown at right) will grow each year that utility rates escalate. Owning your electricity generation fixes your costs, and entitles you to generous incentives.

Projected	Without Solar	\$26,778
Year 1	After Solar	\$11,546
Utility Bills ¹	Yr 1 Savings	\$15,232

Competitive loan financing enables you to get the project installed without large upfront expense and your utility savings cover the monthly loan payments. The table below details the costs, incentives, and payment scenario(s).

Payment Scenarios	Pay Cash	Unsecured Loan 4.500 % APR
Contract Price ²	\$204,772.50	\$204,864.93
PV Price Rate:	\$5.40 / Watt (STC)	\$5.40 / Watt (STC)
Federal Tax Credit ³	-\$61,431.75	-\$61,459.48
State Tax Credit - Yr 1	-\$71,670.38	-\$71,702.73
Tax Savings from Depreciation - Yr 1	-\$54,293.38	-\$54,317.89
Net Cost - Year 1	\$17,376.99	\$17,384.83
Net PV Price Rate:	\$0.46 / Watt (STC)	\$0.46 / Watt (STC)
Down Payment	As specified in contract	\$20,000.00
Estimated Monthly Payments After Installation	None	\$780.72/mo for 20 years
Year 1 Solar Payments	None	\$9,368.64
Year 1 Savings (est)	\$15,232	\$5,863
At Next Tax Filing	Pocket tax credits	Pay tax credits to finance company (\$61,459.48 federal + state \$71,702.73)

Assumptions and Notes:

¹ Electric utility bill projections assume energy purchased from Hawaii Electric Light Co Inc using rate General - Non-Demand (G) (current rate) for the "without project" case and rate General - Non Demand, Customer Grid Supply Plus (G-CGSP) for the post-project case.

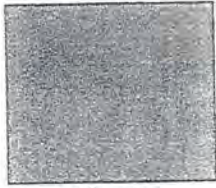
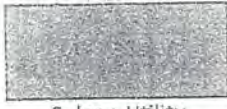
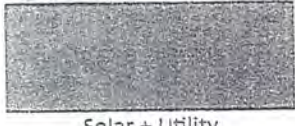
² Financing may include fees that increase cost.

³ As the purchaser and owner of a solar photovoltaic system, you may qualify for certain federal, state, local or other rebates, tax credits or incentives (collectively, "incentives"). If you have any questions as to whether and when you qualify for any incentives and the amount of such incentives, please consult and discuss with your personal tax or financial advisor. ProVision Solar, Inc. makes no representation, warranty or guaranty as to the availability or amount of such incentives.

About Unsecured Loan: No pre-payment penalty. No lien on home.

Investment Analysis

The utility bill savings from your solar system can produce attractive long-term investment returns. To assess the value of your investment, we projected your total energy costs with and without the proposed solar system over the expected system's lifetime of 20 yrs. The analysis factors in expected changes in utility rates and solar production over time.

Scenario	Continue with Utility	Go Solar Pay Cash	Go Solar Unsecured Loan Pay Down Principal with Incentives
Lifetime Costs and Savings for the expected solar system lifetime of 20 yrs	<p>Savings: \$0</p>  <p>Utility Cost</p>	<p>Savings: 46 %</p> <p>\$411,062.00</p>  <p>Solar + Utility</p>	<p>Savings: 39 %</p> <p>\$347,087.00</p>  <p>Solar + Utility</p>
Levelized Cost of Energy	\$0.57 / kWh	\$0.31 / kWh	\$0.33 / kWh
Net Present Value (NPV) ¹	\$0	\$330,279.87	\$297,422.96
Internal Rate of Return (IRR)	N/A	27.89 %	557.98 %
Pre-tax IRR ²	N/A	37.69 %	610.59 %
Upfront Project Payment	N/A	\$204,772.50	\$20,000.00
Payback ³	N/A	1.2 yrs	0.2 yrs

Assumptions and Notes:

Analysis assumes annual electric bill inflation of 5.0 %. Actual savings may vary. ProVision Solar, Inc. is not responsible for substantial changes to savings as a result of your utility making significant changes to rates or rate structures (tiers, seasons, time-of-use).

¹ Net present value is the total value of the investment to you in today's dollars. Future cash flows are discounted 2.0 % annually and summed.

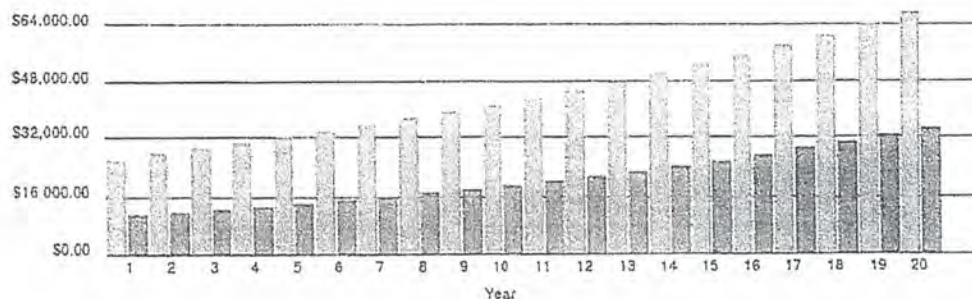
² Pre-tax IRR converts all expenses to pre-tax dollars in an effort to compare solar rates of return to other forms of investments that quote rates of return before they are taxed, such as for stocks. Pre-tax IRR is merely illustrative. If no upfront investment is made, there is no return.

³ Payback refers to the period of time required for the benefits of an investment to "repay" the sum of the original investment. If no upfront investment is made, there is nothing to payback. Payback does not consider the value of benefits beyond the initial payback period, which are significant as utility energy prices escalate.

25 Year Scenario Detail: Pay Cash

Annual Electric Cost Comparison

Utility Bills - Current Utility Bills - Proposed



Project Cash Flow Detail

Cash Flow Summary	Estimated Utility Bill w/o Project	Estimated Utility Bill with Project	Customer Payments ¹	Estimated O&M Expenses	Incentives (Received after Purchase) ²	Depreciation	Tax Deductions ³	Estimated Net Savings	Estimated Cumulative Savings
Upfront			(\$204,773)					(\$204,773)	(\$204,773)
Year 1	(\$26,778)	(\$11,546)		(\$2,048)	\$133,102	\$54,293	\$804	\$201,384	(\$3,389)
Year 2	(\$28,117)	(\$12,246)		(\$2,109)			\$828	\$14,590	\$11,201
Year 3	(\$28,522)	(\$12,989)		(\$2,172)			\$853	\$15,214	\$26,416
Year 4	(\$30,999)	(\$13,775)		(\$2,238)			\$879	\$15,865	\$42,280
Year 5	(\$32,548)	(\$14,607)		(\$2,305)			\$905	\$16,542	\$58,822
Year 6	(\$34,176)	(\$15,487)		(\$2,374)			\$932	\$17,247	\$76,069
Year 7	(\$35,885)	(\$16,419)		(\$2,445)			\$950	\$17,981	\$94,051
Year 8	(\$37,679)	(\$17,404)		(\$2,518)			\$989	\$18,746	\$112,797
Year 9	(\$39,563)	(\$18,446)		(\$2,594)			\$1,019	\$19,543	\$132,339
Year 10	(\$41,541)	(\$19,549)		(\$2,672)			\$1,049	\$20,370	\$152,709
Year 11	(\$43,618)	(\$20,662)		(\$2,752)			\$1,081	\$21,235	\$173,993
Year 12	(\$45,799)	(\$21,884)		(\$2,835)			\$1,113	\$22,193	\$196,187
Year 13	(\$48,089)	(\$23,181)		(\$2,920)			\$1,147	\$23,135	\$219,322
Year 14	(\$50,493)	(\$24,553)		(\$3,007)			\$1,181	\$24,115	\$243,436
Year 15	(\$53,016)	(\$26,003)		(\$3,097)			\$1,217	\$25,135	\$268,571
Year 16	(\$55,669)	(\$27,535)		(\$3,190)			\$1,253	\$26,196	\$294,767
Year 17	(\$58,452)	(\$29,155)		(\$3,286)			\$1,291	\$27,302	\$322,069
Year 18	(\$61,375)	(\$30,868)		(\$3,385)			\$1,329	\$28,452	\$350,521
Year 19	(\$64,444)	(\$32,679)		(\$3,486)			\$1,369	\$29,648	\$380,169
Year 20	(\$67,666)	(\$34,592)		(\$3,591)			\$1,410	\$30,893	\$411,062

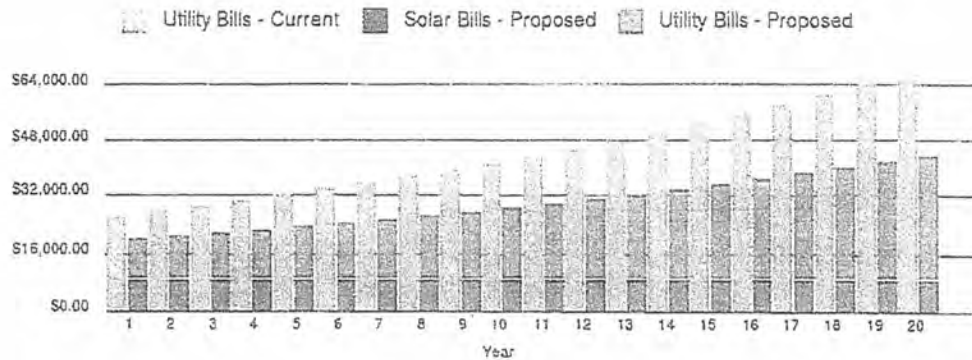
¹ Includes upfront purchase payments to seller less applicable rebates, and ongoing finance payments, if applicable.

² May include state and/or federal tax credits, performance based incentives, and/or renewable energy credits (RECs)

³ Solution may increase deductions for interest payments and maintenance cost, but lower utility bill deductions due to smaller bills.

25 Year Scenario Detail: Unsecured Loan

Annual Electric Cost Comparison



Project Cash Flow Detail

Cash Flow Summary	Estimated Utility Bill w/o Project	Estimated Utility Bill with Project	Customer Payments ¹	Estimated O&M Expenses	Incentives (Received after Purchase) ²	Depreciation	Tax Deductions ³	Estimated Net Savings	Estimated Cumulative Savings
Upfront			(\$20,000)					(\$20,000)	(\$20,000)
Year 1	(\$25,778)	(\$11,546)	(\$70,828)	(\$2,046)	\$133,162	\$54,318	\$804	\$130,640	\$110,640
Year 2	(\$28,117)	(\$12,246)	(\$9,369)	(\$2,109)			\$828	\$8,221	\$115,862
Year 3	(\$29,522)	(\$12,989)	(\$9,369)	(\$2,172)			\$853	\$8,246	\$121,707
Year 4	(\$30,999)	(\$13,775)	(\$9,369)	(\$2,238)			\$879	\$8,486	\$128,203
Year 5	(\$32,548)	(\$14,607)	(\$9,369)	(\$2,305)			\$905	\$7,173	\$135,377
Year 6	(\$34,175)	(\$15,487)	(\$9,369)	(\$2,374)			\$932	\$7,679	\$143,255
Year 7	(\$35,885)	(\$16,419)	(\$9,369)	(\$2,445)			\$960	\$8,813	\$151,868
Year 8	(\$37,679)	(\$17,404)	(\$9,369)	(\$2,518)			\$989	\$9,377	\$161,245
Year 9	(\$39,563)	(\$18,446)	(\$9,369)	(\$2,594)			\$1,019	\$10,173	\$171,418
Year 10	(\$41,541)	(\$19,549)	(\$9,369)	(\$2,672)			\$1,049	\$11,001	\$182,419
Year 11	(\$43,619)	(\$20,662)	(\$9,369)	(\$2,752)			\$1,081	\$11,917	\$194,336
Year 12	(\$45,799)	(\$21,884)	(\$9,369)	(\$2,835)			\$1,113	\$12,825	\$207,161
Year 13	(\$48,089)	(\$23,181)	(\$9,369)	(\$2,920)			\$1,147	\$13,766	\$220,927
Year 14	(\$50,493)	(\$24,553)	(\$9,369)	(\$3,007)			\$1,181	\$14,745	\$235,673
Year 15	(\$53,018)	(\$26,003)	(\$9,369)	(\$3,097)			\$1,217	\$15,766	\$251,439
Year 16	(\$55,669)	(\$27,535)	(\$9,369)	(\$3,190)			\$1,253	\$16,823	\$268,267
Year 17	(\$58,452)	(\$29,155)	(\$9,369)	(\$3,286)			\$1,291	\$17,933	\$286,200
Year 18	(\$61,375)	(\$30,868)	(\$9,369)	(\$3,385)			\$1,329	\$19,093	\$305,293
Year 19	(\$64,444)	(\$32,679)	(\$9,369)	(\$3,486)			\$1,369	\$20,290	\$325,562
Year 20	(\$67,666)	(\$34,592)	(\$9,369)	(\$3,591)			\$1,410	\$21,525	\$347,087

¹ Includes upfront purchase payments to seller less applicable rebates, and ongoing finance payments, if applicable.

² May include state and/or federal tax credits, performance based incentives, and/or renewable energy credits (RECs)

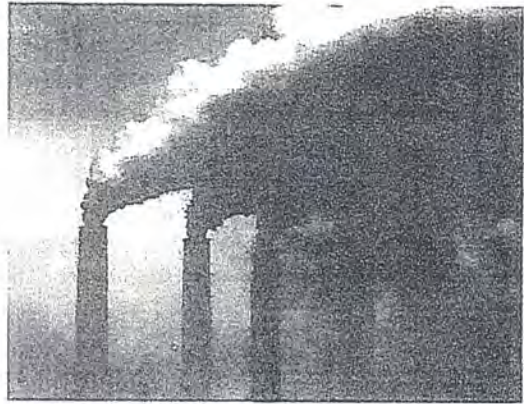
³ Solution may increase deductions for interest payments and maintenance cost, but lower utility bill deductions due to smaller bills.

