

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

June 23, 2023

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

Ref. No. GL S-5844

HAWAII ISLAND

Deny Consent to Transfer Management Control of General Lease No. S-5844 from
WHR LLC, Lessee, to Benjamin Rafter, Transferee, Waiakea, South Hilo, Hawaii,
Tax Map Key: (3) 2-1-001:012 and 2-1-005:013, 016, 017, 027, 032, 046

APPLICANT:

WHR LLC, Lessee/Transferor and Benjamin G. Rafter, Transferee.

LEGAL REFERENCE:

Section 171-36(a)(5), Hawaii Revised Statutes (HRS), as amended.

LOCATION:

Portion of Government lands situated at Waiakea, South Hilo, Hawaii, identified by Tax
Map Key: (3) 2-1-01:012 and 2-1-005:013, 016, 017, 027, 032, 046, as shown on the
attached map labeled Exhibit A.

AREA:

68.926 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:

Resort/Hotel and golf course purposes.

TERM OF LEASE:

65 years, commencing on February 1, 2006 and expiring on January 31, 2071.

ANNUAL RENTAL:

\$580,270.44 minimum base rent or 2% of gross revenues, whichever is greater.
Semi-annual payments of \$290,135.22 due in advance on February 1, and August 1, as required in the lease terms.

CONSIDERATION:

At least \$2,000,000.00.

RECOMMENDED PREMIUM:

Not applicable as the lease does not allow for a premium. See REMARKS section for background and further discussion.

DCCA VERIFICATION:

WHR LLC.:

Place of business registration confirmed:	YES
Registered business name confirmed:	YES
Good standing confirmed:	YES

Benjamin G. Rafter is an individual and as such, not required to register with the DCCA.

BACKGROUND:

General Lease No. S-5844 (Lease) was issued at public auction on September 30, 2005 to Hawaii Outdoor Tours, Inc. (HOTI) for a term of 65 years commencing on February 1, 2006. The Lease character of use is for hotel and golf course purposes. In November 2012, HOTI filed for bankruptcy protection and initially managed the Lease as a debtor in possession. Later, a bankruptcy trustee was appointed to manage the assets, including the Lease. In September 2013, the bankruptcy trustee filed a motion with the court for an order authorizing the assumption of Lease. The Lease was then sold through the bankruptcy court by sealed bid to WHR LLC (Lessee) and closing occurred on December 17, 2013. The bankruptcy court confirmed the sale based solely on high bid submitted by the Lessee, over the oppositions of the Board and the Department.

At its meeting on May 12, 2023, under agenda item D-3, Lessee requested the Board consent to mortgage and security agreement. Staff opposed the request and recommended the Board deny the request. The Board ultimately deferred the matter. During the meeting, Lessee testified that upon closing of the new mortgage, Mr. Benjamin Rafter would be the new controlling party and manager of the Lessee. Lessee also provided a letter summarizing the scope of Mr. Rafter's role in managing the Lessee. A copy of the letter is attached as **Exhibit A**.

The provision for assignment under General Lease No. S-5844 states in part;

If the Lessee is a partnership, joint venture or corporation, the sale or transfer of 20% or more of ownership interest or stocks by dissolution, merger or any other means shall be deemed an assignment for the purposes of this paragraph. If the Lessee is a manager-managed limited liability company, any changes in the manager shall be deemed an assignment for the purposes of this paragraph. If the Lessee is a member managed liability company, the sale or transfer of twenty percent (20%) or more of the total membership interests shall be deemed an assignment for the purposes of this paragraph.

Given the foregoing provision, Lessee was informed during the meeting that Board approval for this proposed transfer was required, and Lessee subsequently submitted a request for consent to assignment. The request notes that Benjamin Rafter, an individual, will become the controlling interest party and manager in the Lessee, and will be required to invest \$2,000,000.00 to become a manager. A copy of the request along with supporting documents is attached as **Exhibit B**. However, based on statements made by the Lessee at the Board meeting, Mr. Rafter will not have majority ownership in the Lessee. Rather, Lessee stated that the two controlling members of the Lessee, Tower Hotels Fund 2013 LLC and Tower Hotels Hilo LLC will assign their respective controlling party interests to Mr. Rafter.¹ Lessee asserts that this would provide Mr. Rafter with full control of the Lessee. Lessee stated that the reason for this transfer was to have a new manager in place who is different from the manager at time of foreclosure. This would serve to secure a lower interest rate for the new mortgage.

Several Notices of Default were issued to Lessee for various defaults including rent, performance bond and unauthorized improvement between 2016 and 2022. All these defaults were cured within the required timeframe. Mr. Rafter has not had a lease, permit, easement or other disposition of State lands terminated within the last five years due to non-compliance with such terms and conditions.

REMARKS

Staff notes that Mr. Rafter has extensive experience in hotel ownership and management throughout Hawaii. Notwithstanding Mr. Rafter's previous success, staff cannot recommend approval of the proposed transfer. Staff believes that the Lessee has not provided sufficient information to clearly establish Mr. Rafter's role in the re-organized Lessee, nor has Lessee responded sufficiently to questions and concerns raised by both staff and members of the Board regarding Lessee's ownership

¹However, because it was unclear whether Mr. Bushor and Mr. Miller had committed to divesting themselves of all shares and interest in WHR, staff asked Lessee to ***explain "How will Mr. Rafter be acquiring the majority control and interest/ownership in WHR, or how much shares are being acquired by Mr. Rafter in comparison to total shares outstanding in WHR?"*** Unfortunately, Lessee refused to provide this information that staff believes is relevant and essential to confirm the representations made by Mr. Bushor (in support of Lessee's request to consent to mortgage and request to assign the Lease) that Mr. Rafter will have majority control and interest in WHR—in other words, staff was precluded from confirming Mr. Rafter had in fact received or was receiving at least a 51% ownership interest in WHR and not simply akin to being appointed a general manager or president that can be removed "at will" by the owners of WHR.

Deny Consent to Transfer of Interest
structure that are relevant to this request.

Lessee asserts both at the Board meeting and subsequent documentation that Mr. Rafter would become a “new controlling party and new manager” of the Lessee. However, beyond general statements, Lessee has not provided any further documentation that clearly specifies Mr. Rafter’s ownership stake and managerial authority. In response to staff and Board member questions, Lessee provided a “pending organizational chart” reflecting the ownership of Lessee upon the closing of the mortgage for which the Lessee is currently seeking the Board’s consent. A copy of the pending organizational chart is attached as **Exhibit C**. The organizational chart appears to be inconsistent with statements made by the Lessee at the Board meeting and its written request for consent to assign as the organizational chart states that the Lessee will be managed by “a Benjamin Rafter controlled entity” rather than Benjamin Rafter as an individual as noted in the written request. Additionally, the organizational chart does not disclose the ownership stake of Benjamin Rafter or the Benjamin Rafter entity in the Lessee but rather notes as “TBD”.

Furthermore, despite the repeated requests by the Land Division Administrator (in response to concerns raised by a Board member) for more information on pending ownership structure of the Lessee after the closing of the new mortgage, Lessee has refused to provide the information requested. The requested additional information includes the following:

- The amended and restated operating agreement showing the manager and individual members (and their respective shares or interest).
- The total outstanding shares/interests of the Lessee and the names and number of shares issued and owned by the individual members/owners/investors.
- The paid-in-capital of each individual member/owner/investor in the form or cash contribution, the amount of cash contribution and to the extent applicable, the amount of shares issued for services rendered or goodwill in lieu of a cash contribution.
- The amount of paid-in-capital and cash contribution of Benjamin Rafter.
- The number of shares/interests issued to Benjamin Rafter (and the total number of shares outstanding at the time of said issuance), and any other information to show Benjamin Rafter has the controlling interest or ownership of the Lessee and is the managing member/owner/investor.

In responding to the inquiries, Lessee either referred back to the pending organizational chart, prior statements, or noted that such information is either confidential or not relevant to the Board’s decision making. The organizational chart identifies other corporate entities as members of the Lessee and identifies some of the individuals associated with those entities. However, the Lessee refused to identify all of the individuals as requested or specify Mr. Rafter’s ownership interest in the Lessee. The response to the inquiries provided by Lessee’s legal counsel is attached as **Exhibit D**.

Based on the lack of information and Lessee’s refusal to provide further information and documentation, staff cannot confirm the credibility of the statements made by the Lessee regarding Mr. Rafter’s ownership and managerial role. Coupled with the Lessee’s prior statements that Mr.

Deny Consent to Transfer of Interest

Rafter will not have a majority ownership stake in the Lessee, staff questions the nature of the agreement between the Lessee and Mr. Rafter. Specifically the extent to which Mr. Rafter will actually be in control of the Lessee in the event the Board approves the consent to assign and whether Mr. Rafter would serve as a permanent replacement for the current Lessee manager. Staff also questions how Mr. Rafter would have managerial control of the Lessee when his investment is \$2,000,000.00, which is a relatively small percentage of the overall value of the hotel as determined by the Lessee's appraisal. Staff does not believe that it is appropriate for the Board to consent to this transfer without more evidence that Mr. Rafter would have a sufficient ownership stake and managerial control over the Lessee, beyond general statements made by the Lessee.

Finally, adding to staff's concern is a news article from December 18, 2013 attached as **Exhibit E**. The article reports on the sale of the lease to the Lessee, including future operating plans. The article referred to Aqua Hospitality, of which Mr. Rafter was the CEO at the time, as a partner of the Lessee and operator of the hotel. The article also quotes Mr. Rafter regarding future hotel operations. When presented with this information, Lessee responded that the article was not factually accurate but did not elaborate further on any prior role Mr. Rafter may have had with the Lessee. Staff is concerned that if Mr. Rafter has had previous involvement with the Lessee, the previous issues the Lessee have had complying with the lease may not improve under Mr. Rafter's control.

Waiver of Assignment Premium

Regarding the Assignment Premium, staff found the lack of an assignment paragraph in the subject lease to be peculiar in that it contains the standard consent to assignment requirement and premium analysis attached as Exhibit G of the lease, but added "*except that payment of an assignment premium shall not be assessed.*" Therefore, staff conducted further research to determine the reason this strange language was added to the assignment paragraph and its intended meaning in the context of the assignment of premium policy and analysis. Staff presents the following information for the Board's knowledge and consideration in its decision making. A copy of GL S-5844 is attached as **Exhibit F**.

Act 55, Session Laws of Hawaii 2000, (Act 55) was passed for the purpose of resolving the uncertainty arising from the pending expiration of the Banyan Drive resort lease in 2015, specifically the lack of incentives for the lessees at the time to invest in improvements to infrastructure and long-term maintenance of the improvements. Act 55 provided for an exception to the public auction requirement, specifically applicable to the Banyan Drive resort leases.² The Department was granted the authority to initiate a request for proposals (RFP) to determine whether there was competition for the subject lease. If the RFP resulted in multiple "willing and able" bidders, then a public auction

² Staff also questions whether Act 55 was constitutional given that it was clearly special legislation. See Minutes, pp. 11-12 (Exhibit 3-A of June 13, 2003, item D-27) where Deputy Attorney General Yvonne Izu questioned the constitutionality of Act 55 and "strongly" recommended following the express provisions of HRS 171-61 when determining the appropriate compensation for the building when cancelling the lease early by agreement. Neither staff nor the Board subtracted the depreciation taken for tax purposes from the replacement value of the building as required in HRS 171-61. "Replacement value" as used in the statute focuses on the value of the building alone, and not the location of the building. For example, the Naniloa building placed in the center of Kalihi or Chinatown will have a different "fair market value" than the same Naniloa building located along Hilo Bay or along the Gold Coast in Waikiki. In real estate, it's all about "location, location, location." HRS 171-61 limits the compensation a lessee may receive to the replacement value of the building only (less depreciation), excluding the land value.

Deny Consent to Transfer of Interest

would be required. If there were no other potential qualified bidders, then the Board was authorized to award a direct lease to the current lessee. Additionally, Act 55 mandated that the lease process “take into account the current fair market value of the tenant owned improvements under the terms of the existing lease”, and that the current fair market value “shall be negotiated between the lessee and lessor”. If a lease was sold at public auction to a bidder other than the current lessee, the winning bidder was required to pay the lessee the full current fair market value at closing. Finally, Act 55 provided that if a new lease was issued, then the lease may contain 1) fair market rent excluding tenant improvements; 2) percentage rent where gross receipts exceed a certain level; 3) a lease assignment premium and 4) requirements to substantially improve the property.