Environmental Benefits

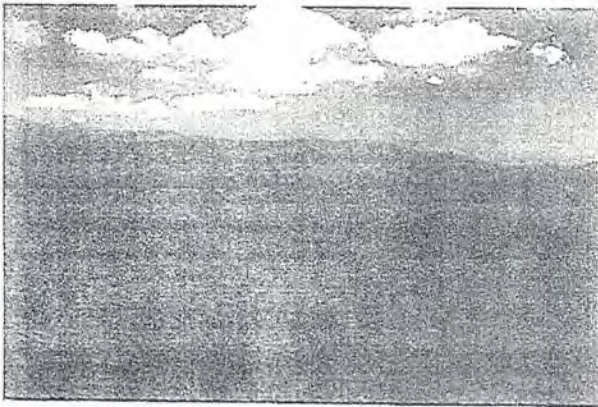
Solar electric systems provide significant environmental benefits over their lifetimes. Depending on location and system specifics, the energy produced by the system in the first 0.5 - 1.5 years will fully offset the energy used to produce and install that system. The energy produced by the system over its remaining 20 yrs lifespan will offset the negative effects of fossil fuel energy. The examples here illustrate some comparisons.

Sources:

- <http://cleantechnica.com/2013/12/26/solar-energy-payback-time-charts/>
- <http://www.epa.gov/cleanenergy/energy-resources/calculator.html#results>



Equivalent to eliminating the burning of 39,146 coal lbs / yr!



Equivalent to sequestering as much carbon as 29.85 forested acres / yr.



Equivalent to eliminating 86,745 vehicle miles / yr.



Proposal

Proposal No. 19157

Sheet No. 01

Date: July 23, 2019

Proposal Submitted To	Work To Be Performed At
Name: 69 Railroad, LLC	Name: Affordable Storage
Address: 40 Kamehameha Ave. Hilo, HI 96720	Address: 69 Railroad Ave. Hilo, HI 96720
Ph. (808) 936-8942 - Hanna Email: hanna@mccullyworks.com	TMK: (3) 2-1-012:026 Helco# 2010 1326 7467 <i>A/F nite hite</i>

We hereby propose to furnish all materials and perform all the labor necessary for the completion of:

4.1 KW Roof Mounted Customer Grid Supply Plus (CGS Plus) Photovoltaic System

Includes:

- 14 - 295 Watt Solar World Panels
- 14 - IQ Enphase Micro Inverters
- Solar Mount System
- Engineered Drawings
- Permits
- CGS Plus Application

All material is guaranteed to be as specified, and the above work to be performed in accordance with the drawings and specifications submitted for above work and completed in a substantial workmanlike manner for the sum of:

Subtotal	\$11,000.00
Tax	\$487.00
Total	\$11,487.00

With Payments Made As Follows:

Acceptance of Proposal:	
Non-Refundable Engineering and Design Fee:	\$1,100.00
Progress Payment - HELCO Acceptance of CGS Application:	\$0.00
Progress Payment - Issued County Permits/ Start of Work:	\$4,643.50
Final Payment - After Final Inspection/ Completion of Project:	\$5,743.50

Any alteration or deviation

from above specifications involving extra costs, will be executed only upon written orders, and will become an extra charge over and above the estimate. All agreements contingent upon strikes, accidents, or delays beyond our control. Owner to carry fire, hurricane and other necessary insurance upon above work.

Respectfully submitted: Yamamoto Electrical Services, LLC. ~

Note - This proposal may be withdrawn by us if not accepted within 30 days.

ACCEPTANCE OF PROPOSAL

The above prices, specifications and conditions are satisfactory and are hereby accepted. You are authorized to do the work as specified. Payment will be made as outlined above.

Name (print) _____

Signature _____

Date _____



Enclosure B



Proposal

Proposal No. 19158

Sheet No. 01

Date: July 23, 2019

Proposal Submitted To	Work To Be Performed At
Name: 69 Railroad, LLC	Name: Affordable Storage - Office
Address: 40 Kamehameha Ave. Hilo, HI 96720	Address: 69 Railroad Ave. Hilo, HI 96720
Ph. (808) 936-8942 - Hanna Email: hanna@mccullyworks.com	TMK: (3) 2-1-012:026 Helco# 2010 1326 7483

We hereby propose to furnish all materials and perform all the labor necessary for the completion of:

11.8 KW Roof Mounted Customer Grid Supply Plus (CGS Plus) Photovoltaic System

Includes:

- 40- 295 Watt Solar World Panels
- 40 - IQ Enphase Micro Inverters
- Solar Mount System
- Engineered Drawings
- Permits
- CGS Plus Application

All material is guaranteed to be as specified, and the above work to be performed in accordance with the drawings and specifications submitted for above work and completed in a substantial workmanlike manner for the sum of:

Subtotal	\$31,000.00
Tax	\$1,373.00
Total	\$32,373.00

With Payments Made As Follows:

Acceptance of Proposal:

Non-Refundable Engineering and Design Fee:	\$1,100.00
Progress Payment - HELCO Acceptance of CGS Application:	\$0.00
Progress Payment - Issued County Permits/ Start of Work:	\$15,086.50
Final Payment - After Final Inspection/ Completion of Project:	\$16,186.50

Any alteration or deviation

from above specifications involving extra costs, will be executed only upon written orders, and will become an extra charge over and above the estimate. All agreements contingent upon strikes, accidents, or delays beyond our control. Owner to carry fire, hurricane and other necessary insurance upon above work.

Respectfully submitted: Yamamoto Electrical Services, LLC.

Note - This proposal may be withdrawn by us if not accepted within 30 days.

ACCEPTANCE OF PROPOSAL

The above prices, specifications and conditions are satisfactory and are hereby accepted. You are authorized to do the work as specified. Payment will be made as outlined above.

Name (print) _____

Signature _____

Date _____



Enclosure B

Taialoha Co., Inc.
101 Aupuni St., Suite 165 Hilo, HI 96720
Phone: 808-333-3393
License: BC-11277

PROPOSAL/CONTRACT

July 31, 2019

To: 69 Railroad, LLC

Phone: 808-960-2953

Address/Job Location: 69 Railroad Hilo, HI 96720

Taialoha Co., Inc. hereby submits the following proposal and conditions for improvements to various buildings and wastewater system located at the above address:

Scope of work:

1. Wastewater improvements, Design;
Determine current capacity and demand
Select and supervise civil engineer
Completion of Plans: 10/1/2019
Cost: \$15,000.00
2. Installation of Improvements;
Manage permit application and approval process
Provide all necessary materials and labor
Construction to commence within 30 days of issuance of required permits
Improvements to be completed in 30 days
Cost: \$45,000.00

Total Contract Price:

\$60,000.00

Payments: 50% payable upon signing proposal, 50% payable at the completion of job

Authorized Signature: ZENDO KERN, RME

All material is guaranteed to be as specified. All work to be completed in a professional manner in accordance to standard practices. Any alteration or deviation from the above specifications involving extra costs will be executed only upon written orders, and will become an extra charge over and above the estimate. All agreements contingent upon strikes, accidents or delays beyond our control. Owners to carry fire and other necessary insurance. Our workers are fully covered by Worker's Compensation insurance.

Acceptance of this proposal

The above prices, specifications and conditions are satisfactory and are hereby accepted. We are authorized to do the work as specified. Payments will be made as outlined above.

Note: This proposal may be withdrawn if not accepted within 30 days.

Signature: _____

Date: _____



Enclosure B

PLEASE DO NOT
DATE DOCUMENT

LAND COURT SYSTEM) REGULAR SYSTEM
Return by Mail () Pickup () To:

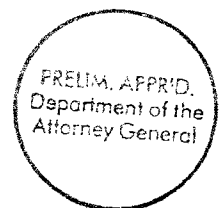
Total Number of Pages:
Tax Map Key No. (3) 2-1-012:026

SECOND EXTENSION OF GENERAL LEASE NO. S-3624

THIS AGREEMENT, made and entered into this _____ day
of _____, 20____, by and between the
State of Hawaii, hereinafter referred to as the "Lessor," by its
Board of Land and Natural Resources, hereinafter referred to as
the "Board," and 69 RAILROAD, LLC, a Hawaii limited liability
company, whose address is 69 Railroad Avenue, Unit A-19 Hilo,
Hawaii 96720, hereinafter referred to as the "Lessee."

WITNESSETH:

WHEREAS, General Lease No. S-3624 dated March 6, 1961,
was issued to Hawaiian Equipment Co., Ltd., a Hawaii
corporation, recorded in the Bureau of Conveyances of the State
of Hawaii in Liber 4323, Page 247, and after mesne assignment
said general lease was assigned to 69 Railroad, LLC, a Hawaii
limited liability company, recorded aforesaid as Document No.
2003-249681, consent given by the State of Hawaii, Board of Land
and Natural Resources by instrument executed October 23, 2003
recorded aforesaid as Document No. 2003-249682; and



WHEREAS, said lease was extended by that certain unrecorded Extension of General Lease No. S-3624 dated March 29, 2016; and

WHEREAS, the Board of Land and Natural Resources is authorized under the provisions of sections 171-191 and 171-192, Hawaii Revised Statutes and Act 149, Session Laws of Hawaii 2018, to modify or eliminate certain restrictions of a lease to the extent necessary to qualify the lease for mortgage lending or guaranty purposes; and

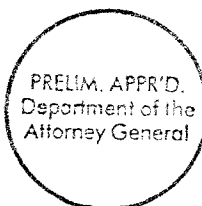
WHEREAS, the Board of Land and Natural Resources at its meeting held on February 11, 2022, agreed to this second extension of General Lease No. S-3624 with the additional provisions as hereinafter contained.

NOW, THEREFORE, in consideration of the rents, covenants and conditions contained herein and in General Lease No. S-3624, and as authorized under the provisions of sections 171-191 and 171-192, Hawaii Revised Statutes and Act 149, Session Laws of Hawaii 2018, the Lessor hereby extends the term of the Lease for an additional thirty (30) years, from March 6, 2026, up to and including March 5, 2056, upon the following terms and conditions:

1. The terms, conditions, and covenants contained in General Lease No. S-3624 dated March 6, 1961, shall continue to remain in full force and effect until the termination date of this Second Extension of General Lease No. S-3624, and provided, further, that where any of the provisions of this Second Extension of General Lease No. S-3624 conflict with the provisions of the General Lease No. S-3624 dated March 6, 1961, as amended, the General Lease shall govern and control.

2. The Lessee shall pay to the Lessor at the Office of the Department of Land and Natural Resources, Honolulu, Oahu, State of Hawaii, an annual rental as provided below, payable in advance, without notice or demand:

Effective March 6, 2026, the sum of ONE HUNDRED FIFTY FIVE THOUSAND AND NO/100 DOLLARS (\$155,000.00) in semi-annual installments on March 6th and September 6th, each and every year during the term, from March 6, 2026, up to and including March 5, 2036.



Effective March 6, 2036, the sum of ONE HUNDRED NINETY FIVE THOUSAND AND NO/100 DOLLARS (\$195,000.00) in semi-annual installments on March 6th and September 6th, each and every year during the term, from March 6, 2036, up to and including March 5, 2046.

The annual rental reserved shall be reopened and redetermined for the period from March 6, 2046 to March 5, 2056.

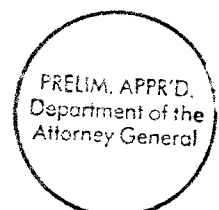
Determination of rent upon reopening. The rental for any ensuing period shall be the fair market rental at the time of reopening. At least six months prior to the time of reopening, the fair market rental shall be determined by:

(1) An employee of the Department of Land and Natural Resources qualified to appraise lands; or

(2) A disinterested appraiser whose services shall be contracted for by the Board. Lessee shall be promptly notified of the determination by certified mail, return receipt requested, and provided with the complete appraisal prepared by the Board or the Board's appraiser. The determination shall be deemed received by Lessee on the date the Lessee signs the return receipt or three (3) days after mailing, whichever occurs first. Provided that if the Lessee does not agree upon the fair market rental as determined by the Board's appraiser, the Lessee must notify the Lessor in writing within thirty (30) days after receipt of the determination, and the Lessee shall appoint the Lessee's own appraiser whose name and address shall be stated in the notice. The Lessee shall provide the Board with the complete appraisal prepared by the Lessee's appraiser. Each party shall pay for its own appraiser. If the Board's and the Lessee's appraisers do not agree upon the lease rental, the Lessee and the Board shall, subject to section 171-17, Hawaii Revised Statutes, as may be amended from time to time, resolve the matter. The costs of mediation and arbitration shall be borne equally by the Lessee and the Board.

In the event that the fair market rental is not finally determined before the reopening date, the Lessee shall pay the rental as determined by the Board's appraiser until the new rent is determined, and the rental paid by Lessee shall then be subject to retroactive adjustments as appropriate.

Should the Lessee fail to notify Lessor in writing



IN WITNESS WHEREOF, the STATE OF HAWAII, by its Board of Land and Natural Resources, has caused the seal of the Department of Land and Natural Resources to be hereunto affixed and the parties hereto have caused these presents to be executed the day, month, and year first above written.

STATE OF HAWAII

Approved by the Board of
Land and Natural Resources
at its meeting held on
February 11, 2022.

By _____
SUZANNE D. CASE
Chairperson
Board of Land and
Natural Resources

APPROVED AS TO FORM:

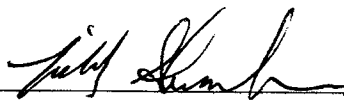
LESSOR



JULIE H. CHINA
Deputy Attorney General

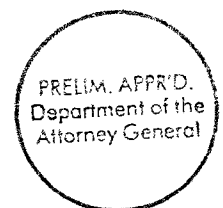
Dated: July 15, 2022

69 RAILROAD, LLC, a Hawaii
limited liability company

By 

Michael Shewmaker
Its Managing Member

LESSEE

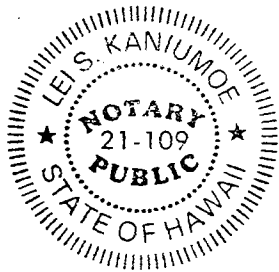


STATE OF HAWAII

COUNTY OF HAWAII

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) SS.
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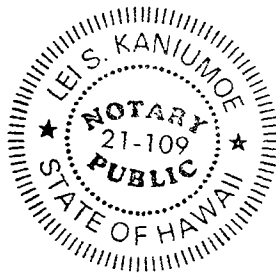
On this 1st day of AUGUST, 2022,
before me personally appeared MICHAEL STEINMAKER,
to me personally known, who, being by me duly sworn or affirmed,
did say that such person executed the foregoing instrument as
the free act and deed of such person, and if applicable in the
capacity shown, having been duly authorized to execute such
instrument in such capacity.



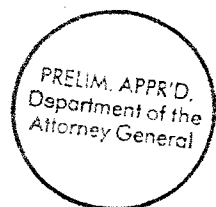
Lei S. Kaniunmoe
Notary Public, State of Hawaii

LEI S. KANIUNMOE

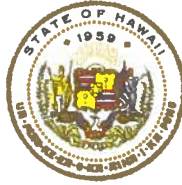
My commission expires: 8/15/2025



Doc. Date: UNDATED # Pages: 6
Notary Name: Lei S. Kaniunmoe Third Circuit
Doc. Description: SECOND EXTENSION OF
GENERAL LEASE S-3624
Lei S. Kaniunmoe 8/1/2022
Notary Signature Date
NOTARY CERTIFICATION



DAVID Y. IGE
GOVERNOR OF HAWAII



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

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

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

August 17, 2022

Mr. Michael Shewmaker
69 Railroad, LLC
69 Railroad Ave. #A19
Hilo, Hawaii 96720

Dear Mr. Shewmaker:

Subject: Documents for: (i) Development Agreement for a 30-Year Extension of Lease Term and (ii) Second Extension of Lease, General Lease No. S-3624, 69 Railroad, LLC, Lessee; Waiakea, South Hilo, Hawaii, Tax Map Key: (3) 2 -1-012: 026.

On August 3, 2022, we received the Development Agreement and Second Extension of Lease documents signed by 69 Railroad, LLC. We are writing to let you know that we are going to hold these documents pending disposition of Land Division's request to the Board of Land and Natural Resources (Board) that it require the Second Extension of Lease to be updated to the terms and conditions of the current lease extension document used by the Department of the Attorney General (ATG).

As you know, the Board has devoted significant attention to the issue of whether public auction leases such as yours can be updated to the current terms and conditions used by the ATG for lease extensions under Act 149 Session Laws of Hawaii 2018. The issue was addressed in the Board action of February 11, 2022, Item D-2, that approved your lease extension. After further consultation with the ATG, it has been determined that the Board may require that public auction leases be updated to current ATG terms and conditions, to the extent permitted by law, as a condition of approving the extension.

Accordingly, we are preparing a staff submittal to apprise the Board of this development and request that it direct the updating of your lease to current ATG terms and conditions for the 30-year extension period commencing March 6, 2026. We will send you a copy of the staff submittal once it is confirmed on the agenda. Although the staff request is to update the form of the Second Extension of Lease, we are holding the Development Agreement in case the Board's action requires revision of that document as well.

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Mr. Michael Shewmaker
69 Railroad, LLC
August 17, 2022
Page 2

If you have any questions in the meantime, please feel free to contact the Hawaii District Land Office at (808) 961-9590. Thank you.

Sincerely,

Russell Tsuji

Russell Y. Tsuji
Land Division Administrator

cc: Ronald Kim, Esq.

Enclosure C

Mr. Russell Y. Tsuji
Land Division Administrator for
State of Hawaii Department of Land and
Natural Resources
P.O. Box 621
Honolulu, HI 96809
Via email: Russell.Y.Tsuji@hawaii.gov

August 30, 2022

Re: August 17, 2022 Land Division Letter re: Development Agreement and Second
Lease Extension for GL No. S-3624, 69 Railroad, LLC, Lessee (McCully &
Shewmaker)

Dear Mr. Tsuji,

I received your letter stating that the Land Division has decided to postpone the Chairperson's execution of the approved and previously agreed upon Development Agreement (or "DA") and Second Extension of Lease (or "2ndEL") documents for General Lease No. S-3624 ("GL No. S-3624"). On February 11, 2022, the Board definitively and finally acted in this matter pursuant to Act 149 by unanimously authorizing the Chairperson to execute the DA and 2ndEL for my client. However, you are currently stating that you will request the Board take an unprecedented action to rescind or revisit the prior approval granted over six months ago. Act 149 and the Department's procedures only provide for the Board's authorization to execute these documents and do not allow for the Board to revisit or rescind an approval six months after the Board voted and duly authorized the Chairperson's actions, absent a material default to perform by a lessee. The Legislature sedulously debated the merits of Act 149 and related legislation for years prior to its passage. In direct contrast to Act 219 (2012), which also addressed lease extensions and allowed for the modification of lease terms, the Legislature specifically chose not to allow the Land Division to modify the terms of a lease extended pursuant to Act 149.

Further, the Department and Land Division are estopped from upending the prior Board approval and/or changing their position on the issue of whether the terms and conditions of the 2ndEL can be "updated" to the "current" terms and conditions of a lease form approved by the Department of Attorney General ("AG"). The Attorney General and the Land Division have consistently and unequivocally stated that such an update of terms and conditions is not

Enclosure C

Mr. Russell Y. Tsuji
August 30, 2022
Page 2

permitted by law, repeatedly citing *State v Kahua Ranch, Ltd.*, 47 Haw. 28, 384 P.2d 581 (1963). Given these facts, please let me know the basis for any contrary opinions that the Department may have as to these issues of finality and estoppel or provide my client with a fully executed copy of the Development Agreement forthwith. My client has currently spent more than \$300,000.00 in effecting ongoing substantial improvements to the property in reliance upon the Board's approval. My client is anxious to complete the improvements as agreed and see the lease extension process completed. If necessary, my client will seek the vindication of its rights in Court. Please note that my client began this process in 2019 and has been harmed by the prolonged time taken to process what seems a relatively straightforward matter.

The Land Division provided my client with a copy of the Development Agreement agreed to by the parties and approved and signed by Deputy AG J. China on July 15, 2022. On or about August 2, 2022, my client hand-delivered a copy of the DA executed by my client and the Deputy AG to the Land Division. Since that date, we have been awaiting the receipt of a fully executed DA which includes the Chairperson's signature as authorized by the Board on February 11, 2022 to submit to the lender, First Hawaiian Bank. Please implement Act 149 and provide my client a copy of the DA which includes the Chairperson's signature forthwith, as the lender requires this document.

Act 149 allows for the Board to authorize lease extensions pursuant to a development agreement proposed by a lessee, and the Board definitively and finally granted this authorization at its February 11, 2022 meeting. At the February 11, 2022 meeting the discussion on the issue of whether the lease extension terms and conditions could be updated was comprehensive and robust, and we consider the matter settled with the Board's vote to extend the lease. The DA that the Land Division had negotiated and approved of, and which was executed by a Deputy AG and my client, stated the parties' mutual understanding that the Board reviewed the Development Plan at its February 11, 2022 meeting and "[t]he State granted final approval of the Development Plan and this Agreement at its meeting held on February 11, 2022, Item D-2." See ¶¶ 3.A and 3.B of the executed DA. The DA also provided that the State would request the AG to prepare the 2ndEL upon execution of the DA. See ¶ 12 of the executed DA

My client and I are concerned about what we perceive to be an aversion or reluctance towards the implementation of Act 149. It is of note that the Governor signed Act 149 in 2018, four years ago, and the Department has still only processed two applications in their entirety. The present proposal by the Land Division to have the Board revisit its prior approval seems to further confirm that perception. There are numerous other leases in the Hilo Economic District that will also be affected by this action. My clients and I understand that a lease issued by public auction cannot be updated with current terms and conditions when extended under Act 149, so please explain if or how the Department has changed its position to presently interpret such an update to be permitted by law. Please also let us know if the Department has a basis to contradict our understanding that any lease within the Hilo Community Economic District may

Enclosure C

Mr. Russell Y. Tsuji
August 30, 2022
Page 3

only be modified during the lease extension process under Act 149 to qualify the lease for a mortgage. *See* HRS § 171-192(a)(3).

In conclusion my client and I expect that the Department will comply with and implement Act 149 and the February 11, 2022 Board authorization by having the Chairperson execute the Development Agreement and Second Lease Extension. My clients are requesting a fully executed copy of the Development Agreement forthwith for their lender.

Very truly yours,

LAW OFFICES OF YEH & KIM

A handwritten signature in dark ink, appearing to read 'RONALD N.W. KIM', with a stylized, sweeping flourish at the end.

RONALD N.W. KIM

Cc: James McCully (client), Gov. D. Ige, DLNR Chair S. Case, DLNR 1st Deputy R. Masuda, BLNR Hawaii member R. Smith, Sen. L. Inouye, Sen R. Kouchi, Speaker S. Saiki, Rep. D. Tarnas, Rep. C. Todd, Rep. M. Nakashima, Rep. R. Onishi

Enclosure C

Holly T. Shikada
Attorney General for the State of Hawaii'i
425 Queen Street
Honolulu, HI 96813
Via email: Holly.T.Shikada@hawaii.gov

August 30, 2022

Re: August 17, 2022 Land Division Letter re: Development Agreement and Second Lease Extension for GL No. S-3624, 69 Railroad, LLC, Lessee

Dear Ms. Shikada,

Please see the enclosed letter from the Land Division to my client, 69 Railroad, LLC, dated August 17, 2022, stating that the Land Division has decided to postpone the Chairperson's execution of the previously agreed upon and approved Development Agreement ("DA") and Second Extension of Lease ("2ndEL") documents for General Lease No. S-3624 ("GL No. S-3624"), and my client's response. As stated in my client's response, further postponing the execution of the DA and 2ndEL raises significant concerns about finality and estoppel and continues to cause my client to suffer damages. I am contacting you to initiate a direct dialogue concerning these issues.

On February 11, 2022, the Board of Land and Natural Resources ("Board") definitively acted pursuant to Act 149 by unanimously authorizing the Chairperson to execute the DA and 2ndEL under the express understanding that the terms and conditions of the 2ndEL would not be "updated" with what the Land Division cites as the "current" lease terms and conditions of a form used by your office.¹ Over six months after this approval the Land Division apparently solicited an opinion from your Department which contradicted the State's previously ensconced position that the terms and conditions of the 2ndEL could not be "updated" pursuant to Act 149. The Land Division cites this contrary opinion as a basis to delay executing the DA while it seeks to bring the lease extension before the Board again to request the Board's approval to update the terms and conditions of the 2ndEL. Even if, solely for the purposes of argument, the Land

¹ Act 149 allows for changes to the terms and conditions of an extended lease for the purposes of a lessee's mortgage, or to comply with "rules" of the Board. As you know, the Board has no such rules which provide for uniform terms and conditions of a lease. The "current" terms and conditions for a lease extension on the form used by your Department are not administrative rules for the Board.

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Ms. Holly T. Shikada
August 30, 2022
Page 2

Division was able to bring the matter before the Board again and to “update” the terms and conditions of the 2ndEL, that would not change the terms and conditions of the DA. During the process of negotiating the DA, the Land Division required that the terms and conditions of the DA conform to what it called the State’s standard form. As my client informed the Land Division, my client needs the fully executed DA for its lender. My client has incurred significantly increased construction costs due to the numerous delays in processing the DA and expended substantial sums in reliance upon and since the Board’s February 11, 2022 approval.

For purposes of background, the Legislature passed Act 149 in 2018 following years of debates and proposed legislation with the express intent and purpose of Act 149 of serving the best interests of the public and fulfilling the State’s fiduciary duties by enhancing state revenues and promoting the public’s social, environmental, and economic well-being through extending leases on public lands within the Hilo Community Economic District (“HCED”) with lessees who commit to making substantial improvements. The Legislature found that the State has an “enormous influence on the vision, economic development, and overall success of the East Hawaii community”, that state-owned lands within the area had been deteriorating, and that Act 149 had the potential “to revive public lands, resulting in more tax revenue and community revitalization”, to provide for efficient and effective improvements and economic opportunities. To this end, Act 149 articulated a straightforward process- a lessee could apply for a lease extension by proposing a development plan with substantial improvements. The Board would review the plan and, if appropriate, authorize the Chairperson to execute a development agreement and lease extension.

However, this simple process articulated by Act 149 has been thwarted, as only two leases have been extended since the passage of Act 149 in 2018. 69 Railroad, LLC, initially applied for a lease extension in 2019. The parties did not initially agree about the fair market rental value for the extended lease term and reached an agreement on rental value in mediation which concluded in October 2020. My client patiently awaited the matter being presented to the Board for nearly a year thereafter. Finally, in October 2021, my client worked with the Land Division on a draft submission to the Board to authorize the Chairperson to execute a DA and 2ndEL, approve the mediated rental values, and approve certain subleases. After the matter was not included in the next Board agenda, the Land Division subsequently informed my client that it had “put a hold” on processing lease extension applications until 2022, due to purported concerns about disparate treatment of lessees based on the Land Division’s acknowledgement and understanding that leases issued by public auction could not be updated pursuant to Act 149.

Instead of requesting the Board’s authorization for the Chairperson to execute a DA and 2ndEL, the Land Division presented its rationale for not implementing Act 149 to the Board at its January 14, 2022 meeting. At that time the Land Division unequivocally claimed that the terms and conditions of GL No. S-3624 could not be updated, citing *State v. Kahua Ranch, Ltd.*, 47 Haw. 28, 384 P.2d 581 (1963) to assert that not updating the terms and conditions of GL No. S-3624 could lead to “disparate treatment” and that lease extensions should not be processed until Act 149 was legislatively amended. At the January 14, 2022 Board meeting the Board

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Ms. Holly T. Shikada
August 30, 2022
Page 3

considered the Land Division's submission but ultimately decided that it should implement Act 149 as it exists, rather than delay processing applications for lease extensions under Act 149 until the Land Division could persuade the Legislature to amend Act 149.

Accordingly, the Land Division subsequently presented a submittal requesting that the Board authorize the Chairperson to execute a DA and 2ndEL for GL No. S-3624 at the Board's February 11, 2022 meeting. The Land Division's submittal once again unequivocally stated that the terms and conditions of GL No. S-3624 could not be updated, and the Board engaged in another robust discussion of the issue at that meeting. As previously stated, the Board ultimately unanimously decided to authorize the Chairperson to execute the DA and 2ndEL at this meeting.

Since that Board authorization, my client has worked with the Land Division and Attorney General's office to agree to the terms and conditions of the DA while expending over \$300,000 on substantial improvements to the premises in reliance on the Board's authorization. In early June 2022, the Land Division let my client know that your office had approved of the form of the DA, as it conformed with the State's standard form for a Development Agreement. My client received a copy of the DA executed by Deputy Attorney General Julie China. On August 2, 2022, my client returned a copy of the DA execute by my client as well to the Land Division, expecting to receive a fully executed copy of the DA that included the Chairperson's signature shortly thereafter. Instead, over two weeks later, my client received the enclosed letter from Mr. Tsuji.