The then-lessee of the Naniloa, Nakano Co., Ltd. (Nakano) sought to assign the multiple leases for the multiple parcels comprising the Naniloa to a new entity, Hawaii Naniloa Resort, LLC (HNR). HNR would then apply for a new single consolidated lease for the Naniloa parcels pursuant to Act 55. As a result, at its meeting on December 14, 2001, under agenda item D-35, the Board approved as amended staff’s recommendations to assign the lease, approved the fair market value of the tenant owned improvements, and the sale of a new lease at public auction. From that point, it appears that HNR objected to numerous conditions of the initial Board action, resulting in the approval returning to the Board on multiple occasions with staff recommending amendments and the Board approving the recommendations subject to further amendments.

As a result of opposition to the conditions raised by HNR, staff made several recommendations that were apparently intended to ensure that HNR would participate in the public auction. The most significant of these recommendations was to waive the lease assignment premium. The submittal for the June 13, 2003, agenda item D-27 Board action justifies the waiver as consistent with criteria that at the time were pending review and approval by the Board for the same day. The criteria as noted in the submittal are as follows: 1) the lessee is required to make or made substantial capital improvements to the leased premises and the primary sources of income to the lessee is generated from these improvements; 2) the market value of the lessee’s improvements is primarily attributable to the operations conducted by the lessee on the leased premises and the cash flow generated by the operations, rather than the cost of the improvements; 3) the lease includes provisions that ensure ground rents keep up with market rents (e.g., frequent rental re-openings, step-ups, etc.).

Staff concluded that the waiver of the assignment premium was justified merely because the lessee or winning bidder at auction would be required under the bid package to make significant improvements and staff believed that was sufficient for the State to waive any interest in the consideration paid on a subsequent sale/assignment of lease. However, the premium policy already allows deduction of the depreciated costs of improvements from the sales consideration before the premium is calculated. Furthermore, the public auction requirements for a new lease under Act 55,³ already provided special benefits to the then existing lessee (HNR) for the purpose of providing incentives to invest in infrastructure improvements not available to the public, such as a direct lease (if the RFQ/RFP shows no interest by others except HNR), or if a public auction was held, the existing lessee HNR would receive full reimbursement of the fair market value of the improvements if not the winning bidder. Waiver of the lease assignment premium provided the lessee (HNR) with

³ As noted in footnote 1, the deputy attorney general thought Act 55 was unconstitutional and urged the Board to follow HRS 171-61 on compensating the lessee for early cancellation of the lease. The auction package had already provided the lessee with compensation for the building if it was not the winning bidder at auction.

Deny Consent to Transfer of Interest

an additional benefit that current staff believe to be unwarranted at the expense of public trust beneficiaries.⁴ Furthermore, the drafting of the waiver in the lease document itself is ambiguous, as the lease assignment premium policy is included in the document complete and unamended as an exhibit, with the aforementioned clause in section 13 stating that “payment of an assignment premium shall not be assessed”. Although HNR was aware that the premium was not required, it is possible that other reasonable, potential bidders could have either overlooked or misconstrued that provision, which could have impacted their decision to bid at public auction.

RECOMMENDATION:

- A. That the Board deny consent to the addition of Mr. Benjamin Rafter as controlling party and manager of WHR LLC, the Lessee for General Lease No. S-5844.

4 Recipients of the State’s share of the sales proceeds would be DLNR and OHA. The following is a rough simplistic illustration showing the fiscal impact to the State and OHA as public land trust beneficiaries:

Assumption is a selling price of \$40,000,000

2013 Bushor’s Purchase out of Bankruptcy	\$5.2 million
2015 Mortgage for Improvements	\$18.5 million
Bushor’s claim of investors	say \$5.0 mil?
Estimated Total Costs of Improvements	\$28,700,000
[Less Holding Period over Unexpired Term: 10yrs/65yrs 0.15384615 = \$4,415,384.62]	
Depreciated costs of improvements	\$24,284,615.40
Difference from \$40 million in sale proceeds	\$15,715,384.60
State’s share is 40% (50% less 5% every 5 years from assignment)	\$6,286,153.84
OHA’s 20% off State’s share	\$1,257,230.77

The scenario below calculates the depreciated costs by using the date of purchase and date of construction of improvements over the remaining term of the lease to expiration.

2013 Bushor’s Purchase out of Bankruptcy	\$5.2 million
2015 Mortgage for Improvements	\$18.5 million
Bushor’s claim of investors	say \$5.0 mil?
Estimated Total Costs of Improvements	\$28,700,000
[Less Expired Term over Unexpired Term: 10yrs/65yrs 0.15384615 off of \$5.2 mil]	\$800,000
[Less Expired Term over Unexpired Term: 8yrs/65yrs 0.12307692 off of \$23.5 mil]	\$3,532,307.69
Depreciated costs of improvements	\$24,367,692.30
Difference from \$40 million in sale proceeds	\$15,632,307.70
State’s share is 40% (50% less 5% every 5 years from assignment)	\$6,252,923.08
OHA’s 20% off State’s share	\$1,250,254.62

Respectfully Submitted,



Ian Hirokawa
Special Projects Coordinator

APPROVED FOR SUBMITTAL:



Dawn N. S. Chang, Chairperson

RT

EXHIBIT A

Grand Naniloa Resort, a DoubleTree by Hilton
93 Banyan Drive, Hilo, Hawaii 96720

May 5, 2023

Item
D-3
05.12.2023

Attention DLNR, Chair Chang and Board Members,

The Co-Managers signing below are excited to announce the appointment of a new controlling party and new manager of WHR, LLC ("Company"), namely Benjamin Rafter ("New Manager"). Mr. Rafter will also be a significant owner of the Company by investing a minimum of \$2,000,000 into the Company, which shall occur prior to loan closing. Our appointment of Benjamin Rafter as our New Manager will be effective on the closing date of the \$54,000,000 new loan proposed by UBS per the Term Sheet previously delivered to DLNR ("New Loan").

1. This Letter shall serve as notice to DLNR that Mr. Rafter, as New Manager, would be in control of the Company and interests of the Company in connection with request for consent the New Loan relating to General Lease S-5844 ("Lease"). As clarification, all management control of the Company will be vested in Mr. Rafter as New Manager. Thus, all communications and actions between DLNR and WHR will be handled by the New Manager, which shall have the same decision-making rights that were previously handled by the Co-Managers of WHR signing below.
2. Company understands the New Manager appointment is subject to DLNR approval per the terms of Lease and that DLNR will need to condition any approval of "reasonable consent" of the New Loan based on also approving the New Manager request for approval, which has been submitted on May 8, 2023, under separate application by Mr. Rafter and Co-Managers to DLNR.
3. Mr. Rafter is involved in the ownership and/or management of 12 hotels in Hawaii and over 40 hotels in total in the United States including several affiliated with the Hilton/Doubletree brand, and is also the CEO and President of Springboard Hospitality. He has managed or owned over seventy hotels in Hawaii over the last fifteen years. Today, Ben is indisputably Hawaii's most respected hotelier.
4. Mr. Rafter is well acquainted with the governor and administrative branch, the legislature and the major figures in Hawaii tourism. He has served as chair of the Hawaii Lodging and Tourism Authority, co-founder of the Hawaii Hotel Association, budget chair and board member of the Hawaii Tourism Authority and head of the Hawaii Owner's Roundtable.
5. With Mr. Rafter as New Manager, we will venture to even greater heights and strive to exceed 2022's net income. Our decision should a) assure greater future results for Hilo's iconic Grand Naniloa Resort, and b) allow us to maintain the hotel under LOCAL ownership and management control. Our goal is to make the Grand Naniloa Resort the centerpiece of a re-envisioned Banyan Drive. We will now have the best Hawaii hotelier along with our new lender, one of the world's largest and most respected banks, UBS--(Union Bank of Switzerland).

We look forward to Grand Naniloa Resort's future under our local ownership and New Manager.

Existing Co-Managers

New Manager

Tower Development, Inc.
Tower Hotels Hilo, LLC

Benjamin Rafter

By: 


By: 

EXHIBIT A

EXHIBIT B

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

REQUEST FOR CONSENT TO ASSIGNMENT - APPLICATION FORM

This Application Form is for current tenants requesting:

- Consent to agreement of sale
- Consent to assignment of lease
- Consent to assignment of sublease
- Consent to assignment of grant of easement

NOTE, THIS IS A REQUEST FOR CONSENT TO APPOINTMENT OF NEW MANAGER OF LESSEE (WHR, LLC OF THE GRAND NANILOA RESORT. THERE IS NO CHANGE TO LESSEE AND THERE IS NO ASSIGNMENT OF LESSEE, BUT MERELY APPOINTMENT OF A NEW MANAGER THAT WILL BE THE CONTROLLING DECISION MAKER OF OWNERSHIP OF LESSEE WHR LLC)

Please note the following important points:

- 1) We will not process your request unless you are in full compliance with your lease terms and conditions, including but not limited to, the rent, insurance, performance bond, and Conservation Plan requirements.
- 2) Persons who have had, during the five years preceding, a previous sale, lease, license, permit or easement canceled for failure to satisfy the terms and conditions are not eligible to purchase or lease public lands, including via assignments.
- 3) For pasture and agriculture leases, proposed Assignees are required to submit their qualifications and experience (Attachment A) to allow us to determine whether they are qualified ranchers or farmers.
- 4) In some leases, the Land Board has the right to review and approve the consideration paid by the Assignee and may condition its consent to the assignment on the revision of lease rent or the payment by the Lessee of a premium based on the amount by which the consideration for the assignment exceeds the straight-line depreciated cost of improvements and trade fixtures being transferred to the Assignee.
- 5) You will be responsible for paying processing fees.

All applications must be complete to be considered for processing. Please submit two copies of the completed application form to the District Branch office in your county:

Oahu District Branch
1151 Punchbowl Street, Room 220
Honolulu, Hawaii 96813
Phone: (808) 587-0433; Fax: (808) 587-0455

Maui District Branch
130 Mahalani St.
Wailuku, Hawaii 96793
Phone: (808) 984-8103; Fax: (808) 984-8111

Hawaii District Branch
75 Aupuni Street, Room 204
Hilo, Hawaii 96720
Phone: (808) 974-6203; Fax: (808) 974-6222
LD-80 (rev. 12/02/08)

Kauai District Branch
3060 Eiwa Street, Room 205A
Lihue, Hawaii 96766
Phone: (808) 274-3491; Fax: (808) 241-3537

STATE OF HAWAII
DEPARTMENT OF LAND & NATURAL RESOURCES
REQUEST FOR CONSENT TO ASSIGNMENT

For DLNR use only:
Date of request: _____
Date request recvd: _____
Type of Request: _____
Assigned Land Agent: _____

I. GENERAL INFORMATION

General Lease No. S-5488

Type of Request:

- Consent to agreement of sale
 Consent to assignment of lease ***
 Consent to assignment of sublease
 Consent to assignment of grant of easement

*****Note, this is deemed an "assignment" by Section 13 of General Lease S-5844, but is accurately stated as a change in the WHR ownership structure by adding Benjamin Rafter, an individual, as controlling interest party and Manager of WHR, LLC**

II. ASSIGNOR/ASSIGNEE INFORMATION

Should the consent be approved, the following information will be used in the preparation of the legal documents. Therefore, please include all applicable parties and legal names.