As explained in the response to Mr. Tsuji, having the Board revisit its prior approval at the present juncture raises significant concerns about finality and estoppel. Act 149, nor any other law we are aware of, would allow the Land Division to reassess its position six months after the Board has authorized a lease extension under that law and seek to have the Board modify its prior action. My client has expended funds and continued with substantial improvements on the premises in good faith, relying upon the Board's duly authorized action. We have asked Mr. Tsuji for clarification of the statements and positions adopted in his letter, but also would like your Department to be directly involved in this discussion, as Mr. Tsuji cited a changed opinion from the Attorney General's office as the present impetus for further delaying the lease extension process.

Very truly yours,

LAW OFFICES OF YEH & KIM

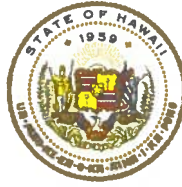


RONALD N.W. KIM

Cc: client

Enclosure C

DAVID Y. IGE
GOVERNOR OF HAWAII



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

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
LAND DIVISION

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

August 31, 2022

Ron Kim, Esq.
Law Offices of Yeh & Kim
505 Kilauea Ave. #B
Hilo, Hawaii 96720-2830

Dear Mr. Kim:

Subject: Development Agreement and Second Extension of Lease Pursuant to Act 149 Session Laws of Hawaii 2018, General Lease No. S-3624, 69 Railroad, LLC, Lessee; Waiakea, South Hilo, Hawaii, Tax Map Key: (3) 2 -1-012: 026.

We acknowledge receipt of your letter dated August 30, 2022 regarding the subject matter. While we understand your client's concerns about returning to the Board of Land and Natural Resources (Board) for a possible amendment of its approval of your lease extension, we believe we have a public trust obligation to apprise the Board at an open, public meeting of their discretion to include updated lease terms for the extension period that are consistent with both Hawaii law (i.e., Hawaii Revised Statutes (HRS) 171-36(a)(5) and (6)) and the Department of the Attorney General's (ATG) interpretation of the *Kahua Ranch* case relating to extensions of public auction leases of ceded lands under Act 149 Session Laws of Hawaii 2018. It is our view that Act 149 provides Legislative authorization to include appropriate updated lease terms, and the *Kahua Ranch* case does not preclude the Board from doing so.

Your client's lease is one of the first public auction leases¹ to be considered for extension under Act 149. Extending your client's lease on its outdated terms would preclude the State from sharing in sublease rents² and in the consideration paid for any future lease assignment,³

¹ Other applications approved by the Board were for directly negotiated leases and each of those leases was updated to the Board's current standard terms and conditions.

² As noted in the Board action of February 11, 2022, Item D-2, your client reported 11 subleases on the lease premises of General Lease No. S-3624 with a combined total annual rent of over \$517,000 (inclusive of common area maintenance fees).

³ Calculations we ran recently for a hypothetical assignment of one the State leases situated on public trust lands (i.e., ceded lands) at a significant sales price estimated by a lessee showed the public trust beneficiaries such as the

Enclosure C

Ron Kim, Esq.
Law Offices of Yeh and Kim
August 31, 2022
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and would also require the State to accept ownership of all improvements at the end of the lease term, even if they have outlived their useful lives and was in poor or dilapidated condition. The Board's authority to participate in sublease rents and charge a premium for a lease assignment under certain circumstances has long been established law under Section 171-36, HRS, and the Board has a public trust obligation to incorporate modern and statutorily-required lease terms.

You and your client (and any other interested person) will have an opportunity testify at the Board meeting when the matter is taken up. We will let you know when the matter is confirmed on the Board agenda.

Sincerely,

Russell Tsuji

Russell Y. Tsuji
Land Division Administrator

cc: Governor David Y. Ige
Chairperson Suzanne D. Case
First Deputy Robert K. Masuda
Hawaii Board Member Riley W. Smith
Senator Lorraine R. Inouye
Senate President Ronald D. Kouchi
House Speaker Scott K. Saiki
Representative David A. Tarnas
Representative Chris Todd
Representative Mark M. Nakashima
Representative Richard H.K. Onishi
Mr. James McCully

Office of Hawaiian Affairs and the Department of Land and Natural Resources could receive a significant portion of the sales proceeds (on ceded lands) in the range of multimillion dollars.

Enclosure C

DAVID Y. IGE
GOVERNOR



HOLLY T. SHIKADA
ATTORNEY GENERAL

VALERIE M. KATO
FIRST DEPUTY ATTORNEY GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
LAND TRANSPORTATION DIVISION
ROOM 300, KEKUANAO'A BUILDING
465 SOUTH KING STREET
HONOLULU, HAWAII 96813
Telephone No. (808) 587.2992
Fax No. (808) 587.2999

September 7, 2022

Ron Kim, Esq.
Law Offices of Yeh & Kim
505 Kilauea Avenue, #B
Hilo, HI 96720-2830

Subject: Development Agreement and Second Extension of Lease
Pursuant to Act 149 Session Laws of Hawaii 2018, General
Lease No. S-3624, 69 Railroad, LLC, Lessee; Waiakea, South Hilo,
Hawaii, Tax Map Key: (3) 2-1-012:026

Dear Mr. Kim:

This responds to your letter dated August 30, 2022, to Attorney General Holly T. Shikada regarding the above-referenced matter. General Shikada provided your letter to our division for a response.

As you know, the Land Division of the Department of the Attorney General anticipates asking the Chairperson to set this matter for an upcoming sunshine meeting, where you and your client would have the opportunity to weigh in with your position on the proposed development agreement and lease extension terms.

We have carefully reviewed the language of Act 149 in the context of State v. Kahua Ranch, Ltd., 47 Haw. 28, 384 P.2d 581 (1963) ("Kahua Ranch"), and conclude that Kahua Ranch does not preclude the Board from amending a public auction lease in order to implement the provisions of Act 149 and satisfy the State's public trust duties. In addition, while the Board did vote on February 11, 2022 to approve the original proposed development agreement and lease extension, approval was expressly "**subject to**" final review and approval by the Chairperson, authorizing her to incorporate terms that are in the public interest. Here, the Chairperson has not yet approved the proposed development agreement or the lease extension.

Very truly yours,
/s/ Daniel A. Morris
Daniel A. Morris
Deputy Attorney General

cc: Holly T. Shikada, Attorney General

Daniel A. Morris
Deputy Attorney General for the State of Hawai'i
425 Queen Street
Honolulu, HI 96813
Via email: Daniel.A.Morris@hawaii.gov

September 12, 2022

Re: September 7, 2022 Letter re: Development Agreement and Second
Lease Extension for GL No. S-3624, 69 Railroad, LLC, Lessee

Dear Mr. Morris,

I have received your letter dated September 7, 2022, responding on behalf of Attorney General Holly T. Shikada to my letter to her dated August 30, 2022. We were reaching out with the hope that your office is interested in implementing Act 149 (2018) which was duly passed by the State's Legislature and protecting the State from civil liability. I am forwarding you a letter from my client's lender which requests a fully executed lease extension agreement on or before September 19, 2022, in order to close the loan of \$750,000.00 needed to complete substantial improvements.

As stated in the lender's letter, time is of the essence. My client needs to complete substantial improvements prior to November 2022 pursuant to the Board's approval of the lease extension on February 11, 2022, which provided that my client would complete substantial improvements within approximately 10 ½ months of the Board's approval. During negotiations for the Development Agreement my client agreed with the Land Division to confirm the date of completion within 10 ½ months of the Board's approval rather than go back to the Board to get authorization for a later date. My client wants to complete substantial improvements within the agreed upon timeframe approved by the Board and needs the Chairperson's cooperation in executing the Development Agreement and Second Lease Extension, as authorized by the Board. My client will not be able to complete the substantial improvements without adequate funding and the present delays, uncertainties and/or additional terms that the Land Division has stated it will seek to add to the Second Lease Extension jeopardize the entire process.

In response to the statements in your letter and Mr. Tsuji's recent correspondence, my client and I strenuously disagree that the Land Division has the authority to halt the ongoing lease

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Mr. Daniel A. Morris
September 12, 2022
Page 2

extension process laid out in Act 149 and authorized for execution by the Board in February of this year. Further, both the Land Division and Department of Attorney General took part in negotiating and/or approving the Development Agreement before expressly approving and having a Deputy Attorney General sign the Development Agreement. We also disagree with the State's current position, directly contrary to the State's prior position on the issue, that Act 149 and/or the Kahua Ranch case allow for the amendment of the terms and conditions of the Second Lease Extension. Although the State has cited the *Kahua Ranch* case as a reason that the State could not amend the terms and conditions of the Second Lease Extension, my client's position has consistently been that Act 149 itself, and not *Kahua Ranch*, precludes changing the terms and conditions. If the Land Division seeks to upend the Board's prior approval, that action will violate precepts of finality and estoppel and my client will seek to preserve its rights using available legal remedies. My client has completed nearly half of the substantial improvements using extended lines of credit in excess of \$400,000.00 in reliance of the Board's approval to extend the Second Lease Extension, having been assured by Departmental representatives that this reliance was reasonable. 69 Railroad, LLC needed to begin substantial improvements forthwith following the Board's approval as the costs for its improvements had already substantively increased due to rising construction costs since my client applied for a lease extension in 2019.

In any event, please review the attached letter from my client's lender. As stated in that letter, my client urgently needs the Development Agreement and Second Lease Extension to be executed as interest rates are rising and the lender is not able to lock its proposed interest rate. Without this loan my client will be unable to complete substantial improvements on the subject property in exchange for a thirty-year lease extension as authorized by the Board, thwarting the intention and purpose of Act 149.

Very truly yours,

LAW OFFICES OF YEH & KIM



RONALD N.W. KIM

Cc: client, Russell Tsuji, Gordon Heit

Enclosure C



First Hawaiian Bank.

Lara Sonoda

Assistant Vice President & Commercial Banking Officer
Commercial Banking Group

69 Railroad, LLC
69 Railroad Ave
Hilo, HI 96720

September 7, 2022

Dear Mr. Shewmaker & Mr. McCully,

This letter is to confirm your approved loan request for \$750,000 with First Hawaiian Bank, with collateral property located at 69 Railroad Hilo, HI. The loan request is for the completion of improvements and renovations to the collateral property. We have entered into the documentation process and in order to close, we will need a copy of the fully executed the lease agreement between 69 Railroad, LLC and the DLNR.

Interest rates are rising and we are not able to lock in our rates, so time is of the essence. I would strongly suggest we work to close the loan with all documentation by Sept. 19th at the latest, if possible.

Mahalo,

A handwritten signature in black ink, appearing to read 'Lara Sonoda', with a stylized flourish at the end.

Lara Sonoda

Enclosure C

Daniel A. Morris
Deputy Attorney General for the State of Hawai'i
425 Queen Street
Honolulu, HI 96813
Via email: Daniel.A.Morris@hawaii.gov

September 16, 2022

Re: Submittal to Board of Land and Natural Resources for September 23, 2022 Meeting
re: Amend Prior Board Action of February 11, 2022

Dear Mr. Morris,

I received a copy of the draft submittal requesting that the Board reconsider and amend its prior action of February 11, 2022, which approved my client's request for a thirty-year lease extension¹. As stated in my prior correspondence, my client vigorously objects to this action as contrary to legal precepts of finality and estoppel. The provision in the Board's February 11, 2022 approval cited in your letter as providing the Chairperson with the discretion to upend that prior approval does not provide such authority. The provision that you cited is part of the Board's authorization for the Chairperson to approve and execute the Development Agreement and execute the Second Lease Extension pursuant to Act 149 and HRS § 171-192, subject to the terms and conditions in the submittal to the Board, standard terms and conditions of the most current development agreement and lease extension forms conforming with Act 149 and HRS § 171-192, review and approval by the Department of Attorney General, and terms and conditions the Chairperson may prescribe to serve the State's best interest. This provision does not state that the Chairperson has the discretion to request that the Board revisit its approval to revise the terms and conditions of the lease extension. Further, as the Board made its authorization to the Chairperson pursuant to Act 149 and HRS § 171-192, the terms and conditions which the Chairperson may prescribe are limited to terms and conditions consistent with that law. Act 149 and HRS § 171-192 only allow for the revisions to the terms and conditions of an extended lease as may be necessary to satisfy a lessee's lender's requirements.

We also noted that the draft submittal references an Attorney General Opinion requested by the Department of Land and Natural Resources on April 28, 2022, and delivered to the Department on July 26, 2022, as the impetus for the Department requesting that the Board revisit

¹ The Board, including the Chairperson, voted unanimously in favor of the February 11, 2022 approval.

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Mr. Daniel A. Morris
September 16, 2022
Page 2

its prior final approval. As you know, HRS § 28-3 requires that attorney general opinions are filed with the lieutenant governor, public archives, and/or supreme court library within three days of issuance and available as public records thereafter. Please provide us with a copy of this opinion forthwith as it is the basis for the proposed Board action.

Very truly yours,

LAW OFFICES OF YEH & KIM

A handwritten signature in dark ink, appearing to read 'RONALD N.W. KIM', is written over a horizontal line.

RONALD N.W. KIM

Cc: client, Holly Shikada, Russell Tsuji, Gordon Heit

Enclosure C

Law Offices of Yeh & Kim
A Limited Liability Law Company

505 Kilauea Ave. #B, Hilo, Hawai'i 96720-2830
Telephone (808) 961-0055

RONALD N.W. KIM
rkim@yehandkim.com
Of Counsel:
THOMAS L.H. YEH
tly@yehandkim.com
JOHN MUKAI
jmukai@yehandkim.com

Daniel A. Morris
Deputy Attorney General for the State of Hawai'i
425 Queen Street
Honolulu, HI 96813
Via email: Daniel.A.Morris@hawaii.gov

September 21, 2022

Re: Request for Attorney General Opinion

Dear Mr. Morris,

I have not received any response to the request in my letter dated September 16, 2022, for the Attorney General Opinion referenced in the submittal to the Board that the Department of Land and Natural Resources requested on April 28, 2022, and received on July 26, 2022. Again, HRS § 28-3 requires that attorney general opinions are to be filed with the lieutenant governor, public archives, and/or supreme court library within three days of issuance and available as public records thereafter. Please provide this Attorney General Opinion forthwith as it is the basis for the proposed Board action on September 23, 2022.