Assignor: Tower Developmement Inc., as Manager, and Tower Hotels Hilo, LLC, as Manager of Lessee WHR, LLC

Last name First Name

Last name First Name

Last name First Name

Assignee(s): Rafter Benjamin

Last name First Name

Marital status: Single Widow/widower Married – spouse of: Lenz, Kari
Held as: Tenant in Severalty Tenants in Common Joint Tenants Tenants by Entirety
Percentage held: _____%

Benjamin Rafter shall hold the controlling interest party in WHR, LLC and be the Manager of WHR, LLC with full control of WHR, LLC

Last name First Name

Marital status: Single Widow/widower Married – spouse of: _____
Held as: Tenant in Severalty Tenants in Common Joint Tenants Tenants by Entirety
Percentage held: _____%

Last name First Name

Marital status: Single Widow/widower Married – spouse of: _____
Held as: Tenant in Severalty Tenants in Common Joint Tenants Tenants by Entirety
Percentage held: _____%

Mailing address:

No. and Street

City

State

Zip Code

Contact person: _____
Last name First Name

Phone number: (808) [REDACTED] () ()
Work Home Cellular

() () [REDACTED]
Pager Fax E-mail address

Assignee intends to hold title as: **As Manager and Investor with controlling Interests of WHR, LLC**

Type of owner (check one):

- Individual Partnership
 Husband and Wife Limited Partnership
 Sole Proprietorship Limited Liability Partnership
 Joint Venture Corporation
 Trust Non-Profit Corporation
 Association Limited Liability Corporation
 Other (specify): _____

For partnership or corporation, State of incorporation: _____

III. **AGENT**

If you have an attorney, consultant or other person processing this request for you, please include the following information.

Agent name: _____
Last name First Name

Agent address: _____
No. and Street

City State Zip Code

Phone numbers: () () ()
Work Home Cellular

() () _____
Pager Fax E-mail address

IV. **ASSIGNMENT INFORMATION**

The following information is required to process your request. Please furnish evidence of the actual cost for improvements or renovations as well as trade fixtures (copy of construction contract, receipts, inventory of all personal property, etc.).

- 1) Cost of improvements: \$ _____
- 2) Cost of trade fixtures: \$ _____
- 3) Value of inventory: \$ _____

4) Consideration: \$ zero paid, but investment of \$2M into WHR is required to become Manager

5) What is the reason for the assignment?

The appointment of a New Manager and controlling party for the New Loan underwriting and also to invest in WHR of \$2M is sought by Mr. Rafter for the purposes of being the controlling interest holder and manager of WHR.

6) Has any of the assignees had a sale, lease, permit, easement, license or any other land disposition canceled within the past five years for failure to satisfy the terms and conditions of such disposition? NO

V. ATTACHMENTS

- 1) Attach two (2) copies the assignment document, both bearing original signatures. Not applicable. The appointment of the new Manager is for the New Loan and will be completed upon the New Loan Closing. The Appointment will be issued upon the New Loan Closing.
- 2) If the subject lease is for pasture or agricultural use, the proposed Assignee is required to complete Attachment A.
- 3) Attach copy of State and county tax clearances for the Assignee(s). Refer to Attachment B for information. Not Applicable.

VI. CERTIFICATION

I/We hereby certify that the statements and information contained in this application, including all attachments, are true and accurate to the best of my/our knowledge and understand that if any statements are shown to be false or misrepresented, this application may be rejected.

Tower Development Inc.
Printed Name

X 
Signature

Tower Hotels Hilo, LLC
Printed Name

X 
Signature

NEW MANAGER

BENJAMIN RAFTER
Printed Name

X 
Signature

DATE May 3, 2023
Date

<u>For DLNR Use Only:</u>	TO CLOSE REQUEST:
Reason for closing: _____	

Approved by DLA: _____	
Date request closed: _____	

Attachment A
Qualification Questionnaire

Qualifications and Experience

1. Indicate experience to qualify as a bona fide farmer pursuant to Section 171-14.5, HRS. For husband and wife, at least one individual shall qualify. For partnerships, joint ventures and corporations, "Applicant" in the following questions refers to the entity itself, and, therefore, only 1.A, 1.B, 1.G and 1.J below will apply.
- A. Has the Applicant spent not less than two years, full-time, in farming operations? If yes, explain in Question 3. () Yes () No
- B. Is the Applicant an owner-operator of an established farm conducting a substantial farming operation? If yes, explain in Question 3. () Yes () No
- C. Has the Applicant, for a substantial period of the individual's adult life, resided on a farm and depended on farm income for a livelihood? If yes, explain (number of years, location, income, etc):

- D. Is the Applicant an individual who has been a farm tenant or farm laborer or other individual, who has for the two years last preceding the auction obtained the major portion of their income from farming operations? If yes, explain in Question 3. () Yes () No
- E. Does the Applicant have a college degree in agriculture? If yes, explain in Question 2. () Yes () No
- F. Is the Applicant an individual who, by reason of ability, experience, and training as a vocational trainee, is likely to successfully operate a farm? If yes, explain in Question 2. () Yes () No
- G. Has the Applicant received a commitment for a loan under the Bankhead-Jones Farm Tenant Act for the acquisition of a farm? If yes, attach copy of executed loan document or notification letter. () Yes () No
- H. Is the Applicant an individual who is displaced from employment in an agricultural production enterprise? If yes, explain in Question 3. () Yes () No
- I. Is the Applicant a member of the Hawaii Young Farmer Association or a Future Farmer of America graduate with two years of training with farming projects? If yes, attach letter confirming membership and training and explain in Question 2. () Yes () No
- J. Does the Applicant possess the qualifications under the new farmer program pursuant to section 155-1(3), HRS? If yes, explain: () Yes () No

K. Does the Applicant possess such other qualifications? () Yes () No
 If yes, briefly describe any other information which you may consider pertinent to assessing your qualifications and experience and which is not contained in your responses to Questions 2 & 3:

2. Education and Training

A. List all vocational training, business, trade, college or university, graduate or professional schools:

Name & Location of School (and Name of Person, if applicable)	Field of Study	Degree Type	Date Received

B. Attach evidence of your graduation from college (copy of transcripts or diploma).

C. Describe any vocational or other training you have received which relates to your qualifications and experience to successfully operate your farm/ranch:

3. In chronological order starting with the Applicant's most current experience, briefly describe Applicant's farming/ranching experience and business experience (management, financial and marketing) as it relates to the land intended to be bid on. For partnerships, joint ventures and corporations, include both experience of business entity itself as well as experience of principals or managers. **Copy and attach additional sheets as needed.**

Business Name _____ Address _____ Name & Title of Supervisor _____ Your Position _____ Commodity Produced _____ Size of Operations (no. of employees , acres) _____ Duties & Responsibilities _____ _____ _____ _____	From: _____ Month Year To: _____ Month Year Full-time () Part-time () Average hours worked per week: _____
Business Name _____ Address _____ Name & Title of Supervisor _____ Your Position _____ Commodity Produced _____ Size of Operations (no. of employees , acres) _____ Duties & Responsibilities _____ _____ _____ _____	From: _____ Month Year To: _____ Month Year Full-time () Part-time () Average hours worked per week: _____
Business Name _____ Address _____ Name & Title of Supervisor _____ Your Position _____ Commodity Produced _____ Size of Operations (no. of employees , acres) _____ Duties & Responsibilities _____ _____ _____ _____	From: _____ Month Year To: _____ Month Year Full-time () Part-time () Average hours worked per week: _____

4. For any experience listed above which the Applicant would like to be considered in order to qualify as a bona fide farmer pursuant to Section 171-14.5, HRS, under Question 11, attach verification, including but not limited to: 1) pay stubs or W-2 forms where Applicant was employed as an individual or 2) Schedule F of federal income tax returns or General Excise tax returns where Applicant was a self-employed individual or a corporation.
5. Attach at least two (2) reference letters from people, who are not related to you, verifying agricultural background (applies to farm laborer or previous farm experience).

Business Plan

6. What will the land be used for? List the goals and objectives to utilize and develop the land:

7. What products will be sold?

8. What is the projected yearly level of production?

9. What is the demand for your products in the near- and long-term?

10. Who are your primary customers and how will the products be distributed?

11. What is your pricing strategy?

12. How will you market your products?

13. Who are your major competitors and what is your competitive strategy?

14. What improvements to the land do you intend to make and at what cost?

15. How will you develop the land from the beginning of your use of the lease area until it is in full operation? Give estimated times required by each major activity and projected percentages of development.

16. How will you finance the operations?

17. What is the most lease rent that you can pay before net profit will be zero? \$ _____ per year

18. What problems are anticipated in carrying out this plan and how will you resolve them?

19. Attach a completed Cash Flow Projection. You must show **all** income and expenses applicable to your business for a five-year period or one crop rotation **whichever is greater**. Attachment C provides a sample form. You may use your own format.

20. Attach a Preliminary Map Plan (can be drawn free hand). Please note:

- A. Pasture leases should show fencing, stock watering troughs, water distribution system if needed and topography with physical features to be protected, such as streams, eroded land, steep areas, etc.
- B. Intensive agriculture leases should show crop rows, roadways, structures, windbreaks if necessary and water distribution system plus topography with physical features such as streams, gullies, step areas, etc. If you are proposing crops that are not prevalent in the area, letters from agricultural experts testifying to the viability of the crop within the area should be included.

Financial Capacity

21. All Applicants must attach the following: (NOT APPLICABLE AS THE FINANCIAL OBLIGATIONS ARE OF WHR, LLC ONLY)

- a. Federal income tax returns for the most recent three years. If the most recent year of operation will not be submitted, please explain why:
- b. At least one (1) credit reference letter from a bank or other financial institution with which the Applicant regularly does business.
- c. If Applicant is an individual, husband and wife, sole proprietorship or partnership, attach Personal Financial Statement for each person (Attachment D).
- d. If Applicant is as a corporation, attach financial statements (current balance sheet and

income/expense statement) for the most recent two years.

- e. If Applicant is a corporation, partnership or joint venture which was formed within the last three years, Applicant must also submit Personal Financial Statements (Attachment D) for each principal stockholder in the case of a corporation, each partner in the case of a partnership, or each member in the case of a joint venture, for the years previous to the formation of the organization so that a minimum of three consecutive years of statements are submitted.

22. Are there any outstanding judgments against you? If yes, explain: Yes/No

NO

-

23. Have you filed bankruptcy within the past seven years? NO Yes/No

24. Have you had property foreclosed upon or given title or deed in lieu thereof in the last seven years? NO Yes/No

25. Are you a party in any legal action? If yes, explain: NO Yes/No

26. Have you directly or indirectly been obligated on any loan, which resulted in foreclosure, transfer of title in lieu of foreclosure, or judgment? If yes, provide details, including date, name and address of lender and reasons for the action: NO Yes/No

27. Are you presently delinquent or in default on any Federal, State or county rent, debt or any other loan, mortgage, financial obligation, bond, or loan guarantee? If yes, explain: NO Yes/No

Criminal Convictions

28. Have you ever been convicted of the crime of cruelty to animals and/or have you been convicted of a violation of law? If yes, explain. NO Yes/No

Attachment B
Information on Obtaining Tax Clearances

For information on obtaining State tax clearances, contact the State Department of Taxation:

State District Tax Offices:

Oahu District Tax Office
830 Punchbowl Street
Post Office Box 259
Honolulu, Hawaii 96809-0259
Phone: (808) 587-4242
Toll-free: 1-800-222-3229

Kauai District Tax Office
3060 Eiwa Street, #105
Lihue, Hawaii 96766-1889
Phone: (808) 274-3456

Hawaii District Tax Office
75 Aupuni Street
Post Office Box 833
Hilo, Hawaii 96721-0833
Phone: (808) 974-6321

Maui District Tax Office
54 South High Street
Post Office Box 1169
Wailuku, Hawaii 96793-1169
Phone: (808) 984-8511

Tax Clearance Application (Form A-6): <http://www.hawaii.gov/tax/current/a6.pdf>
Instructions for filing Form A-6: <http://www.hawaii.gov/tax/current/a6ins.pdf>

For information on obtaining county tax clearances, contact the Real Property Tax Office in your county.