Very truly yours,

LAW OFFICES OF YEH & KIM



RONALD N.W. KIM

Cc: client, Holly Shikada

Enclosure C

LAW OFFICES OF YEH & KIM
A Limited Liability Law Company

THOMAS L.H. YEH 2341
RONALD N.W. KIM 8306
JOHN S. MUKAI 5344
505 Kilauea Avenue, Suite B
Hilo, Hawai'i 96720-3059
Phone: 808-961-0055
Email: Tly@yehandkim.com
RKim@yehandkim.com
JMukai@yehandkim.com

Attorneys for Plaintiff
69 Railroad, LLC, a Hawai'i
limited liability company

Electronically Filed
THIRD CIRCUIT
3CCV-22-0000295
20-SEP-2022
10:07 AM
Dkt. 1 CMP

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAI'I

69 RAILROAD, LLC, a Hawai'i limited
liability company,

Plaintiff,

vs.

RUSSELL TSUJI, in his official capacity as
Administrator of Land Division; SUZANNE
CASE, in her official capacity as Chairperson)
of the Board of Land and Natural Resources)
for the STATE OF HAWAII;)
DEPARTMENT OF LAND AND)
NATURAL RESOURCES FOR THE STATE)
OF HAWAII; STATE OF HAWAII; JOHN)
DOES 1-10; JANE DOES 1-10; and DOE)
ENTITIES 1-10,)

Defendants.)
_____)

CIVIL NO. _____
Hilo (Declaratory Action)

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff 69 RAILROAD, LLC, a Hawai‘i limited liability company (hereinafter referred to as “Plaintiff”), by and through its undersigned counsel, seeks declaratory and injunctive relief against the Defendants herein to implement and effectuate Act 149 (2018), codified as Hawaii Revised Statutes (“hereinafter referred to as “HRS”) §§ 171-191, *et seq.* (hereinafter collectively referred to as “Act 149”), by this Court determining, declaring and ordering that: 1) the approval of the Board of Land and Natural Resources (hereinafter referred to as “Board”) at its meeting on February 11, 2022, authorizing the Chairperson to execute a Development Agreement and thirty-year extension of General Lease No. S-3624 (hereinafter referred to as the “Lease”) for Plaintiff’s leased premises and improvements at TMK No. (3) 2-1-012:016 was the final authorization needed under Act 149 for the Chairperson to execute said Development Agreement and Lease extension; 2) Defendants are estopped from seeking to amend or reconsider the Board’s prior approval based on a position directly contrary to Defendants’ prior established position, particularly due to Plaintiff’s expenditure of substantial funds and changes in position in reasonable reliance upon the Defendants’ actions and representations; 3) pursuant to the prior approvals of the Board, Defendant DEPARTMENT OF LAND AND NATURAL RESOURCES FOR THE STATE OF HAWAII (hereinafter referred to as “Defendant DLNR”), and the Department of Attorney General, Defendant SUZANNE CASE must execute the Development Agreement and Lease extension as authorized by the Board forthwith; 4) the Legislature defined the public’s best interest in Act 149 as the State fulfilling its fiduciary duties to enhance revenues and promote the public’s social, environmental, and economic well-being through extending leases on public lands within the Hilo community economic district (“HCED”) for lessees who

commit to making substantial improvements, which an executive agency such as Defendant DLNR is not free to disregard or redefine with its own opinion; and 5) irrespective of Defendant DLNR's interpretation of caselaw based on a predecessor statute to HRS Chapter 171 regarding public lands leased by auction, HRS § 171-192 only allows for amendments to the terms and conditions of a lease extension if required by a lessee's lender or if the Board had promulgated administrative rules mandating such amendments, which the Board has not, and as such Defendants' present effort to amend the terms of General Lease No. S-3624 is arbitrary and capricious, and constitutes *ad hoc* rulemaking to be applied *ex post facto* in violation of applicable law, including HRS Chapter 91. Plaintiff does hereby state, allege, and aver as follows:

INTRODUCTORY ALLEGATIONS

1. Plaintiff 69 Railroad, LLC (hereinafter referred to as "Plaintiff") is a limited liability company duly organized and formed under the laws of the State of Hawai'i, leasing a property within the HCED with a street address of 69 Railroad Avenue, Hilo, Hawai'i 96720, and designated as TMK No. (3) 2-1-012-026 (hereinafter referred to as "Subject Property").

2. Defendant RUSSELL TSUJI is sued herein in his official capacity as Administrator of Land Division of Defendant DLNR, and was and is a citizen and resident of the State of Hawai'i at all times relevant herein.

3. Defendant SUZANNE CASE is sued herein in her official capacity as Chairperson of the Board of Land and Natural Resources for the State of Hawai'i ("Board") which Board is the executive head of Defendant DLNR, and Defendant CASE was and is a citizen and resident of the State of Hawai'i at all times relevant herein.

4. Defendant DEPARTMENT OF LAND AND NATURAL RESOURCES FOR THE STATE OF HAWAII (hereinafter referred to as “Defendant DLNR”) is an executive agency of Defendant STATE OF HAWAII, both of which are amenable to suit herein as provided by law.

5. Despite due and diligent search of information or attempts at determining the identities of JOHN DOES 1-10, JANE DOES 1-10 and DOE ENTITIES 1-10, Plaintiff has been unable to determine the identity of said Defendants and begs leave to amend the Complaint and identify and name said Defendants when their true identities become known.

6. This Court has jurisdiction of this matter pursuant to HRS §§ 603-21.5, 603-21.9, and 632-1, et seq., because the Plaintiff is situated within, and the dispute and controversy herein, arose in the District of South Hilo, County and State of Hawai‘i.

7. Venue is proper in the Third Circuit Court, State of Hawai‘i pursuant to HRS § 603-36 (5), because Plaintiffs’ claims for relief arose in this Circuit.

BACKGROUND FACTS

8. In 2018 the Hawai‘i State Legislature, after years of debate and taking account of the deteriorating conditions of buildings on State properties within the HCED such as the blighted structures on Banyan Drive in Hilo, passed Act 149 to make it economically viable for lessees to renovate or construct improved structures within the HCED, providing for the long-term extension of leases for existing lessees within the HCED nearing the end of their terms who commit to making substantial improvements, and finding that the public’s best interest was the State fulfilling its fiduciary duties by enhancing revenues and promoting the public’s social, environmental, and economic well-being through extending leases on public lands within the

HCED for lessees therein who commit to substantial improvements.

9. In determining the public's best interest, the Legislature took account of the HCED, noting that the State has an "enormous influence on the vision, economic development, and overall success of the East Hawaii community", that state-owned lands within the area had been deteriorating, and that Act 149 had the potential "to revive public lands, resulting in more tax revenue and community revitalization", and provide for efficient and effective improvements and economic opportunities.

10. Act 149 allows for the Board to approve a lease extension within the HCED of up to 40 years and modify or eliminate any of the restrictions specified in HRS § 171-36(a) by the Board approving a lessee's proposed development of "substantial improvements" (improvements with a cost that equals or exceeds thirty percent of the market value of the existing improvements on the leased property), considering whether the development is of sufficient worth and value to justify the extension of the lease, the estimated time to complete improvements and their date of completion, and the minimum revised fair market annual rent. HRS §§ 171-191, 171-192(a) and (b).

11. Act 149 allows for amendments to the extended leases to conform or comply with lender requirements or subject to "the rules of the board, setting forth any additional terms and conditions, which shall ensure and promote the purposes of the demised lands", but the Board and Land Division has not promulgated administrative rules that set forth terms and conditions for leases or lease extensions . HRS §§ 171-192(a), 171-192(c)(8).

12. In spite of the express Legislative intent and simple process laid out in Act 149, in the four years since the Legislature enacted the law only two lessees have successfully

extended their leases within the HCED due to inexplicable delays and Defendants' deliberate efforts to thwart the execution and implementation of Act 149, particularly in regards to Plaintiff's request for a Lease extension.

13. Plaintiff has leased the Subject Property within the HCED pursuant to GL No. 3624, as extended (hereinafter referred to as "Lease"), with said Lease scheduled to expire on March 5, 2026.

14. Plaintiff acquired the Lease in 2003 and invested substantial sums in renovating the structures on the Subject Property to rehabilitate the Subject Property as suitable for and appealing to various sublessees.

15. On April 12, 2019, Plaintiff applied for a lease extension through 2056, pursuant to Act 149 and HRS §§ 171-191 and 192., at which time Plaintiff's proposed improvements were estimated to amount to approximately \$ 626,838.

16. On October 30, 2020, Defendant DLNR, represented by Defendant TSUJI participated in a mediation with Plaintiff which resulted in a Mediation Agreement that memorialized the parties' agreed upon rental amounts which considered Plaintiff's income from subleasing improvements Plaintiff's predecessor had constructed and Plaintiff had extensively renovated and the parties' mutual agreement and understanding that HRS §§ 171-191 and 192 would be followed for the Board proceeding to "authorize or approve an extension of lease term and/or development agreement.

17. Plaintiff thereafter awaited Defendants presenting the mediated rental values and approval of development and lease extension to the Board.

18. After nearly a year Defendant DLNR, through the Assistant Administrator for its

Land Division, contacted Plaintiff in late September 2021 to work on a draft submission for the Board's October 22, 2021 meeting requesting that the Board authorize Defendant CASE to execute a Development Agreement for the proposed development and extension of Lease through 2056, approve the mediated rental values, and approve certain subleases.

19. The submission requesting Board approval for the Lease extension was not included in the subsequent Board agenda, and after the Board meeting Defendant DLNR informed Plaintiff that following discussions with Defendant CASE, Defendant DLNR "will be putting a hold" on presenting lease extension requests to the Board for leases originally issued by auction because under Act 149 "there is no means for the Department to update auction leases in the extension period using the most current lease form and leasing practices and policies of the Board.... We will re-evaluate the matter early next year."

20. Instead of providing the Board with the agreed upon submission requesting Board approval for the Lease extension, Defendant DLNR presented its justification for not implementing Act 149 to the Board at the Board's January 14, 2022 meeting, and recommended amending Act 149 based on its unequivocal position that the terms and conditions of the Lease extension could not be updated as DLNR contrasted the lack of authorization in Act 149 to the Legislature's express authorization to amend lease extension terms and conditions in Act 219 (2011) (authorizing the extension of certain hotel and resort leases) and also citing the holding of *State v. Kahua Ranch, Ltd.*, 47 Haw. 28, 384 P.2d 581 (1963), where the Hawai'i Supreme Court ruled that the State could not reform the terms of an existing lease for public lands leased by auction under a statute that was a predecessor to HRS Chapter 171.

21. Plaintiff presented testimony at the January 14, 2022 meeting with a request that

Defendant DLNR implement and effectuate Act 149, noting that delays in having the Board authorize the Development Agreement and Lease extension had caused substantial increases in construction costs and financing the improvements, as construction costs and interest rates had significantly risen since Plaintiff's original application in 2019.

22. The Board considered Defendant DLNR's submission at its meeting on January 14, 2022, robustly discussed the various issues including Defendant DLNR's position that it could not amend the terms of the Lease extension, and ultimately concluded that it should implement Act 149 as it exists rather than delay processing applications until Defendant DLNR may successfully persuade the Legislature to amend Act 149.

23. Defendant DLNR accordingly presented a substantially similar submission to the draft submission which Plaintiff reviewed in October 2021 to the Board for the Board's February 11, 2022 meeting, which stated that the terms and conditions of the Lease extension could not be updated.

24. At the February 11, 2022 meeting, the Board thoroughly discussed the issue of updating the terms and conditions of the Lease extension, went to executive session with a Deputy Attorney General, and unanimously decided to authorize Defendant CASE to approve and execute a Development Agreement for the Lease extension and to subsequently execute a Lease extension pursuant to Act 149, HRS § 171-192, and the terms and conditions stated in Defendant DLNR's submission for that meeting, subject to standard terms and conditions of development agreement and lease extension forms conforming with Act 149 and HRS § 171-192, review and approval by the Department of Attorney General, and other terms and conditions prescribed by Defendant CASE to best serve the State's interests.

25. In the approved submittal, the Board also determined at its February 11, 2022 meeting that it was not entitled to receive portion of sublease rents and approved the requested extension without requiring such participation in sublease rents, as Plaintiff owns the improvements on the Subject Property during the term of the Lease, the Lease did not contain any provision allowing for the State's participation in sublease rents, and Defendant DLNR staff pointed out "the Board has no statutory authority to update the lease form with the most current lease form" in lease extensions under Act 149. Attached hereto as Exhibit "A" is a true and correct copy of the Board's approval of February 11, 2022, which includes the Board's consent to specified subleases, the authorization to Chairperson Case to approve and execute a development agreement for the 30-year lease extension and to execute the lease extension form, and approval of the mediated rental values.

26. Relying upon the Board's February 11, 2022 authorization and Defendant DLNR's further assurance that reliance on this authorization to begin substantial improvements was reasonable, Plaintiff has entered into construction contracts and expended substantial sums towards constructing the substantial improvements for the Subject Property, and provided Defendants with a bond to cover the total cost of planned substantial improvements, as the improvements are supposed to be completed within 10 ½ months of the Board's approval and the costs for the improvements have been substantially increasing over time.

27. Plaintiff also proposed a Development Agreement and then worked with Defendant DLNR and the Department of Attorney General to agree to revisions to Plaintiff's proposed Development Agreement which Defendant DLNR represented would conform with Defendant DLNR's "standard development agreement", be "in the best interests of the State,"

and were necessary to recommend that Defendant CASE approve the Development Agreement.

28. In early June 2022 Plaintiff and Defendant DLNR agreed on the form of the Development Agreement which expressly stated “[t]he State granted final approval of the Development Plan and this Agreement at its meeting held on February 11, 2022,” and Defendant DLNR informed Plaintiff that it would request the Department of Attorney General to prepare execution copies of the Development Agreement.

29. Defendant DLNR subsequently provided Plaintiff with a copy of the Development Agreement and a copy of the Lease extension approved and executed by a Deputy Attorney General, which Plaintiff also executed and returned to Defendant DLNR on August 2, 2022, thereafter expecting to receive fully executed copies of the Development Agreement and Lease extension which would include Defendant CASE’s signature while Plaintiff continued to expend substantial sums and contractually obligate itself to complete the agreed upon improvements.

30. Instead of providing fully executed copies of the Development Agreement and Lease extension, Defendant TSUJI provided Plaintiff with a letter dated August 17, 2022, stating that Defendant DLNR had decided to postpone Defendant CASE executing the Development Agreement and Lease extension pending disposition of Defendant DLNR’s request to the Board to require that the terms and conditions of the Lease extension be amended, in direct contradiction to Defendant DLNR’s prior position that the terms and conditions of the Lease extension could not be amended or updated.

31. Defendant TSUJI stated that the issue of whether leases can be updated under Act 149 “was addressed in the Board action of February 11, 2022, Item D-2, that approved your lease

extension”, but “[a]fter further consultation with [the Department of the Attorney General], it has been determined that the Board may require that public auction leases be updated...to the extent permitted by law,” and that Defendant DLNR was preparing a staff submittal to request that the Board direct updating the terms and conditions of the Lease extension.

32. Plaintiff raised concerns about finality and estoppel with Defendant DLNR and the Department of Attorney General, and concerns that ongoing delays and the potentially prohibitive terms and conditions which Defendant DLNR stated it would seek to impose as updated terms conditions could jeopardize Plaintiff’s time-sensitive funding to complete substantial improvements and the Lease extension itself; however, both Departments informed Plaintiff that Defendant DLNR intends to proceed with requesting that the Board retroactively amend its prior approval based upon Defendant DLNR’s change of position due to its assertion of a public trust obligation to let the Board know about Defendant DLNR’s change of position.

33. Defendants DLNR and Tsuji have asserted that they will seek to receive a portion of Plaintiff’s sublease rent if they “update” the Lease extension to “current” terms and conditions; however, there are no administrative rules allowing for Defendants to demand a portion of sublease rent and the Board only has a “rent participation policy” which the Board and Defendants have applied disparately, as Defendants have not sought to impose, or excused this policy for various other lessees of industrial or commercial State lands who have received lease extensions outside of the HCED.

34. On September 16, 2022, the Board published its agenda, including an agenda item in which Defendants are seeking to have the Board reconsider and amend its prior approval of the Development Agreement and Lease extension at its meeting scheduled for September 23,

2022.

35. Defendants' actions herein have harmed and continue to threaten harm to Plaintiff and potentially others, as Plaintiff has expended substantial sums in reasonable reliance upon the Board's February 11, 2022 approval, Plaintiff has incurred significantly increased construction costs due to unreasonable delays, Plaintiff's funding may be jeopardized, other lessees within the HCED are and/or may be deterred from incurring the costs of a lease extension due to the delays encountered by Plaintiff, and other harm or damages to be established in this matter.

COUNT I –ESTOPPEL

36. Plaintiff repeats, realleges and incorporates by reference the allegations contained in Paragraphs 1 through 35 as if fully set forth herein.

37. Plaintiff reasonably relied on Defendants' representations and conduct herein to understand that Defendant CASE would approve and execute the Development Agreement and execute the Lease extension as approved by the Board at the February 11, 2022 meeting, with said representations including but not limited to the approved submission to the Board following the February 11, 2022 meeting, the authorization for Defendant CASE to approve and execute the Development Agreement and execute the Lease extension, further express assurances that Plaintiff could begin substantial improvements, the negotiations and approvals for the Development Agreement by Defendant DLNR with revisions that purportedly conformed with Defendant DLNR's standard form and were in the State's best interest, that accepting Defendant DLNR's revisions to the Development Agreement would cause that Agreement to be presented to Defendant CASE for execution, the Development Agreement's reference to the February 11, 2022 meeting as Defendant STATE OF HAWAII's "final approval", providing Plaintiff with

copies of the Development Agreement and Lease extension signed by a Deputy Attorney General that were supposed to be transmitted to Defendant CASE for execution, and Defendants DLNR and TSUJI's repeatedly stated position that the terms and conditions of the Lease extension could not be substantively amended, and this reliance was reasonable as all representations were within Defendants' respective authority.

38. Plaintiff has relied on Defendants' representations to Plaintiff's detriment, expending significant sums in good faith on ongoing substantial improvements, including entering binding construction contracts, securing a performance bond and making progress payments for the improvements.

39. This Court's equitable powers are needed to prevent the manifest injustice of Defendants acting to upend the Board's prior approval and jeopardize the Lease extension based on a position directly contrary to Defendants' prior position.

40. Further, as Defendants seek to upend the prior Board approval based on a legal opinion inapposite to Defendants' prior stated opinion, equity and fairness dictate that Defendants not to be allowed to act inconsistently with their prior opinion to take advantage of their own wrong or mistake to Plaintiff's detriment, disadvantage, or injury.

COUNT II – DECLARATORY JUDGMENT

41. Plaintiff repeats, realleges and incorporates by reference the allegations contained in Paragraphs 1 through 40 as if fully set forth herein, and Plaintiff is entitled to a declaratory ruling determining and ordering the following, as contained in Paragraphs 42-48 hereinbelow.

42. On February 11, 2022, the Board approved Plaintiff's request for the Lease extension and authorized Defendant CASE to approve and execute the Development Agreement

and execute the Lease extension, which was Defendant STATE OF HAWAII's final approval for the Development Pursuant to Act 149.

43. As authorized by the Board, Defendant CASE is obligated to execute the approved Development Agreement forthwith as Defendant DLNR represented to Plaintiff that revisions to the Development Agreement were necessary to conform to the standard terms and conditions of Defendant DLNR's form and in Defendant STATE OF HAWAII's "best interest", that the Development Agreement would be presented to Defendant CASE for execution after the revisions, and the Department of Attorney General had reviewed, approved, and signed the revised Development Agreement.

44. Pursuant to Act 149 and the Board's February 11, 2022 approval, Defendant CASE is also obligated execute the Lease extension forthwith, as Plaintiff has fully bonded improvements and Defendant DLNR and the Department of Attorney General also reviewed, approved, and a Deputy Attorney General executed the Lease extension.

45. Act 149 and HRS § 171-192 only allow for amendments to the terms and conditions of a lease extension if needed to accommodate a lessee's lender or if the Board had promulgated administrative rules mandating such amendments, and as the Board has no such rules, Defendant DLNR's attempts to require lease amendments for lease extensions made under Act 149 in the absence of such rules constitutes *ad hoc* rulemaking in violation of HRS Chapter 91, and Defendants' efforts to apply such an *ad hoc rule ex post facto* to the February 11, 2022 approval further violates applicable law.

46. Pursuant to Act 149, HRS § 171-192, and the Board's February 11, 2022 approval, Defendant CASE does not have discretion to delay executing the Development

Agreement and Lease Extension as approved by the Board and would have only been able to prescribe terms and conditions to serve the State's best interest consistent with Act 149, HRS § 171-192, and the terms and conditions of the Board's approval, as Act 149, HRS § 171-192 and the Board's February 11, 2022 approval prohibited the revision of the Lease extension terms and conditions.

47. The Legislature defined the public's best interest in Act 149 as the State fulfilling its fiduciary duties to enhance revenues and promote the public's social, environmental, and economic well-being through extending leases on public lands within the HCED for lessees who commit to making substantial improvements, and Defendant DLNR may not disregard this Legislative finding by asserting its own opinion of the public trust.

48. Plaintiff's agreed upon improvements and the agreed upon rental values, which DLNR already negotiated, are in compliance with Act 149.

49. An actual controversy exists between Plaintiff and Defendants as to whether: a) Defendant DLNR's attempts to circumvent the Board's prior final approval constitute an abuse of discretion, *ad hoc* rulemaking, and are in excess of its authority, b) Defendant CASE is obligated to execute the Development Agreement and Lease extension forthwith given the law and facts herein, c) Act 149 and HRS § 171-192 allow for amendments to the terms and conditions of a lease extension for any reason other than to accommodate a lessee's lender in the absence of legally promulgated rules, d) Defendants are estopped from seeking to retroactively amend the terms and conditions of the Board's prior approval, and e) Defendant DLNR's attempt to implement policy changes in the subject lease extension is contrary to express legislative intent.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that judgment be entered in its favor and against Defendants for the following relief:

A. For an order declaring and determining that: a) the Board's approval of February 11, 2022, was the final approval needed from Defendant STATE OF HAWAII pursuant to Act 149, which Defendant DLNR cannot seek to have the Board revisit other than for cause such as a breach of the Development Agreement; b) pursuant to the Board's approval of February 11, 2022, Defendant CASE is obligated to execute the Development Agreement and Lease extension forthwith, as Defendant DLNR claimed that its revisions to the Development Agreement would conform with Defendant DLNR's standard form, be in Defendant STATE OF HAWAII's best interest, and were needed to present the Development Agreement to Defendant CASE for execution; and, Plaintiff received copies of the Development Agreement and Lease extension reviewed, approved, and executed by the Department of Attorney General; c) Act 149 and HRS § 171-192 only allow for amendments to the terms and conditions of a lease extension to accommodate a lessee's lender, as the Board has not promulgated rules requiring or allowing such amendments; d) Defendants are estopped from retroactively amending the Board's prior approval based on their changed opinion; and, e) as an executive agency, Defendant DLNR may not redefine the public interest contrary to the direct and express legislative intent articulated in Act 149.

B. For an order enjoining and restraining Defendants from delaying or interfering with Defendant CASE executing the Development Agreement and Lease extension

forthwith, including but not limited to prohibiting Defendants from proceeding before the Board to reconsider or amend its final approval of February 11, 2022.

- C. That the Court award Plaintiffs their recoverable expenses and/or restitution as a result of the conduct of Defendant as determined at trial or other hearing herein.
- D. That Plaintiff be awarded its attorneys' fees and costs as allowed by law.
- E. For such other and further relief as this Court deems just and appropriate.

DATED: Hilo, Hawai'i, September 20, 2022.

LAW OFFICES OF YEH & KIM

By /s/ Ronald N.W. Kim
THOMAS L.H. YEH
RONALD N.W. KIM
JOHN S. MUKAI
Attorneys for Plaintiff
69 RAILROAD, LLC, a Hawai'i limited liability
company

DAVID Y. IGE
GOVERNOR OF HAWAII



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

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
LAND DIVISION

75 Aupuni Street, Room 204
Hilo, Hawaii 96720
PHONE: (808) 961-9590
FAX: (808) 961-9599

February 14, 2022

Electronically Filed
THIRD CIRCUIT
3CCV-22-0000295
20-SEP-2022
10:27 AM
Dkt. 8 EXH

Ref. No.: GL S-3624

Mr. Michael Shewmaker
69 Railroad, LLC
40 Kamehameha Ave.
Hilo, Hawaii 96720

Dear Mr. Shewmaker:

Subject: Consent to Sublease General Lease No. S-3624, 69 Railroad, LLC, Lessee, to Self Storage Hilo LLC, Covan World-Wide Moving, Incorporated, C.A.R.S.S. LLC, Provision Solar, Inc., Tracey Gapol, Charles Wagner & Erin Wagner, Hawaii Behavioral Health, LLC, Whitney & Arnessa Iranon, Mr. & Mrs. Charles and Erin Wagner, McCully Works, Inc., and Lamar Pacheco, Sublessees, Waiakea, South Hilo, Hawaii, Tax Map Key: (3) 2-1-012:026.

Authorize the Chairperson to Approve and Execute a Development Agreement for a 30-Year Extension of Lease Term and to Execute the Lease Extension Document, General Lease No. S-3624, 69 Railroad, LLC, Lessee; Waiakea, South Hilo, Hawaii, Tax Map Key: (3) 2 -1-012: 026.

Approve Mediated Settlement of Rent Reopening Dispute Pursuant to Mediation Agreement for the Periods of 2026-2046, General Lease No. S-3624, 69 Railroad, LLC, Lessee; Waiakea, South Hilo, Hawaii, Tax Map Key: (3) 2 -1-012: 026.

At its meeting of February 11, 2022, under agenda item D-2 (copy enclosed), the Board of Land and Natural Resources approved as amended, the above recommendations regarding General Lease No. S-3624.

The Board amended the table of subleases on page 8 of the submittal as follows:

Item 5, Tracey Gapol Sublessee, the expiration date of the sublease is 5/31/26.

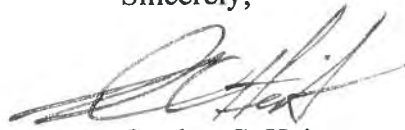
Enclosure D
Exhibit A

Item 8, Whitney & Arnessa Iranon, Sublessees, the sublease has been on a month-to-month tenancy since the expiration of the sublease term on 12/31/21.

Please provide our office with the current sublease agreement for Tracey Gapol including the new expiration date of 5/31/2026. We will be requesting the assistance of the Department of the Attorney General in preparing the consent documents for the sublease documents you previously provided to our office. Also, please be informed that the fees for processing these consents are \$22.50 each. Please remit a check for \$247.50 (made to the Department of Land and Natural Resources).

If you have any questions, please feel free to contact the Hawaii District Land Office at 961-9590. Thank you.

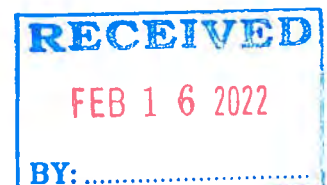
Sincerely,



Gordon C. Heit
District Land Agent

Enclosure (w/o exhibits)

cc: Central Files
District Files
Ron Kim



Enclosure D
Exhibit A

AMENDED

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

February 11, 2022

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

PSF: 19HD-036

Hawai'i

Consent to Sublease General Lease No. S-3624, 69 Railroad, LLC, Lessee, to Self Storage Hilo LLC, Covan World-Wide Moving, Incorporated, C.A.R.S.S. LLC, Provision Solar, Inc., Tracey Gapol, Charles Wagner & Erin Wagner, Hawaii Behavioral Health, LLC, Whitney & Arnessa Iranon, Mr. & Mrs. Charles and Erin Wagner, McCully Works, Inc., and Lamar Pacheco, Sublessees, Waiakea, South Hilo, Hawaii, Tax Map Key: (3) 2-1-012:026.

Authorize the Chairperson to Approve and Execute a Development Agreement for a 30-Year Extension of Lease Term and to Execute the Lease Extension Document, General Lease No. S-3624, 69 Railroad, LLC, Lessee; Waiakea, South Hilo, Hawaii, Tax Map Key: (3) 2 -1-012: 026.