City & County of Honolulu
City Hall
Treasury Office, Room 115
530 South King Street
Honolulu, Hawaii 96813
OR call 523-4856 (tax clearance forms
can be mailed or e-mailed to you)

County of Hawaii
Real Property Tax Office/Collections Div
Aupuni Center
101 Pauahi Street, Suite 4
Hilo, Hawaii 96720
Phone: (808) 961-8282
Fax: (808) 961-8415

County of Kauai
Real Property Tax Collection
4444 Rice Street, Suite 463
Lihue, Hawaii 96766
Phone: (808) 241-6555

County of Maui
Real Property Tax Division
70 E. Kaahumanu Avenue, Suite A-16
Kahului, Hawaii 96732
Phone: (808) 270-7697



**STATEMENT BY BENJAMIN RAFTER
CHIEF EXECUTIVE OFFICER, SPRINGBOARD HOSPITALITY**

Re: Managing and Owning the Grand Naniloa Hotel Hilo, a Doubletree by Hilton

Ever since arriving to Hawaii in the early 2000s, I have been a believer in the uniqueness of Hawaii's hotel industry. I've been fortunate to manage almost seventy hotels in Hawaii, probably more than anyone on Earth, for hotel luminaries such as Dr. Richard Kelley (Outrigger's patriarch and son of Roy Kelley), Andre Tatibouet (founder of Aston), and Mike Paulin (founder of Aqua). I've renovated over twenty Hawaii hotels, worked with most of the major local hotel investors and worked hard to ensure that local ownership and management keeps a place at the table amongst the large equity shops on the mainland and in Japan and Korea.

Throughout this journey I've learned a lot of things. Confidence in the Aqua team persuaded me to put my cell phone in all of our hotels rooms. This led to almost 10,000,000 visitors having direct access to my cell phone, whether they were staying in two star or five star accommodations, pre renovation or post launch. A gentle reminder from a Hawaii mentor that every guest is a de facto member of my ohana led me to build our values around both hospitality and traditional Hawaiian values of family. This has served me well, especially as we expand my new company, Springboard, to what is now thirteen states and 47 properties in Hawaii and on the mainland.

I've been lucky enough to achieve several "firsts" during the journey. Aqua was the first company in more than a generation to operate hotels on all six tourism islands. The Surfjack Hotel & Swim Club was generally regarded as the first true boutique hotel in the islands (and has since been replicated by many, many others). We lovingly restored the last "walk up" hotel in Waikiki, the White Sands, reflecting an homage to the early jet age and the 1960s that would have ceased to exist.

All of the items above are why I'm excited to invest in and manage the Grand Naniloa. Hilo is in need of a great hotel. The renovation of the Naniloa and the affiliation with Hilton have set the groundwork, and the hotel is producing decent cash flow and customer award scores. All that is needed is a more localized manager and a hands on approach. I and Springboard are well suited to provide this.

Why believe my opinion? I have extensive experience investing in Hawaii hotels across all four major tourism islands. I'm currently owner or partial owner of eight hotels in Hawaii and nearly twenty across the United States. My Springboard Investment Advisors investment vehicle is majority owned by me and contains no institutional money – no mainland funds, no hedging risk with large capital sources. Thus each decision is well thought out and pragmatic.

The current manager of the hotel has no other investments in or ties to Hawaii. Springboard manages twelve properties in Hawaii and, as noted above, our principals have extensive Hawaii experience. Our office is in Waikiki and we have a large team here, with locally trained sales people, revenue managers, renovation experts, finance people and people and culture professionals. We are extensively familiar with Hawaii's distribution channels and the difficulties of the Hilo market for both local visitors and tourists.

The logo consists of the letters "SB." in a white, serif font, centered within a dark blue square.

Springboard is also deeply familiar with Hilton and its Doubletree brand. We manage the Doubletree in Park City and a full service Hilton in St. Louis. We've managed Hiltons for more than twenty years, ironically owning a Hilton product in Denver with the Kelley family of Outrigger fame. We know Hilton's systems, reward programs, technology and guests. We are working on two Hilton products in Maui and, at a previous company, introduced the Hampton by Hilton brand to the islands.

I firmly believe that the Grand Nanihoa is a great hotel that can add to Banyan Drive while acting as a hub for the Hilo community and I'm looking forward to directing that journey on behalf of both a personal investment and management of the hotel.

Aloha,

Ben Rafter

A solid black rectangular redaction box covering the signature area.

Benjamin G. Rafter

Summary of Accomplishments

Highly analytical executive with a deep technical background and a successful career in both technology and hospitality startups. Started and led companies that generated significant financial returns for investors and employees, most notably by building disruptive business models in traditional industries.

- Purchased, renovated and relaunched some of Hawaii's oldest hotels and resorts including the Surfjack Hotel & Swim Club and the White Sands.
- Created one of the biggest Hawaii hotel success stories by growing Aqua Hospitality to 29 properties before merging the company with a large regional competitor, creating a portfolio of approximately 11,000 hotel rooms.
- Founded, led and grew several startups, including one acquired by Amazon.com in a transaction that produced significant returns for investors.
- Led a worldwide consulting practice for a 3,000-person systems integrator, creating multiple new business lines for various G2000 clients.

Experience

SPRINGBOARD HOSPITALITY (formerly OLS), *PRESIDENT AND CEO*

2018–CURRENT

Acquired OLS Hotels & Resort in 2018 when it was a small, regional operator based in LA. Currently it has grown to one of the largest pure independent operators with 47 properties in thirteen states with concentrations primarily in urban and resort markets on the West Coast and Hawaii. OLS moved to Hawaii in 2018 upon expiration of a non-compete and currently has 12 properties on four islands. Recent additions also include Sedona, Stowe, Park City, Jackson Hole, Los Angeles, Anchorage, Lake Tahoe, Mammoth, Myrtle Beach and Ft. Myers Beach.

JORORO, *MANAGING MEMBER*

2013–CURRENT

SPRINGBOARD INVESTMENT ADVISORS, *PARTNER*

2019–CURRENT

During a non-compete, created a personal investment vehicle, Jororo, focused on buying and repositioning hospitality assets in Hawaii. Jororo's target acquisitions benefit from highly curated, localized experiences and completed efforts have won numerous awards and accolades. Jororo currently has ownership stakes and is managing member/GP in approximately \$300 million of real estate.

Subsequently co-founded Springboard Investment Advisors ("SIA") to invest in assets benefiting the Springboard management platform. SIA investments include new build hotels, repositioning opportunities and conversions from alternative uses. Recent investments have included Ft. Myers Beach, FL; Denver, CO; Maui, HI; Hawaii Island, HI; Anchorage, AK and Myrtle Beach, SC.

AQUA HOSPITALITY, *PRESIDENT AND CEO*

2008–2014

ASTON HOTELS & RESORTS, *PRESIDENT*

2013–2014

At time of departure, Aqua Hospitality and Aston Hotels & Resorts consisted of 56 hotels and resorts with 11,000 hotel rooms across five U.S. states and Guam. Combined, Aqua and Aston represented the largest concentration of rooms in Hawaii. Prior to its sale to Interval Leisure Group (Nasdaq: IILG, now Marriott Vacations), Aqua Hospitality was the largest operator in Hawaii by number of properties. Highlights include:

- Sold Aqua to Aston's parent company, resulting in a significant return for ownership. Agreed to take dual president role with Aston, creating responsibility for several thousand employees and more than \$400 million of revenue.
- Developed relationships with over twenty hotel and resort owners ranging from Asian and North American high net worth to REITs and private equity firms.
- Grew Aqua in less than five years from a break-even, small Waikiki operator to a major, highly profitable force in Hawaii tourism. Eventually became Hawaii's only operator on all six tourism islands. Without investment capital, hired over 2,000 employees while quintupling the size of the company, as measured by rooms and rooms revenue.
- Won multiple awards including Fastest-Growing Companies ([Pacific Business News](#)) and Best Places to Work ([Hawaii Business](#)).

Benjamin G. Rafter

- Sold majority share of company to Och-Ziff, at the time a \$48 billion NY-based private equity firm. Reinvested all ownership and exit bonuses before creating a triple digit IRR during Och-Ziff's exit to IILG.
- Successfully fused together quant and traditional hotel resources. Recruited resources from banking, technology, ecommerce, economics and other areas, and cross-trained them in hotel operations and analytics respectively.

JETAWAY/TRAVELWORM, *PRESIDENT AND CEO*

2005–2008

Owned by Wasserstein and Co, a NY-based private equity firm, JetAway and its associated brands sold several hundred thousand hotel room nights per year via both consumer-direct and affiliate/wholesale channels. Over a two-year period, successfully stabilized the company and sold it to an Atlanta-based private equity firm.

GET2HAWAII (GET2) *PRESIDENT AND CEO*

2001–2005

Get2 was a private label technology vendor providing dynamic packaging, yield management and fulfillment. Recruited by the acting president to define and execute the company's business strategy. Led the buildout of the technology, growing booking (top line) revenue from \$3 million in 2002 to approximately \$90 million in 2005.

CAMBRIDGE TECHNOLOGY PARTNERS, *PRINCIPAL STRATEGIST (AND OTHER ROLES)* 1998–2001

Cambridge was a Nasdaq 100-listed professional services organization that focused on digital strategy and fixed price, mission critical systems integration projects. Highlights of Cambridge roles include:

- Started and directed Cambridge's "Innovation Center" practice and acted as principal strategist. Innovation Center partnered with G2000 companies to create new businesses by leveraging core technology assets across emerging technologies and new markets.
- Directly sold several global, multi-million dollar projects to C-suite executives.
- Educated the global sales force and created the selling and implementation methodology for Innovation Center.
- Speaker for "Jumpsmart" workshops – a series of traveling seminars for top Fortune 500 clients and prospects.
- As regional practice lead, prior to Innovation Center, led several implementations at companies such as Microsoft, Intel and Russell Investments.

LIVEBID (INNERLIX TECHNOLOGIES), *CO-FOUNDER*

1996–1998

Co-founded with two high school friends a successful startup that harnessed streaming and other Internet technologies to become the recognized leader in the real-time auction space. Livebid hosted several notable auctions, including the sale of the Batmobile, O.J. Simpson's estate and Titanic artifacts. In March 1999, Amazon.com acquired Livebid.

WESTIN HOTELS AND RESORTS, *VARIOUS*

1992–1996

Started career at Westin Hotels & Resorts in various roles including database marketing analyst and emerging technologies manager. In this role, created and implemented one of the first e-commerce enabled sites in the travel industry. Other activities included statistical output and personalization efforts for Westin's Premier frequency program and various data mining and analysis campaigns to help Westin execute marketing and advertising campaigns.

Notable Board member and budget chair, Hawaii Tourism Authority; board member and former chairperson, Hawaii Lodging and Tourism Association; co-founder and board member Hawaii Hotel Association. Donated thousands of room nights for various organizations (please inquire). Created Aqua Blue Foundation to support Aqua's efforts for ocean preservation.

Speaking Numerous speaking engagements at both conference and board levels in North America and Asia.

Education B.A. Communications, University of Washington. Phi Beta Kappa.

EXHIBIT C

Pending Organization Chart for Lessee WHR LLC - post-closing of UBS loan

WHR LLC, a Hawaii limited liability company (Manager: a Benjamin Rafter-controlled entity)					
↓					
Class A Members (Capital/Equity Members)			Class B Members (Promote Class)		
	<u>Class A %</u>	<u>WHR %</u>		<u>Class B %</u>	<u>WHR %</u>
Tower Hotels Fund 2013 LLC	64.5191%	32.2595% ^{1,4}	Tower Hotels Hilo LLC	75.0000%	37.5000% ⁵
Olson/Nanihoa LLC	35.4810%	17.7405% ^{2,4}	Pele Hilo LLC	20.0000%	10.0000% ⁶
[Benjamin Rafter entity - TBD]	<i>TBD</i>	<i>TBD</i> ^{3,4}	Miller Realty Inc.	4.0000%	2.0000% ⁷
Total	100.0000%	50.0000%	MR Delaware SPE LLC	1.0000%	0.5000% ⁸
			Total	100.0000%	50.0000%

Notes:

- ¹ Members of Tower Hotels Fund 2013 LLC are Michael Paulin, Edward Bushor, Kim Taylor Reece, Peter Hershon, and other individuals and entities whose names are confidential pursuant to the operating agreement.
- ² The identity of the members of Olson/Nanihoa LLC are confidential.
- ³ Benjamin Rafter entity plans to contribute a minimum of \$2,000,000 and may backstop any further needed contribution. See Note 4, below.
- ⁴ Percentage Interest(s) of the Class A Members are shown as of May 31, 2023. The Percentage Interest of each of the Class A members after the closing of the UBS loan are subject to actual Class A Member contributions in response to an expected capitial call necessary to payoff existing lender.
- ⁵ Members of Tower Hotels Hilo LLC: Tower Hotels LLC (Edward Bushor-controlled entity), Michael Paulin, Stuart Miller, and other individuals and entities whose identities are confidential pursuant to the operating agreement.
- ⁶ The member of Pele Hilo LLC is Michael Paulin.
- ⁷ The shareholder of Miller Realty Inc. is Stuart Miller.
- ⁸ MR Delaware SPE LLC is controlled by Stuart Miller and Julia McCullough.