Approve Mediated Settlement of Rent Reopening Dispute Pursuant to Mediation Agreement for the Periods of 2026-2046, General Lease No. S-3624, 69 Railroad, LLC, Lessee; Waiakea, South Hilo, Hawaii, Tax Map Key: (3) 2 -1-012: 026.

APPLICANT AND REQUEST:

Sublease:

69 Railroad, LLC, a Hawaii limited liability company, as Sublessor, to:

1. Self Storage Hilo LLC
2. Covan World Wide Moving
3. C.A.R.S.S. LLC
4. Provision Solar, Inc.
5. Tracey Gapol
6. Charles Wagner & Erin Wagner
7. Hawaii Behavioral Health, LLC
8. Whitney & Arnessa Iranon

as amended

APPROVED BY THE BOARD OF
LAND AND NATURAL RESOURCES
AT ITS MEETING HELD ON

Enclosure D
Exhibit A

9. Mr. & Mrs. Charles & Erin Wagner
10. McCully Works, Inc.
11. Lamar Pacheco

As Sublessees.

Development Agreement and Lease Extension:

Lessee 69 Railroad, LLC, a Hawaii limited liability company (Lessee or Applicant), is requesting an extension of General Lease No. S-3624 of 30 years, commencing on March 6, 2026 and expiring on March 5, 2056 for an aggregate term (initial term plus all extensions) of 95 years.¹

LEGAL REFERENCE:

Sections 171-36(a)(6), -191 and -192, Hawaii Revised Statutes (HRS), as amended, and Act 149, Session Laws of Hawaii 2018.

LOCATION:

Parcel C, portion of the Government (Crown) Land of Waiakea, situate on the east side of Railroad Avenue at its intersection with Lanikaula Avenue, at Waiakea, South Hilo, County and State of Hawaii, identified by Tax Map Key: (3) 2 -1-012: 026, as shown on the attached map labeled Exhibit I.

AREA:

4.499 acres, more or less.

TRUST LAND STATUS:

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

CHARACTER OF USE:

Allowed uses under the County of Hawaii zoning code, ML-1A Limited Industrial

TERM OF LEASE:

Original term of 55 years, commencing on March 6, 1961 and expiring on March 5, 2016.
Board approved extension of 10 years commencing on March 6, 2016 and expiring on March 5, 2026.²

¹ Initial term of 55 years commencing on March 6, 1961 and expiring on March 5, 2016. BNLR previously approved a 10-year extension at its meeting of September 27, 2013, Item D-3 and June 12, 2015, Item D-1.

² Sept 27, 2013 (Agenda Item D-3) and June 12, 2015 (Agenda Item D-1).

Requested extension of 30 years commencing on March 6, 2026 and expiring on March 5, 2056.

ANNUAL RENTAL:

Current annual rent is \$127,384.40 due in semi-annual installments on March 6th and September 6th, each and every year during the term, from March 6, 2016, up to and including March 5, 2026.

RENTAL REOPENINGS:

Rental reopenings in the original term were at the end of the 15th, 25th, 35th and 45th years of the original term. A rental reopening for the extended term was determined by an appraisal that projected the rent for the extension period of March 6, 2016 and expiring on March 5, 2026.

By letter dated February 27, 2020, staff apprised Lessee of the State's appraisal dated February 20, 2020 establishing the lease rent amounts for the three 10-year reopening periods to begin March 6, 2026, as follows:

<u>Effective Date</u>	<u>Annual Lease Rent</u>
03/06/2026	\$170,063.00
03/06/2036	\$228,549.00
03/06/2046	\$307,151.00

Lessee rejected the State's proposed annual lease and mediation ensued.

The parties have reached an agreement in principle subject to the Board's approval, of the mediated amount of annual rental for the periods of 2026-2056 as set forth in a Mediation Agreement, attached as Exhibit II, as follows:

<u>Effective Date</u>	<u>Annual Lease Rent</u>
03/06/2026	\$155,000.00
03/06/2036	\$195,000.00
03/06/2046	To be re-opened and negotiated prior to 03/06/2046

Staff recommends the Board confirm the Mediation Agreement signed and approved by the parties and their respective attorneys.

USE OF LOAN PROCEEDS:

The Lessee proposes to complete general improvements to the warehouse structures and lot by asphalt re-pavement, installation of new rain gutters, solar panel and wastewater installation. A complete list of improvements is attached as Exhibit III.

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Exhibit A

SUBLEASE RENT PARTICIPATION:

There are eleven subleases of the premises to various businesses as discussed below in more detail. Whenever a lease with subleases comes before the Board for an extension request, an issue arises as to whether the State should share in sublease rents collected by the lessee if the State does not already do so. Section 171-36(a)(6), HRS, provides in part as follows:

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

Emphasis added.³

The Board approved a sublease rent participation policy under the foregoing authority on May 26, 2000, Item D-24, as amended on January 26, 2001, Item D-8, and further amended on January 26, 2012, Item D-14. The relevant portion of the policy, as amended, provides as follows.

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

In the present case, General Lease No. S-3624 provides that the Lessee owns improvements it makes until the expiration or earlier termination of the lease. The lease contains no provision stating a specific right and method of calculation of State participation in sublease rents. Lessee has made substantial improvements to the premises during its tenancy including \$165,000 in approved repairs and renovations to qualify for a 10-year

³ Section 171-36(a)(6), HRS, was not in existence at the time General Lease No. S-3624 was issued by public auction in 1961. Rather, this provision was added to the Public Lands statute four years later by Act 239, Session Laws of Hawaii 1965.

lease extension that commenced in 2016 and will make additional investments in improvements if the Board approves the requested extension. Finally, an affiliate of Lessee, McCully Works, Inc., will continue to occupy a portion of the lease property for its own business.⁴

General Lease No. S-3624 was issued through public auction and, as such, cannot be amended. *State v. Kahua Ranch, Ltd.*, 47 Haw. 28, 384 P.2d 581 (1963), *aff'd on reh'g*, 47 Haw. 466, 390 P.2d 737, *reh'g denied*, 47 Haw. 485, 391 P.2d 872 (1964). The exception to this general rule appears to be where the Legislature includes language in a lease extension act to the effect that, "Any extension of a lease granted pursuant to this section shall be effectuated, documented, and executed using the most current lease form and leasing practices and policies of the board." See Act 219 Session Laws of Hawaii 2011 (Act 219). Act 219 allowed for the extension of hotel/resort leases and the Board approved the extension of leases for three properties under the act before it sunset on December 31, 2015. Act 149, under which Lessee seeks the extension of the subject lease, does not include a similar provision. As a result, the Board has no statutory authority to update the lease form with the most current lease form and leasing practices, even if both the State and Lessee were to agree to such an update.⁵ In light of the foregoing, staff recommends no participation in sublease rents at the present time.⁶

4 In 2012, when Lessee requested consent to two subleases of the premises under General Lease No. S-3624, staff recommended to the Board at its meeting of September 28, 2012, Item D-2, that it increase the lease rent pursuant to Section 171-36(a)(6), HRS, and the Board policy. However, after much discussion including an executive session, the Board amended the staff recommendation and consented to the subleases without increasing the lease rent. The basis for the Board's decision appears to be that the lease agreement does not provide for the State to share in sublease rents. A copy of the Board action of September 28, 2012, Item D-2, approved as amended, is attached as Exhibit IV. A copy of the approved minutes from the meeting for Item D-2 is attached hereto as Exhibit V.

5 For further discussion on issues encountered by Land Division in applying the various lease extension acts, see *Report to the Board of Land and Natural Resources on Issues Encountered by Land Division in Processing Applications for Lease Extensions Statewide* at the Board's meeting of January 14, 2022, Item D-9: <https://dlnr.hawaii.gov/wp-content/uploads/2022/01/D-9.pdf>. The lease covenant regarding ownership of improvements at the end of the lease term is another provision that Land Division typically updates in lease extensions when permitted. Under the subject lease, the improvements default to State ownership at the end of the lease. For new leases, the current lease form gives the State the option to accept ownership of the improvements or require lessee to remove them.

6 The House Investigative Committee Investigating Compliance with Audit Nos. 19-12 and 21-01 (Committee) explored these and other issues relating to lease extensions in the Kanoelehua Industrial Area and issued a number of findings and recommendations in its report. The Committee's recommendations include that the Legislature should make statutory changes to ensure not only that the Department receive fair market rent on lease extensions, but that it share in sublease rents, charge a premium for the extension, and preclude lessees from disputing rents determined by appraisal for the extension period. The full text of the Committee's report can be found here: <https://www.capitol.hawaii.gov/CommitteeFiles/Special/HIC21/Document/HIC21%20Final%20Report.pdf>

Enclosure D
Exhibit A

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

In accordance with Hawaii Administrative Rules (HAR) § 11-200.1-16 and the Exemption List for the Department of Land and Natural Resources reviewed and concurred on by the Environmental Council on November 10, 2020, the subject request is exempt from the preparation of an environmental assessment pursuant to General Exemption Type 1 that states, "Operations, repairs or maintenance of existing structures, facilities, equipment, or topographical features, involving negligible or no expansion or change of use beyond that previously existing," Part 1, Item 40 that states, "Leases of state land involving negligible or no expansion or change of use beyond that previously existing." The proposed extension of a long-term lease is a de minimis action that will probably have minimal or no significant effect on the environment and should be declared exempt from the preparation of an environmental assessment and the requirements of § 11-200.1-17, HAR.

With respect to the improvements proposed by Lessee, which include re-pavement of the parking lot, and installation of new rain gutters, solar panels and a wastewater system along with other renovations to the premises, the improvements are exempt from the preparation of an environmental assessment pursuant to General Exemption Type 3 that states:

"Construction and location of single new, small facilities or structures and the alteration and modification of the facilities or structures and installation of new, small, equipment and facilities and the alteration and modification of the equipment or facilities, including but not limited to: (A) Single family residences less than 3,500 square feet, as measured by the controlling law under which the proposed action is being considered, if not in conjunction with the building of two or more such units; (B) Multi-unit structures, designed for not more than four dwelling units if not in conjunction with the building of two or more such structures; (C) Stores, offices and restaurants designed for total occupant load of twenty individuals or fewer per structure, if not in conjunction with the building of two or more such structures; and (D) Water, sewage, electrical, gas, telephone, and other essential public utility services extensions to serve such structures or facilities; accessory or appurtenant structures including garages, carports, patios, swimming pools, and fences; and acquisition of utility easements."

Part 1, Item 14 that states, "Construction or placement of utilities (telecommunications, electrical, solar panels, drainage, waterlines, sewers) and related equipment (such as transformers, poles, cables, wires, pipes) accessory to existing facilities."

Staff notes that at least one measure, House Bill 2417, has been introduced in the 2022 legislative session as of the date of writing this submittal that contemplates legislative changes to require updating the forms for all leases upon extension, among other recommendations itemized in the bill:

https://www.capitol.hawaii.gov/measure_indiv.aspx?billtype=HB&billnumber=2417&year=2022

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Part 1, Item 22 that states, "Interior alterations and renovations to offices, buildings or structures that do not increase the floor area or change the maximum occupancy to include: a. installation of office partitions, utility outlets or connections, air conditioning, lighting, and security systems; b. renovations required to bring existing structures into compliance with current building codes and applicable health, safety, and access regulations; c. renovations that will result in energy or other operational/cost savings; or d. other similar interior alterations."

The proposed improvements are de minimis actions that will probably have minimal or no significant effect on the environment and should be declared exempt from the preparation of an environmental assessment and the requirements of § 11-200.1-17, HAR.

APPLICANT REQUIREMENTS:

Applicant shall be required to comply with the requirements of Act 149 Sessions Laws of Hawaii 2018, negotiate a development agreement with department staff, and execute the development agreement.

BACKGROUND:

General Lease No. S-3624 was first sold at public auction to Hawaiian Equipment Co., Ltd., as lessee, recorded in the Bureau of Conveyances of the State of Hawaii in Liber 4323 at Page 247, which General Lease, by mesne assignments, was assigned, to the current Lessee, 69 Railroad, LLC, consent given by the Board by unrecorded instrument executed October 23, 2003.⁷ The General Lease was for a period of 55 years effective March 6, 1961. A condition of the auction lease was that the character of use be industrial, unless prior written consent for a different use, subject to any terms and conditions as set forth by the Lessor, was given.

At its meeting of September 27, 2013, under agenda item D-3, the Board consented to the Extension of General Lease S-3624 dated March 29, 2016 for 10 years expiring on March 5, 2026, to amortize the self-financed improvements made to the property.⁸

SUBLEASE INFORMATION:

The original Lessee, Hawaiian Equipment, constructed two large warehouses on the property in 1962 at a cost of approximately \$223,000. The warehouses were used for heavy

⁷ As an auction lease, General Lease No. S-3624 cannot be amended. See *State v. Kahua Ranch, Ltd.*, 47 Haw. 28, 384 P.2d 581 (1963), *aff'd on reh'g*, 47 Haw. 466, 390 P.2d 737, *reh'g denied*, 47 Haw. 485, 391 P.2d 872 (1964).

⁸ Improvements at that time included extensive repairs to the roof along with exterior wall renovations at a cost in excess of \$160,000.00.

construction equipment storage and repairs. After the lease was assigned to Railroad Avenue Partners in 1987, major renovations were done to the structures at a cost of approximately \$140,000 and again in 1989 at a cost of \$76,000. These renovations included the enclosing of the warehouse structures and the creation of several individual bays. The Lessee also created self-storage units in the open base yard area of the lease land.

Lessee, 69 Railroad, LLC, currently is subletting portions of the premises to 11 businesses listed below. The lease does not require Lessee to pay rent based on a percentage of its gross receipts.⁹ Some of the subleases do not have Board consent. However, staff is requesting the Board consent to the sublease for the following subleases within GL S-3624.