EXHIBIT C

EXHIBIT D

Note: WHR LLC responses are in bold underline.

Dear Counsel:

In connection with counsel's email to you below, please advise me if you will be supplementing your responses to me in your letter dated May 25, 2023, in particular the documents and information requested that you claimed were confidential. Examples include:

- The amended and restated operating agreement showing the manager and individual members (and their respective shares or interest);

This request is not a factor of a reasonable mortgage. We again ask DLNR to focus on whether the Mortgage is reasonable. We will answer this again in any event. Ben Rafter has been appointed as the new Manager, as is in evidence in testimony of both Mr. Bushor and Mr. Rafter. The reasonable consent may be conditioned upon the Operating Agreement being finalized showing Ben Rafter as Manager. This Operating Agreement shall be finalized along with the loan documents and signed in conjunction with the loan closing and you may condition the AG with the right to approve of this representation during the loan closing process. The WHR Organizational Chart has been provided to DLNR as additional explanation. Note, the letter explaining appointment of Mr. Rafter is also already in the testimony provided to BLNR with the representation the Manager is Mr. Rafter as clearly stated in the appointment letter previously submitted to BLNR.

- The total outstanding shares/interests of WHR and the names and number of shares issued and owned by the individual members/owners/investors;

This request is not a factor of a reasonable mortgage. We again ask DLNR to focus on whether the Mortgage is reasonable. We will answer this again in any event. The ownership is as set forth on the Organizational Chart and the ownership interests are in the companies listed on the Organizational Chart. This is unnecessary information to the issue at hand, but irrespective of the request, WHR is the one that has committed to fund the capital to fund the difference between the loan amount and the amount to payoff the existing loan. Testimony also exists that Ben Rafter is the backstop to the company in the event the owners listed on the Org Chart don't all pay their exact percentage interests.

- The paid-in-capital of each individual member/owner/investor in the form or cash contribution, the amount of cash contribution and to the extent applicable, the amount of shares issued for services rendered or goodwill in lieu of a cash contribution.

This request is not a factor of a reasonable mortgage. We again ask DLNR to focus on whether the Mortgage is reasonable. We will answer this again in any event. The amounts each owner of WHR is committed to fund are listed on the Exhibit A attached hereto. Thus, there is \$21M that is committed to be funded to pay any outstanding amounts on the loan, and WHR and its members are committed to fund the amount well below this amount. Also, Ben Rafter has testified he is the backstop to the company in the event the owners listed on the Org Chart don't all pay their exact percentage interests.

EXHIBIT D

- The amount of paid-in-capital and cash contribution of Ben Rafter;

This request is not a factor of a reasonable mortgage. We again ask DLNR to focus on whether the Mortgage is reasonable. We will answer this again in any event. Mr. Rafter has stated in testimony he will, upon closing of the loan, contribute a minimum \$2,000,000 as he testified. We need the Consent of the Mortgage as a condition to the loan closing and all owners contributing the amount capital to be paid in as of the closing.

- The number of shares/interests issued to Ben Rafter (and the total number of shares outstanding at the time of said issuance), and any other information to show Ben Rafter has the controlling interest or ownership of WHR and is the managing member/owner/investor.

This request is not a factor of a reasonable mortgage. We again ask DLNR to focus on whether the Mortgage is reasonable. We will answer this again in any event. The interests are equal to the \$2,000,000. There are not separate shares, but instead his interests will be equal to the minimum \$2,000,000 or such higher number of capital invested as a backstop per his testimony previously provided.

We will note WHR's decision not to amend or revise the loan documents that conflict or otherwise are prohibited under the lease.

WHR has never stated it would not amend the loan documents and in fact, WHR has agreed as a condition to the reasonable consent to the Mortgage to amend all provisions that are inconsistent with the lease, and this may be a condition to the consent of the Mortgage, as we agree the AG and the lender and WHR counsel will all revise the loan documents to be consistent with the Lease.

[Counsel's note: Additionally, please note that the Lessee WHR already confirmed that the Lender has agreed to remove the Mezzanine Loan provision (Section 11.29) of the Loan Agreement. See Letter dated May 25, 2023. - MAC]

Attached is an article from 2013 showing Ben Rafter's involvement with Naniloa. Confirm date Rafter admitted as a member/owner/investor, and the amount of his cash contribution, if any, from 2013 to current.

A 2013 Article is not factual information. Ben Rafter has not been a member/owner/investor before the current appointment and current closing of the new loan in 2023, which is being closed in conjunction with Mr. Rafter being the new Manager of WHR and investing \$2,000,000 minimum for the first time into WHR.

Further, your letter dated May 25, 2023 and attachments refer to the manager making a capital call to members/owners/investors in the event of a financial shortfall or other difficulty or to resolve financial defaults.

WHR has the right to mandate a capital call for the needs of WHR, which for the Mortgage closing, WHR has notified all Members and will require the funding of the capital call for the difference of the \$54,000,000 loan and the payoff amount \$65M (estimate), and the Members of WHR have a legal

obligation to contribute in the capital all such amounts, but note, Mr. Rafter has agreed to be the backstop. That is why this is non-issue, as WHR has the right to call the capital from the Members.

As you know, WHR has had difficulty keeping current under the lease. Attached to this email are significant default situations WHR faced that went before the Board in 2021 and 2022. Please confirm manager Bushor *did not make a capital call* to resolve the 2021 and 2022 financial difficulties and lease default situation, *or if he did make a capital call*, identify the date of the capital call, and : (i) those individual members/owners/investors who did not contribute cash to the capital call; and (2) those individual members/owners/investors who did contribute cash, and the specific date and amount of cash contribution of each member/owner/investor.

Any defaults in 2021 and 2022 related to Covid, and in 2022, testimony of the Receiver noted the default was from a “snafu” of Evolution and processing a check that was 5 days late, but this was not WHR responsibility as the Receiver has authorization to make all lease payments at this time. This confirms that no capital calls have been required before this new UBS loan closing as the cash flow has been adequate since June 2021 to pay all lease payments and honor all lease obligations.

EXHIBIT E

Hawaii

Land & Nature

Tribune Herald



Wednesday, December 18, 2013 Proudly serving Hilo the Big Island since 1923 75 cents

Google

LIFE
A window into society's mindset
Page A8



NATION
Budget heads to final passage
Page A3



SPORTS
Honokaa finds way despite disadvantage
Page B1

A new Naniloa

Giant whale statue part of artistic plans

By TOM CALLIS
Tribune-Herald staff writer

The former Naniloa Volcanoes Resort's days of being simply a hotel may be numbered.

The new owners of the Hilo establishment, being temporarily re-named the Naniloa Hilo Hotel, are promising an entirely new experience for travelers, with a marine and historical theme that will put the Big Island's past and

Inside
DLNR still plans to appeal sale of hotel. **Page A5**

Hawaii's artists on display.

Real estate developer Ed Bushor said Tuesday the 383-room hotel, acquired recently through bankruptcy, will be part museum with historical items from the Edmund

C. Olson Trust featured throughout its lobby and hallways. That will be mixed with art from local and world-renowned artists, including Robert Wyland, known for his murals of whales and other sea life, he said.

"I want people to come in and not know if this is a museum or if is this a hotel," said Bushor, who

See **NANILOA** Page A5



HOLLYN JOHNSON/Tribune-Herald
From left, Benjamin Rafter, Ed Olson and Ed Bushor stand in the lobby of the Naniloa Volcanoes Resort on Tuesday afternoon. The partners hope to revive the hotel with a museum theme.

- Ryan Yasuichi Shimabukuro, 33, of Hilo with driving after license revoked.
- Summer Mae Lopez, 33, of Keauu with two counts of failure to appear.
- Samuel J. Sapp, 35, of Kailua Kona with DUI.
- Benjamin Andrew Krueger, 38, of Kailua-Kona with DUI.

Contempt of court typically means failing to comply with a judge's order, such as paying a fine or appearing at a court proceeding. Failure to appear means not showing up in court on the date written on a traffic citation.

One-way traffic on Kapiolani

In observance of the 2013 Christmas season activities at St. Joseph Catholic Church in Hilo, a temporary one-way traffic pattern will be in effect on Kapiolani Street on Dec. 24 and 25. Traffic will be allowed only in the Puna, or southerly,

direction on Kapiolani between Waiānue Avenue and Haili Street, from 4 p.m. Christmas Eve until 3 a.m. Christmas Day and from 6 a.m. to 2 p.m. on Christmas Day. Parking will be allowed on both sides of Kapiolani Street during these times.

DLNR still plans to appeal sale of hotel

Tribune-Herald

The state Department of Land and Natural Resources still plans to continue its appeal of the Naniiloa Volcanoes Resort sale, according to its land manager.

The sale in U.S. Bankruptcy Court closed Tuesday, but DLNR still believes there are loose ends with the process that need to be addressed, said Land Administrator Russell Tsuji.

DLNR filed the notice of appeal last week.

Tsuji said the agency has concerns over the court transferring the lease for the property to the buyers,

WHR LLC, without its consent. Additionally, it wants assurances that other "non-monetary issues," including building code violations, will be addressed.

He believes that the court could have set a bad precedent for other DLNR tenants that go into bankruptcy by not addressing those issues.

Benjamin Rafter, president and CEO of Aqua Hospitality, one of hotel's new partners, said code violations and other problems will be resolved.

Tsuji said he hopes to talk with the representatives of the new owners, adding that the appeal is "likely to go forward."

GMO From front page

moves to the administration to enforce," he said.

Council Chair J Yoshimoto, who offered the other ad hoc committee proposal, said he also wanted to wait to see what the state Legislature does regarding GMOs in Hawaii.

After several recesses, Wille withdrew her proposal.

Initially, she failed to get a second to her motion to bring it up for discussion. South Kona/Ka'u Councilwoman Brenda Ford supported it but

a few council members who wanted to discuss Yoshimoto's version.

Ford and Wille accused the other council members of avoiding accountability by not allowing Wille's version to come up for discussion.

Puna Councilman Greggor Ilagan and Hamakua Councilwoman Valerie Poindexter told the Tribune-Herald that they didn't see it that way.

"This (ad hoc committee) is what I want to talk about," Ilagan said.

NANILOA From front page

acquired the beleaguered hotel in a partnership with Ed Olson, Aqua Hospitality and what he called a "hand full" of other investors.

The 1960s-era hotel sits on Hilo Bay and offers hard-to-beat views of Mauna Kea and downtown Hilo.

While it has struggled over the years, Bushor, of Oahu, said he sees plenty of potential.

"I saw it the moment I walked on the property," he said. "I fell in love with Hilo."

The partnership, known as WHR LLC, took ownership of the hotel and its nine-hole golf course Tuesday, and it was already getting to work on its ambitious makeover plans.

The first step is cleaning up the Banyan Drive property, Bushor said, and workers were busy clearing weeds from the lobby's roof and tending to planters near its entrance.

That will follow with a new coat of paint for the outside of the buildings plus floor-by-floor renovations and other landscaping work.

That includes the placement of new art and other features, such as a life-sized statue of a young humpback whale that guests will see as soon as they enter the lobby. The whale, Bushor said, will stand three stories tall on the makai side and is one example of how he plans to transform the property into the hotel that he says Hilo deserves.

The hotel will remain open during renovations, he said.

Other plans include a sculpture garden and "water features," including one with dolphins spraying water over the entrance to the hotel.

"You need to hear the water, see the water and you need to smell Hawaii everywhere in the hotel," Bushor said. "And then you'll have an experience."

The hotel will be similar in concept to the former Wyland Waikiki, which he sold after two years to Marriott.

"We don't plan to sell this property," Bushor said.

In connection with its museum theme, the hotel will have "curators" instead of bellmen escort guests to their rooms, some of which will have themes from individual artists or musicians, he said. Hotel keys will be

million will be spent on renovations and "soft costs," such as building permits.

He also said he has a "handshake agreement" with musician Willie K on opening a lounge on the property, with entertainment that he hopes will attract Hilo residents.

But even with the investment, is there enough demand to fill the rooms?

Bushor and Benjamin Rafter, president and CEO of Aqua Hospitality, both said they don't expect occupancy to be a problem.

"Hilo is starved for this," Rafter said. "The demand is there for Hilo. The (service) isn't there."

Aqua Hospitality is managing the property.

Rafter said the hotel now employs 37 people but it will have more than 100 employees once renovations are finished.

Bushor expects renovations to take a year to complete.

By December 2014, he plans to hold a soft opening under a new name followed by a grand opening on New Year's Eve.

"We will work day and night to get this done," Bushor said.

By buying the hotel, the new owners also take on

the \$500,000 a year lease with the state Department of Land and Natural Resources.

About 58 years remain on the lease, and Bushor said he can work with the price, which is higher than nearby properties.

Olson said he is excited to be part of the project and

be able to put the trust's archives on display.

He believes it will encourage more tourists to stay overnight in Hilo rather than driving to Kona or flying back to Oahu.

"It's a great opportunity for Hilo," Olson said.

Email Tom Callis at tcallis@hawaiitribune-herald.com.

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HILTON WAIKOLOA VILLAGE'S

New Year's Eve

2014 DINNER & CELEBRATION

TUESDAY, DECEMBER 31 / 7:00PM - 12:30AM

LIVE ENTERTAINMENT:

JOHNNY SHOT BAND

Come and enjoy the unique island music and high energy sounds of DJ Tiger and the "Johnny Shot Band" - 7 piece band including Neil Barnett on guitar and vocals, Amber Ricci for vocals and percussion, John Kahakalau on drums, and Moon Brown on the saxophone.

EVENT INCLUDES:

- Two Drinks Per Person • (Cash Bar Also Available)
- Specialty Dinner Stations •
- Gourmet Coffee Station •
- Party Favors •
- Midnight Countdown •
- Balloon Drop •
- Midnight Champagne Toast •

DINNER BUFFET: GENERAL SEATING

Adults: **\$129***
Teens 13-17: **\$89***
Children 5-12: **\$49***

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Upgrade to Ali'i Seating for an additional **\$40*** per person. (Upgrade includes pupus served tableside, one additional drink ticket and preferred seating. Only 200 seats available.)

*An additional 15% service charge and 4.16% sales tax applies

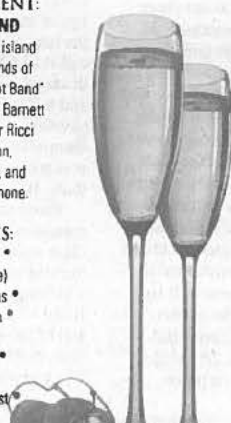


EXHIBIT F

TABLE OF CONTENTS

	<u>Page</u>
TERM OF LEASE	1
ANNUAL RENTAL	2
REOPENING OF ANNUAL RENTAL	4
INTEREST RATE/SERVICE CHARGE	6
RESERVATIONS:	
1. Minerals and waters	6
2. Ownership of improvements	6
AGREEMENTS AND COVENANTS BETWEEN PARTIES:	
1. Payment of rent	7
2. Taxes, assessments, etc.....	7
3. Utility services	7
4. Covenant against discrimination	7
5. Sanitation	7
6. Waste and unlawful, improper or offensive use of premises	7
7. Compliance with laws	7
8. Inspection of premises	8
9. Improvements	8
10. Repairs to improvements	8
11. Liens	8
12. Character of use	8
13. Assignments, etc.....	9
14. Subletting	9
15. Indemnity	9
16. Costs of litigation	10
17. Liability insurance	10
18. Bond, performance	11
19. Lessor's lien	11
20. Mortgages	12
21. Breach	15
22. Condemnation	15
23. Right to enter	16
24. Inspection by prospective bidders	16
25. Acceptance of rent not a waiver	16
26. Extension of time	17
27. Justification of sureties	17



TABLE OF CONTENTS (cont'd)

	<u>Page</u>
28. Waiver, modification, reimposition of bond and liability insurance provisions	17
29. Quiet enjoyment	18
30. Surrender	18
31. Non-warranty	18
32. Hazardous materials.....	18
33. Hawaii law	19
34. Exhibits - Incorporation in lease	19
35. Headings	19
36. Partial invalidity	19
37. Time is of the essence	19
38. Archaeological sites	19
39. Incorporation by reference	20
 SPECIAL CONDITIONS:	
40. Improvements	21
41. Bond, improvement	21
42. Fire and extended coverage insurance	21
43. Phase one (1) hazardous waste evaluation	22
44. Survey and boundary stakeout	22
45. Environmental assessment	22
46. Subordination of existing subleases	22
47. Reserved.....	22
48. Existing improvements	23
49. Hunting'.....	23
50. Audit and examination of books, etc.	23
51. Environmental regulations	23
 DEFINITIONS	 24
 SIGNATURE PAGE	 25
 ACKNOWLEDGMENT PAGE	 26

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STATE OF HAWAII

DEPARTMENT OF LAND AND NATURAL RESOURCES

GENERAL LEASE NO. S-5844

THIS LEASE, made this 20th day of January, 2006, by and between the STATE OF HAWAII, hereinafter referred to as the "Lessor," by its Board of Land and Natural Resources, called the "Board," and HAWAII OUTDOOR TOURS, INC., a Hawaii corporation, whose address is 421 Makalika Street, Hilo, Hawaii 96720, hereinafter referred to as the "Lessee";

WITNESSETH:

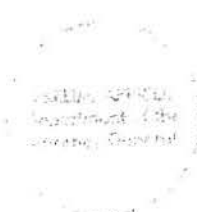
The Lessor, pursuant to Sections 171-6, 171-35, and 171-61, Hawaii Revised Statutes, for and in consideration of the rent to be paid and of the terms, covenants and conditions herein contained, all on the part of the Lessee to be kept, observed and performed, does lease unto the Lessee, and the Lessee does lease from the Lessor the premises situate at Waiakea, South Hilo, Island of Hawaii, Hawaii, consisting of:

"Resort Site," containing an area of 6.35 acres, more or less, more particularly described in Exhibit "A" and as shown on the map marked Exhibit "B," attached hereto and made parts hereof; and

"Golf Course and Allied Facilities Site," containing a gross area of 63.775 acres, and a net area of 62.576 acres, after exclusions, more particularly described in Exhibit "C" and as shown on the map marked Exhibit "D," attached hereto and made parts hereof.

SUBJECT TO all encumbrances listed in Exhibits "A", "C", and "E" attached hereto and made parts hereof.

TO HAVE AND TO HOLD the leased premises unto the Lessee for the term of SIXTY FIVE (65) years, commencing on the 1st day of February, 2006, up to and including the 31st day of January, 2071, unless sooner terminated as hereinafter provided, the Lessor reserving and the Lessee yielding and paying to the Lessor at the Office of the Department of Land and Natural Resources, Honolulu, Oahu, State of Hawaii, rental as provided hereinbelow:



A. Rent shall consist of Base Rent and Percentage Rent.

B. Base Rent.

1. Base Rent shall be an annual rental amount, payable in advance without notice or demand, in equal semi-annual installments on February 1st and August 1st of each and every year.

2. Base rent for each year during the first ten years of the lease term, up to and including the tenth (10th) year of the lease term, shall be FIVE HUNDRED THOUSAND AND NO/100 DOLLARS (\$500,000.00).

3. For the second ten years of the lease term, commencing at the beginning of the eleventh (11th) year of the lease term up to and including the twentieth (20th) year of the lease term, the annual base rent shall be an amount equal to the annual base rent for the first year of the lease term multiplied by an escalation rate of one and a half percent (1.5%), compounded annually, for each year of the first ten-year period.

4. For the third ten years of the lease term, commencing at the beginning of the twenty-first (21st) year of the lease term up to and including the thirtieth (30th) year of the lease term, the annual base rent shall be an amount equal to the annual base rent for the eleventh year of the lease term multiplied by an escalation rate of one and a half percent (1.5%), compounded annually, for each year of the second ten-year period.

C. Percentage Rent.

1. Percentage rent shall be payable annually in arrears, without notice or demand, no later than one hundred eighty (180) days after the close of each and every of Lessee's fiscal years. Each payment of percentage rent shall be accompanied by a written statement certified as correct by Lessee, or a person duly authorized by Lessee, showing in accurate detail the amount of gross receipts, by category, for the payment period, and reviewed financial statements prepared according to generally accepted accounting principles.

2. Percentage rent shall be equal to two percent (2%) of the annual gross revenue from the leased premises to the extent such amount exceeds the annual base rent.

3. The annual gross revenue shall include all revenues generated from, on, or within the leased premises, including but not limited to room revenues, food and beverage sales, retail sales, commissions, greens fees, cart and other equipment rental, club membership fees, driving range income, and the gross revenues of any sublessee or concessionaire (but not including the revenues from licensees of space for radio, television, cellular phone or other similar transmission antennas), less adjustments for:

a. Discounts, refunds and allowances made on any sale;

b. Sales and use taxes, hotel room or tourist taxes, general excise tax or other similar taxes now or in the future imposed on the sales of rooms, green and cart fees, food, beverages, merchandise or services, but only if such taxes are added to the selling price, separately stated, and collected separately from the sell price of merchandise or services, from customers;

c. Sales of fixtures, furnishings, trade fixtures or personal property that are not retail merchandise and are not sold in the ordinary course by the Lessee;

d. Charges made by credit card companies not directly or indirectly owned or controlled by the Lessee;

e. Receipts from sales of meals to employees of the Lessee consumed on the demised premises and sold to them at or below cost in the course of their employment, provided such sales are registered and recorded separately from other sales;

f. Gratuities or tips received by employees from patrons or service charges collected and turned over to employees in lieu of such employees receiving gratuities or tips from patrons;

g. Rent received from sublessees or concessionaires whose gross revenues are included in the calculation of annual gross revenue.

4. Lessee shall at all times keep and maintain accurate records of all business transactions and sales made in and from the premises. Lessor shall have the right at all reasonable times during business hours, through Lessor's duly authorized agent, attorney, or accountant, to inspect and make copies of Lessee's records, accounts, and books in any way



bearing on such sales (including copies of tax or information returns furnished any governmental authority), at the premises or at any other office of Lessee at which such books, records, and accounts may be kept, and to inspect the records, accounts and books in any way bearing on sales of any other person or firm selling goods or services in or from any part of the premises. All such information shall be held by Lessor, its agents, attorneys, and accountants in strictest confidence.

5. If an audit discloses that Lessee has underpaid the percentage rent due for any period, Lessor shall notify Lessee in writing of such deficiency and upon such notification the deficient amount shall be immediately due and payable by Lessee. If an audit by Lessor's accountant or by a licensed independent certified public accountant retained by Lessor shall disclose that rent has been underpaid by two percent (2%) or more for any period under examination, Lessor, in addition to any other remedies available in this lease or otherwise, shall be entitled to reimbursement of all costs and expenses incurred in completing any such audit in addition to any deficiency (together with applicable interest, service charge and other charges) revealed or disclosed.

6. If an audit discloses that Lessee has overpaid the percentage rent due for any period, Lessor shall notify Lessee in writing of such overpayment. Overpaid amounts shall be credited to and set off against rental amounts next due and payable following the date that such overpayment is discovered or revealed.

7. The percentage rates shall remain constant throughout the first thirty (30) years of the lease term.

D. Rental reopening. The annual base rent and percentage rent rates shall be reopened and redetermined as of the day following the expiration of the thirtieth (30th), fortieth (40th), and fiftieth (50th) years of the term.