	Sublessee	Area	Date	Monthly Rent ¹⁰	Character of Use
1	Self Storage Hilo LLC	77,383sq. ft.	3/01/16-2/29/26	\$8,252.70	Self-storage/office use
2	Covan World-Wide Moving, Incorporated	20,800sq. ft.	3/01/16-2/29/26	\$14,560.00	Warehouse/office space
3	C.A.R.S.S. LLC	3,840 sq. ft.	3/01/16-2/29/26	\$3,625.20	Warehouse/office space
4	Provision Solar, Inc.	3,840 sq. ft.	3/01/19-2/28/22	\$4,608.00	Warehouse/office space
5	Tracey Gapol	2,551 sq. ft.	6/01/19-5/31/21	\$1,447.22	Photography studio
6	Charles & Erin Wagner	2,000 sq. ft.	6/15/21-5/31/26	\$1,160.00 ¹¹	Office/physical therapy ¹²
7	Hawaii Behavioral Health, LLC	2,359 sq. ft.	3/01/17-2/28/22	\$2,594.90*	Office use
8	Whitney & Arnessa Iranon	1,920 sq. ft.	1/01/19-12/31/21	\$1,305.60	Warehouse/office space
9	M/M Charles & Erin Wagner	1,723 sq. ft.	5/01/17-4/30/22	\$2,611.79*	Massage/physical therapy
10	McCully Works, Inc.	1,478 sq. ft.	11/01/19-2/28/26	\$976.32	Warehouse/office space
11	Lamar Pacheco	1,494 sq. ft.	3/15/20-3/31/23	\$1,972.00	Auto detailing/office use

*Monthly rental amount includes CAM fees

All subleases are allowed under County of Hawaii zoning code ML – Limited Industrial Use as either expressly permitted or accessory uses. With respect to the subleases identified as Nos. 6 and 9 above, whose uses include office, physical therapy and massage, Lessee's counsel sent the letter attached as Exhibit VI to the County Planning Director on September 29, 2021 confirming Lessee's understanding that the sublease uses are allowed as accessory uses pursuant to Section

9 This lease is silent with regards to sublease rent participation. It only requires the Lessor's consent to sublet.

10 Monthly rent and fees do not include GET.

11 Annual rent increase of \$0.02 per sf. Additional monthly CAM of \$840.00 adjustable quarterly.

12 §171-41, HRS, requires leases for commercial, industrial and other business uses to be consistent with county zoning requirements.

24-5-142(d) of the County Zoning Code. The Planning Director responded by letter dated September 30, 2021 stating in part that. "This letter will confirm that the use of the physical therapy and wellness operation would be permitted in the ML district on the [subject] property." See Exhibit VII. In light of this, staff is recommending the Board consent to all the foregoing subleases.

DCCA VERIFICATION:

SUBLESSOR: 69 Railroad, LLC

Place of business registration confirmed:	YES <u>X</u>	NO
Registered business name confirmed:	YES <u>X</u>	NO
Good standing confirmed:	YES <u>X</u>	NO

SUBLESSEE: Self Storage Hilo LLC.

Place of business registration confirmed:	YES <u>X</u>	NO
Registered business name confirmed:	YES <u>X</u>	NO
Good standing confirmed:	YES <u>X</u>	NO

SUBLESSEE: Covan World-Wide Moving, Incorporated.

Place of business registration confirmed:	YES <u>X</u>	NO
Registered business name confirmed:	YES <u>X</u>	NO
Good standing confirmed:	YES <u>X</u>	NO

SUBLESSEE: C.A.R.S.S. LLC.

Place of business registration confirmed:	YES <u>X</u>	NO
Registered business name confirmed:	YES <u>X</u>	NO
Good standing confirmed:	YES <u>X</u>	NO

SUBLESSEE: Provision Solar, Inc..

Place of business registration confirmed:	YES <u>X</u>	NO
Registered business name confirmed:	YES <u>X</u>	NO
Good standing confirmed:	YES <u>X</u>	NO

SUBLESSEE: Charles & Erin Wagner

Individuals are not required to register with the DCCA

SUBLESSEE: Hawaii Behavioral Health, LLC

Place of business registration confirmed:	YES <u>X</u>	NO
Registered business name confirmed:	YES <u>X</u>	NO
Good standing confirmed:	YES <u>X</u>	NO

SUBLESSEE: Whitney and Arnessa Iranon

Individuals are not required to register with the DCCA

Enclosure D
Exhibit A

SUBLESSEE: Mr. & Mrs. Charles and Erin Wagner

Individuals are not required to register with the DCCA

SUBLESSEE: McCully Works, Inc.

Place of business registration confirmed:

YES X NO

Registered business name confirmed:

YES X NO

Good standing confirmed:

YES X NO

SUBLESSEE: Lamar Pacheco

Individuals are not required to register with the DCCA

LEASE EXTENSION:

With the Lessee's current lease set to expire on March 5, 2026, the Lessee is requesting an additional 30-year extension pursuant to Act 149, Session Laws of Hawaii 2018 (Act 149) in order to amortize the cost of additional improvements to the property. Act 149 allows up to a 40-year extension of leases located in the Hilo Community Economic District (HCED) based on "substantial improvements" to the lease premises:

"Substantial improvements" means any renovation, rehabilitation, reconstruction, or construction of the existing improvements, including minimum requirements for off-site and on-site improvements, the cost of which equals or exceeds thirty per cent of the market value of the existing improvements that the lessee or the lessee and developer install, construct, and complete by the date of completion of the total development.

The subject lease is located within the HCED as defined in Act 149. Lessee's proposed improvements include re-pavement of the parking lot, and installation of new rain gutters, solar panels and a wastewater system along with other renovations to the premises at a cost in excess of \$536,000.00 (Exhibit III).¹³ An appraisal evaluation performed by a certified appraiser has determined that the economic life of the proposed improvements will exceed the thirty-five plus-year period necessary to amortize the refurbishments. The appraiser, contracted by the Lessee, determined the market value of the current improvements to be \$1,575,000.00. Lessee's proposed expenditure of \$626,838.60¹⁴ represents 40.0% of the value of the existing improvements (\$1,575,000.00), and Lessee is only seeking a 30-year extension of the lease. Accordingly, Lessee's proposed expenditure appears to justify the requested 30-year extension under Act 149.

¹³ Once the requested lease extension is granted, Lessee will seek a consent to mortgage from the Board or Chairperson, as appropriate, in order to finance improvements to the property. The Lessee has prequalified for a loan from First Hawaiian Bank of up to \$1,050,000.00. As a condition of the loan, the bank is requesting the Lessee obtain an extension of the current lease including the known fixed rent for a minimum of 10 years beyond the established amortization period (minimum of 35-years).

¹⁴ Revised 1/28/2022.

The subject parcel is located in an area served by aging and/or substandard infrastructure. The area also includes numerous other DLNR parcels currently encumbered by long-term leases that have been extended and are scheduled to expire within the next ten years. Most of the DLNR leases in this area were established pursuant to Act 4, First Special Session of 1960 and Act 32, Sessions Laws of Hawaii 1962 resulting from the destruction of the Hilo bayfront caused by the 1960 tsunami. Businesses that were severely impacted by the tsunami were given the opportunity to relocate to the newly created industrial area of Kanoelehua. These acts provided the Lessees with an option to purchase the land within two years. Several businesses exercised this option creating an industrial area of mixed DLNR leases and fee simple properties.

Act 149 also stipulates that prior to entering into a development agreement, the lessee shall submit to the Board the plans and specifications for the total development being proposed. The Board shall review the plans and specifications and determine: 1) Whether the development proposed is of sufficient worth and value to justify the extension; 2) The estimated time to complete the improvements and expected date of completion; 3) The minimum revised annual rent based on the fair market value of the lands to be developed, as determined by an appraiser for the Board, and the percentage rent where gross receipts exceed a specified amount.

Lessee states that it will complete its proposed improvements by December 31, 2022. Staff is requesting authority to negotiate a development agreement outlining the terms and conditions required in compliance with Act 149 and Section 171-192(a), HRS, as amended, with Lessee. Staff is further recommending that the Chairperson be given authority to approve and execute the development agreement and lease extension document. As discussed above, the subject lease cannot be updated because it is a public auction lease.

There are no outstanding rental reopening issues. The Lessee is current with rent, insurance and performance bond. By letter dated June 19, 2020, the Department offered Lessee a two-month rent deferral due to the economic impacts of the COVID-19 pandemic. Lessee accepted the deferral, exercising the option to pay the deferred balance of \$21,655.35 in six equal installments between January 1, 2021 and June 30, 2021. Lessee paid the deferred rent ahead of schedule.

No agency comments were solicited on the request because it involves a lease extension; not a new disposition.

RECOMMENDATION:

That the Board, subject to the Applicant fulfilling the Applicant requirement listed above:

1. Declare that, after considering the potential effects of the proposed disposition as provided by Chapter 343, HRS, and Chapter 11-200.1, HAR, the extension of a long-term lease is a de minimis action under Section 11-200.1-16, HAR, and Type

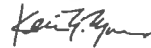
Enclosure D
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- 1, Part 1, Item 40 of the Exemption List for the Department dated November 10, 2020, will probably have minimal or no significant effect on the environment and is therefore exempt from the preparation of an environmental assessment and the requirements of Section 11-200.1-17, HAR. Similarly, the proposed improvements including re-pavement of the parking lot, and installation of new rain gutters, solar panels and a wastewater system along with other renovations to the premises are de minimis actions under Section 11-200.1-16, HAR, and General Exemption Type 3, Part 1, Items 14 and 22 will probably have minimal or no significant effect on the environment and are therefore exempt from the preparation of an environmental assessment and the requirements of Section 11-200.1-17, HAR.
2. Consent to the sublease under General Lease No. S-3624 between 69 Railroad, LLC, as Sublessor, and the Sublessees listed above, subject to any applicable conditions cited above which are by this reference incorporated herein and further subject to the following terms and conditions:
 - A. The standard terms and conditions of the most current consent to sublease form, as may be amended from time to time;
 - B. Review and approval by the Department of the Attorney General; and
 - C. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.
 3. Determine that: 1) the development proposed is of sufficient worth and value to justify the extension of the lease; 2) the estimated time to complete the improvements is approximately 10 ½ months from this approval; and 3) the minimum revised annual rent based on the fair market value of the lands to be developed shall be as set forth in recommendation 5 below.
 4. Authorize the Chairperson to approve and execute a development agreement for the 30-year extension of General Lease No. S-3624, 69 Railroad, LLC, Lessee, and thereafter to execute lease extension document for the lease pursuant to Act 149 Session Laws of Hawaii 2018 and Section 171-192, Hawaii Revised Statutes, as amended, under the terms and conditions cited above, which by this reference are incorporated herein, and further subject to the following:
 - A. The standard terms and conditions of the most current development agreement and public auction lease extension document forms conforming with Section 171-192, HRS, and Act 149 as may be amended from time to time;
 - B. Review and approval by the Department of the Attorney General; and

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- C. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.
5. Approve the mediated settlement of the rent reopening dispute pursuant to the Mediation Agreement that sets annual rental for the period of 2026-2036 in the amount of \$155,000.00, and annual rental for the period of 2036-2046 in the amount of \$195,000.00, with the annual rental for the period of 2046-2056 to be reopened and negotiated prior to March 6, 2046, subject to any applicable conditions cited above which are by this reference incorporated herein.

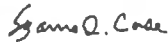
Respectfully Submitted,



for Gordon C. Heit
District Land Agent

APPROVED FOR SUBMITTAL:

RT



Suzanne D. Case, Chairperson

Land Board Meeting: February 11, 2022; D-2: Approved as amended.

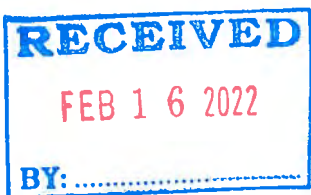
Approved as amended. The Board amended the table of subleases on page 8 of the submittal as follows:

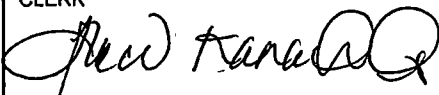

Item 5, Tracey Gapol, Sublessee, the expiration date of the sublease is 5/31/26.

Item 8, Whitney & Arnessa Iranon, Sublessees, the sublease has been on a month-to-month tenancy since the expiration of the sublease term on 12/31/21.

The table relates to the Board's consent to subleases under recommendation 2 of the submittal.

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STATE OF HAWAII CIRCUIT COURT OF THE THIRD CIRCUIT		SUMMONS TO ANSWER CIVIL COMPLAINT		Electronically Filed THIRD CIRCUIT 3CCV-22-0000295 20-SEP-2022 01:21 PM Dkt. 13 SUMM
CASE NUMBER				
PLAINTIFF'S NAME & ADDRESS, TEL. NO. 69 Railroad, LLC, c/o Law Offices of Yeh & Kim, 505 Kilauea Ave., Hilo HI 96720 (808) 961-0055				
PLAINTIFF 69 Railroad, LLC, a Hawaii limited liability company		VS.	DEFENDANT(S) Russell Tsuji, Suzanne Case, Department of Land and Natural Resources, State of Hawaii	
TO THE ABOVE-NAMED DEFENDANT(S) You are hereby summoned and required to file with the court and serve upon Thomas L.H. Yeh, Ronald N.W. Kim, and/or John S. Mukai plaintiff's attorney, whose address is stated above, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the date of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. THIS SUMMONS SHALL NOT BE PERSONALLY DELIVERED BETWEEN 10:00 P.M. AND 6:00 A.M. ON PREMISES NOT OPEN TO THE GENERAL PUBLIC, UNLESS A JUDGE OF THE ABOVE-ENTITLED COURT PERMITS, IN WRITING ON THIS SUMMONS, PERSONAL DELIVERY DURING THOSE HOURS. A FAILURE TO OBEY THIS SUMMONS MAY RESULT IN AN ENTRY OF DEFAULT AND DEFAULT JUDGMENT AGAINST THE DISOBEYING PERSON OR PARTY.				
DATE ISSUED SEP 20 2022		CLERK 		CIRCUIT COURT CLERK T. KANAEOLO
The original document is filed in the Judiciary's electronic case management system which is accessible via eCourt Kokua at: http://www.courts.state.hi.us				
 In accordance with the Americans with Disabilities Act, and other applicable state and federal laws, if you require a reasonable accommodation for a disability, please contact the ADA Coordinator at the Circuit Court Administration Office on OAHU- Phone No. 808-539-4400, TTY 808-539-4853, FAX 539-4402; MAUI- Phone No. 808-244-2929, FAX 808-244-2777; HAWAII- Phone No. 808-961-7424, TTY 808-961-7422, FAX 808-961-7411; KAUAI- Phone No. 808-482-2365, TTY 808-482-2533, FAX 808-482-2509, at least ten (10) working days prior to your hearing or appointment date.				

Enclosure D