1. Determination of base rent and percentage rent upon reopening. The base rent for any ensuing period shall be the fair market rental at the time of reopening. Except as provided herein, the provisions in Hawaii Revised Statutes, Chapter 658A, shall be followed. At least six (6) months prior to the time of reopening, the fair market rental shall be determined by a staff appraisal or independent appraisal, as allowed by law, whose services shall be contracted for by the Lessor, and the Lessee shall be promptly notified by certified mail, return receipt requested, of the fair market rental as

determined by Lessor's appraiser; provided, that should the Lessee fail to notify Lessor in writing within thirty (30) days after receipt thereof that Lessee disagrees with the fair market rental as determined by Lessor's appraiser and that Lessee has appointed its own appraiser to prepare an independent appraisal report, then the fair market rental as determined by Lessor's appraiser shall be deemed to have been accepted by Lessee and shall be the fair market rental as of the date of reopening. If Lessee has notified Lessor and appointed his appraiser as stated hereinabove, Lessee's appraiser shall complete his appraisal and the two appraisers shall then exchange their reports within forty-five (45) days from the date of Lessee's appointment of the appraiser.

The two appraisers shall review each other's reports and make every effort to resolve whatever differences they may have. However, should differences still exist fourteen (14) days after the exchange, the two appraisers shall within seven (7) days thereafter appoint a third appraiser who shall also prepare an independent appraisal report based on the review of the two appraisal reports prepared and any other data. Copies thereof shall be furnished to the first two appraisers within forty-five (45) days of the appointment. Within twenty (20) days after receiving the third appraisal report, all three shall meet and determine the fair market rental in issue. The fair market rental as determined by a majority of the appraisers shall be final and binding upon both Lessor and Lessee, subject to vacation, modification or correction in accordance with the provisions of Chapter 658A, Hawaii Revised Statutes. Each party shall pay for its own appraiser and the cost of the services of the third appraiser shall be borne equally by the Lessor and the Lessee. All appraisal reports shall become part of the public record of the Lessor.

In the event that the appraisers are unable to determine the fair market rental before the reopening date, or by the foregoing prescribed time, whichever is later, the Lessee shall pay the fair market rental as determined by Lessor's new appraised value until the new rent is determined and the rental paid by Lessee shall then be subject to retroactive adjustments as appropriate to reflect the fair market rental determined as set forth hereinabove. However, Lessee or Lessee's appraiser's failure to comply with the procedures set forth above shall constitute a waiver of Lessee's right to contest the new rent, and the Lessee shall pay the rent as determined by Lessor's appraiser without any retroactive adjustments. Alternatively, Lessor may treat this failure as a breach of this lease and terminate the lease.

E. Interest rate and service charge. The interest rate on any and all unpaid or delinquent rentals shall be at one percent (1%) per month, plus a service charge of FIFTY AND NO/100 DOLLARS (\$50.00) per month for each month of delinquency.

RESERVING UNTO THE LESSOR THE FOLLOWING:

1. Minerals and waters. (a) All minerals as hereinafter defined, in, on or under the premises and the right, on its own behalf or through persons authorized by it, to prospect for, mine and remove the minerals and to occupy and use so much of the surface of the ground as may be required for all purposes reasonably extending to the mining and removal of the minerals by any means whatsoever, including strip mining. "Minerals," as used herein, shall mean any or all oil, gas, coal, phosphate, sodium, sulphur, iron, titanium, gold, silver, bauxite, bauxitic clay, diaspore, boehmite, laterite, gibbsite, alumina, all ores of aluminum and, without limitation thereon, all other mineral substances and ore deposits, whether solid, gaseous or liquid, including all geothermal resources, in, on, or under the land, fast or submerged; provided, that "minerals" shall not include sand, gravel, rock or other material suitable for use and used in general construction in furtherance of the Lessee's permitted activities on the premises and not for sale to others. (b) All surface and ground waters appurtenant to the premises and the right on its own behalf or through persons authorized by it, to capture, divert or impound the same and to occupy and use so much of the premises required in the exercise of this right reserved; provided, however, that as a condition precedent to the exercise by the Lessor of the rights reserved in this paragraph, just compensation shall be paid to the Lessee for any of Lessee's improvements taken.

2. Ownership of improvements. The ownership of all improvements of whatever kind or nature, including but not limited to fences and stockwater system(s) located on the land prior to or on the commencement date of this lease, excluding those improvements listed in paragraph 48 hereunder and those improvements constructed during the term of this lease unless provided otherwise.

SUBJECT TO the rights of native tenants and to regulatory rights and ownership rights (if any) of the State of Hawaii established pursuant to state law including Chapter 6E, Hawaii Revised Statutes, over prehistoric or historic remains found in, on, or under the land.

THE LESSEE COVENANTS AND AGREES WITH THE LESSOR AS FOLLOWS:

1. Payment of rent. The Lessee shall pay the rent to the Lessor at the times, in the manner and form provided in this lease and at the place specified above, or at any other place the Lessor may from time to time designate, in legal tender of the United States of America.

2. Taxes, assessments, etc. The Lessee shall pay or cause to be paid, when due, the amount of all taxes, rates, and assessments of every description as to which the premises or any part, or any improvements, or the Lessor or Lessee, are now or may be assessed or become liable by authority of law during the term of this lease; provided, however, that with respect to any assessment made under any betterment or improvement law which may be payable in installments, Lessee shall be required to pay only those installments, together with interest, which becomes due and payable during the term of this lease.

3. Utility services. The Lessee shall be responsible for obtaining any utility services and shall pay when due all charges, duties and rates of every description, including water, sewer, gas, refuse collection or any other charges, as to which the premises or any part, or any improvements, or the Lessor or Lessee may become liable for during the term, whether assessed to or payable by the Lessor or Lessee.

4. Covenant against discrimination. The use and enjoyment of the premises shall not be in support of any policy which discriminates against anyone based upon race, creed, sex, color, national origin, religion, marital status, familial status, ancestry, physical handicap, disability, age or HIV (human immunodeficiency virus) infection.

5. Sanitation. The Lessee shall keep the premises and improvements in a strictly clean, sanitary and orderly condition.

6. Waste and unlawful, improper or offensive use of premises. The Lessee shall not commit, suffer or permit to be committed any waste, nuisance, strip or unlawful, improper or offensive use of the premises or any part, nor, without the prior written consent of the Lessor, cut down, remove or destroy, or suffer to be cut down, removed or destroyed, any trees now growing on the premises.

7. Compliance with laws. The Lessee shall comply with all of the requirements of all municipal, state, and federal

authorities and observe all municipal, state and federal laws applicable to the premises, now in force or which may be in force.

8. Inspection of premises. The Lessee shall permit the Lessor and its agents, at all reasonable times during the lease term, to enter the premises and examine the state of its repair and condition.

9. Improvements. The Lessee shall not at any time during the term construct, place, maintain or install on the premises any building, structure or improvement of any kind and description except with the prior written approval of the Board and upon those conditions the Board may impose, including any adjustment of rent, unless otherwise provided in this lease. The Lessee shall own these improvements until the expiration or other termination of the lease, at which time the ownership shall, at the option of the Lessor, remain and become the property of the Lessor or shall be removed by Lessee at Lessee's sole cost and expense.

10. Repairs to improvements. The Lessee shall, at its own expense, keep, repair, and maintain all buildings and improvements now existing or hereafter constructed or installed on the premises in good order, condition and repair, reasonable wear and tear excepted.

11. Liens. The Lessee shall not commit or suffer any act or neglect which results in the premises, any improvement, or the leasehold estate of the Lessee becoming subject to any attachment, lien, charge, or encumbrance, except as provided in this lease, and shall indemnify, defend, and hold the Lessor harmless from and against all attachments, liens, charges, and encumbrances and all resulting expenses.

12. Character of use. The Lessee shall use or allow the premises leased, on all parcels, except the golf course parcel, to be used solely for hotel and hotel-related uses (including retail, restaurant, banquet, commercial office, and spa facilities), but excluding condominium or hotel condominium uses. The golf course parcel (tax map key no. (3) 2-1-01:12) shall be used for golf course and golf course related uses (including clubhouse, restaurant and bar, cart barn and driving range) and other recreational and parking uses as may be permitted under the county zoning ordinances or land use permits obtained from the county; provided, however, that in the event the golf course parcel is withdrawn or deleted from the lease, any rights to use the golf course parcel to serve the hotel

parcels shall terminate. The Lessee, with the consent of the Department of Land and Natural Resources, may sublease portions of the subject property for uses not permitted above (e.g., telecommunication antennas), provided that the Department of Land and Natural Resources shall have the right to revise the rent based on the rent to be charged the sublessee.

13. Assignments, etc. The Lessee shall not transfer, assign, or permit any other person to occupy or use the premises or any portion or transfer or assign this lease or any interest, either voluntarily or by operation of law, except by way of devise, bequest, or intestate succession, and any transfer or assignment made shall be null and void; provided that with the prior written approval of the Board the assignment and transfer of this lease or any portion may be made in accordance with current industry standards, as determined by the Board; provided, further, that the approval of any assignment of lease shall be subject to the Assignment of Lease Evaluation Policy adopted by the Board on December 15, 1989, as amended, a copy of which is attached hereto as Exhibit "G," except that payment of an assignment premium shall not be assessed.

If the Lessee is a partnership, joint venture or corporation, the sale or transfer of 20% or more of ownership interest or stocks by dissolution, merger or any other means shall be deemed an assignment for purposes of this paragraph. If the Lessee is a manager-managed limited liability company, any changes in the manager shall be deemed an assignment for purposes of this paragraph. If the Lessee is a member managed limited liability company, the sale or transfer of twenty percent (20%) or more of the total membership interests shall be deemed an assignment for purposes of this paragraph.

14. Subletting. Except as otherwise provided in this lease, the Lessee shall not rent or sublet the whole or any portion of the premises, without the prior written approval of the Board; provided, however, that prior to this approval, the Board shall have the right to review and approve the rent to be charged to the proposed sublessee and 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 or any subsequent sublessees shall be included as part of the Lessee's gross receipts, and the Board shall have the right to revise the rent of the premises based upon the rental rate charged to the sublessee including the percentage rent, if applicable, and provided, further, that the rent may not be revised downward.

15. Indemnity. The Lessee shall indemnify, defend,

and hold the Lessor harmless from and against any claim or demand for loss, liability, or damage, including claims for bodily injury, wrongful death, or property damage, arising out of or resulting from: 1) any act or omission on the part of Lessee relating to Lessee's use, occupancy, maintenance, or enjoyment of the premises; 2) any failure on the part of the Lessee to maintain the premises and sidewalks, roadways and parking areas adjacent thereto in Lessee's use and control, and including any accident, fire or nuisance, growing out of or caused by any failure on the part of the Lessee to maintain the premises in a safe condition; and 3) from and against all actions, suits, damages, and claims by whomsoever brought or made by reason of the Lessee's non-observance or non-performance of any of the terms, covenants, and conditions of this lease or the rules, regulations, ordinances, and laws of the federal, state, municipal or county governments.

16. Costs of litigation. In case the Lessor shall, without any fault on Lessor's part, be made a party to any litigation commenced by or against the Lessee (other than condemnation proceedings), the Lessee shall pay all costs, including reasonable attorney's fees, and expenses incurred by or imposed on the Lessor; furthermore, the Lessee shall pay all costs, including reasonable attorney's fees, and expenses which may be incurred by or paid by the Lessor in enforcing the covenants and agreements of this lease, in recovering possession of the premises, or in the collection of delinquent rental, taxes, and any and all other charges.

17. Liability insurance. The Lessee shall procure and maintain, at its cost and expense and acceptable to the Lessor, in full force and effect throughout the term of this lease, commercial general liability insurance, in an amount of at least \$500,000.00 for each occurrence and \$1,000,000.00 aggregate, with an insurance company or companies licensed to do business in the State of Hawaii. The policy or policies of insurance shall name the State of Hawaii as an additional insured. The insurance shall cover the entire premises, including all buildings, improvements, and grounds and all roadways or sidewalks on or adjacent to the premises in the use or control of the Lessee.

The Lessee, prior to entry and use of the premises or within fifteen (15) days from the effective date of this lease, whichever is sooner, shall furnish the Lessor with a certificate(s) showing the policy(s) to be initially in force, keep the certificate(s) on deposit during the entire lease term, and furnish a like certificate(s) upon each renewal of the policy(s). This insurance shall not be cancelled, limited in

scope of coverage, or nonrenewed until after thirty (30) days written notice has been given to the Lessor.

The Lessor shall retain the right at any time to review the coverage, form, and amount of the insurance required by this lease. If, in the opinion of the Lessor, the insurance provisions in this lease do not provide adequate protection for the Lessor, the Lessor may require Lessee to obtain insurance sufficient in coverage, form, and amount to provide adequate protection. The Lessor's requirements shall be reasonable but shall be designed to assure protection for and against the kind and extent of the risks which exist at the time a change in insurance is required. The Lessor shall notify Lessee in writing of changes in the insurance requirements and Lessee shall deposit copies of acceptable insurance policy(s) or certificate(s) thereof, with the Lessor incorporating the changes within thirty (30) days of receipt of the notice.

The procuring of the required policy(s) of insurance shall not be construed to limit Lessee's liability under this lease nor to release or relieve the Lessee of the indemnification provisions and requirements of this lease. Notwithstanding the policy(s) of insurance, Lessee shall be obligated for the full and total amount of any damage, injury, or loss caused by Lessee's negligence or neglect connected with this lease.

It is agreed that any insurance maintained by the Lessor will apply in excess of, and not contribute with, insurance provided by Lessee's policy.

18. Bond, performance. The Lessee shall, at its own cost and expense, within fifteen (15) days from the effective date of this lease, procure and deposit with the Lessor and thereafter keep in full force and effect during the term of this lease a good and sufficient surety bond, conditioned upon the full and faithful observance and performance by Lessee of all the terms, conditions, and covenants of this lease, in an amount equal to two times the annual rental then payable. This bond shall provide that in case of a breach or default of any of the lease terms, covenants, conditions, and agreements, the full amount of the bond shall be paid to the Lessor as liquidated and ascertained damages and not as a penalty.

19. Lessor's lien. The Lessor shall have a lien on all the buildings and improvements owned or placed on the premises by the Lessee, on all property kept or used on the premises, whether the same is exempt from execution or not and on the rents of all improvements and buildings located on the

premises for all Lessor's costs, attorney's fees, rent reserved, for all taxes and assessments paid by the Lessor on behalf of the Lessee, and for the payment of all money provided in this lease to be paid by the Lessee, and this lien shall continue until the amounts due are paid.

20. Mortgages.

a. Authorized Mortgages. Notwithstanding anything to the contrary contained in this lease, Lessee may from time to time with the prior written consent of the Chairperson, which consent shall not be unreasonably withheld, assign this lease by way of mortgage (an "Authorized Mortgage") to any bank, insurance company, or other lending institution legally permitted to make mortgage loans in the State of Hawaii, as mortgagee (an "Authorized Mortgagee"). Any Authorized Mortgagee and its permitted assigns may enforce the Authorized Mortgage and acquire title to the leasehold estate in any lawful way; may, pending foreclosure of the Authorized Mortgage (or pending sale of this lease in lieu of foreclosure of the Authorized Mortgage), take possession of and rent and operate the Premises; and may, upon foreclosure of the Authorized Mortgage (or upon such sale in lieu of foreclosure thereof), without further consent of Lessor, sell and assign the leasehold estate by assignment in which the assignee shall expressly assume and agree to observe and perform the terms and conditions of this lease on Lessee's part to be observed and performed; and such assignee may make a purchase money mortgage of this lease to the assignor thereof; provided, that upon the execution of such assignment or mortgage a true copy thereof shall be delivered promptly to Lessor. Nothing contained in such mortgage shall release or be deemed to relieve Lessee from full and faithful observance and performance of this lease or from any liability for the nonobservance or nonperformance hereof, nor be deemed to constitute a waiver of any rights of Lessor hereunder. In the event of a conflict between this lease and the Authorized Mortgage, the provisions of this lease shall control. The Authorized Mortgagee or its assigns of the Authorized Mortgage shall be liable to perform the obligations herein imposed on Lessee only during the period such person has possession or ownership of the leasehold estate.

b. Protection of Authorized Mortgagee. So long as there shall be in existence an Authorized Mortgage of this lease, a copy of which was delivered to Lessor, Lessor shall not terminate, cancel, surrender or accept a surrender of this lease because of any default on the part of Lessee to observe or perform any of the covenants or conditions herein contained if the Authorized Mortgagee or its assigns, within one hundred

twenty (120) days from the date written notice of such default shall have been mailed by Lessor to the Authorized Mortgagee at its last address known to Lessor, shall cure such default, if the same can be cured by the payment of money, or if such is not the case, shall undertake in writing to perform and shall thereafter pay all rent and other charges as and when due under this lease and perform all other covenants of this lease capable of performance by the Authorized Mortgagee or its assigns until such time as this lease shall be sold upon foreclosure of the Authorized Mortgage commenced promptly and completed with due diligence, and any default (i) consisting of Lessee's failure promptly to discharge any lien, charge or encumbrance against the Premises junior in priority to the Authorized Mortgage or (ii) which is otherwise not susceptible to cure by the Authorized Mortgagee except upon obtaining possession of the Premises or by foreclosure, shall be deemed to be duly cured if the Authorized Mortgage shall be foreclosed by appropriate action instituted within said one hundred twenty (120) day period and thereafter prosecuted in a timely manner. Lessor agrees that, simultaneously with mailing or delivering any notice of default or breach under or with respect to this lease to Lessee, it will mail or deliver a copy thereof to the Authorized Mortgagee at such address of which Lessor may be notified in writing.

c. Insurance Policy. Lessor agrees that the name of any Authorized Mortgagee may be added as the primary loss payee to any and all insurance policies required to be carried by Lessee under this lease.

d. New Lease with an Authorized Mortgagee. In the event of termination of this lease for any reason (including, without limitation, by reason of any default by Lessee or by reason of the disaffirmance thereof by Lessee, as a debtor-in-possession, or by a receiver, liquidator or trustee for Lessee or its property), Lessor, if requested by an Authorized Mortgagee, will enter into a new lease (the "New Lease") of the Premises with such Authorized Mortgagee and/or its designees, which New Lease shall commence as of the date of termination of this lease and shall run for the remainder of the term (as if this lease had not terminated), at the same rent, additional rent, and supplemental rent (if any) and upon the same terms, provisions, covenants and agreements, and subject to the rights, if any, of any parties then in possession of any part of the Premises, provided that:

(i) the Authorized Mortgagee shall make written request upon Lessor for the New Lease within 30 days after the date of termination;

(ii) the Authorized Mortgagee shall pay to Lessor at the time of the execution and delivery of the New Lease any and all sums which would, at the time of the execution and delivery thereof be due and unpaid pursuant to this lease but for its termination, and in addition thereto any expenses, including reasonable attorneys' fees, to which Lessor shall have been subjected by reason of Lessee's default; and

(iii) the Authorized Mortgagee shall perform and observe all covenants in this lease to be performed and observed by Lessee, and shall further remedy any other conditions which Lessee under this terminated lease was obligated to perform under its terms, to the extent the same are curable or may be performed by the Authorized Mortgagee.

e. New Lease Prior to Fee Mortgages. Any New Lease shall be prior to any mortgage, deed of trust, or other lien, charge, or encumbrance on the fee of the Premises made subsequent to the Authorized Mortgage, and shall be accompanied by a quit-claim conveyance of title to the Improvements (free of any mortgage, deed of trust, lien, charge, or encumbrance created by Lessor after the execution of this lease) for a term of years equal to the term of the New Lease, subject to the reversion in favor of Lessor upon the expiration or earlier termination of the New Lease. Nothing herein contained shall require the Authorized Mortgagee to enter into a New Lease nor to cure any default of Lessee.

f. Foreclosure Without Lessor's Consent. Neither foreclosure of any Authorized Mortgage (or any sale thereunder), whether by judicial proceedings or by virtue of any power contained in any such Authorized Mortgage, nor any conveyance of Lessee's leasehold interest to the Authorized Mortgagee or its designee through, or in lieu of, foreclosure or other appropriate proceedings in the nature thereof, shall require the consent of Lessor or constitute a breach of any provision of, or a default under, this lease, and upon such foreclosure, sale or conveyance, Lessor shall recognize the purchaser or other transferee in connection therewith as the lessee under the lease. If the Authorized Mortgagee or any designee of it becomes the lessee under this lease or under any New Lease, the Authorized Mortgagee or its designee shall be liable for the obligations of Lessee under this lease or the New Lease only to the extent that such liabilities arise during the period of time that the Authorized Mortgagee or its designee constitutes the actual beneficial holder of the leasehold interest.

g. Authorized Mortgagee's Liability Under New Lease; Restriction on Subleases. If the Authorized Mortgagee shall elect to demand a New Lease, Lessor agrees, at the request of, on behalf of and at the expense of the Authorized Mortgagee, upon a guaranty, indemnity and/or other assurance from the Authorized Mortgagee reasonably satisfactory to Lessor, to institute and pursue diligently to conclusion the appropriate legal remedy or remedies to oust or remove Lessee from occupying the Premises, but not any subtenant actually occupying the Premises or any part thereof. Unless and until Lessor has received notice from the Authorized Mortgagee that the Authorized Mortgagee elects not to demand a New Lease, or until the period therefor has expired, Lessor shall not cancel or agree to the termination or surrender of any existing subleases nor enter into any new subleases hereunder without the prior written consent of the Authorized Mortgagee.

21. Breach. Time is of the essence in this agreement. If the Lessee shall fail to pay the rent, or any part thereof, at the times and in the manner provided in this lease and this failure shall continue for a period of more than thirty (30) days after delivery by the Lessor of a written notice of breach or default and demand for cure, by personal service, registered mail or certified mail to the Lessee and to each holder of record having a security interest in the premises, or if the Lessee shall become bankrupt, or shall abandon the premises, or if this lease and premises shall be attached or taken by operation of law, or if any assignment is made of the Lessee's property for the benefit of creditors, or if Lessee shall fail to observe and perform any of the covenants, terms, and conditions contained in this lease and on its part to be observed and performed, and this failure shall continue for a period of more than sixty (60) days after delivery by the Lessor of a written notice of breach or default and demand for cure, by personal service, registered mail or certified mail to the Lessee at its last known address and to each holder of record having a security interest in the premises, the Lessor may, subject to the provisions of Section 171-21, Hawaii Revised Statutes, at once re-enter the premises, or any part, and upon or without the entry, at its option, terminate this lease without prejudice to any other remedy or right of action for arrears of rent or for any preceding or other breach of contract; and in the event of termination, at the option of the Lessor, all buildings and improvements shall remain and become the property of the Lessor or shall be removed by Lessee; furthermore, Lessor shall retain all rent paid in advance to be applied to any damages.

22. Condemnation. If at any time, during the term of

this lease, any portion of the premises should be condemned, or required for public purposes by any county or city and county, the rental shall be reduced in proportion to the value of the portion of the premises condemned. The Lessee shall be entitled to receive from the condemning authority (a) the value of growing crops, if any, which Lessee is not permitted to harvest and (b) the proportionate value of the Lessee's permanent improvements so taken in the proportion that it bears to the unexpired term of the lease; provided, that the Lessee may, in the alternative, remove and relocate its improvements to the remainder of the premises occupied by the Lessee. The Lessee shall not by reason of the condemnation be entitled to any claim against the Lessor for condemnation or indemnity for leasehold interest and all compensation payable or to be paid for or on account of the leasehold interest by reason of the condemnation shall be payable to and be the sole property of the Lessor. The foregoing rights of the Lessee shall not be exclusive of any other to which Lessee may be entitled by law. Where the portion taken renders the remainder unsuitable for the use or uses for which the premises were leased, the Lessee shall have the option to surrender this lease and be discharged and relieved from any further liability; provided, that Lessee may remove the permanent improvements constructed, erected and placed by it within any reasonable period allowed by the Lessor.

23. Right to enter. The Lessor or the County and their agents or representatives shall have the right to enter and cross any portion of the premises for the purpose of performing any public or official duties; provided, however, in the exercise of these rights, the Lessor or the County shall not interfere unreasonably with the Lessee or Lessee's use and enjoyment of the premises.

24. Inspection by prospective bidders. The Lessor shall have the right to authorize any person or persons to enter upon and inspect the premises at all reasonable times following a published notice for its proposed disposition for purposes of informing and apprising that person or persons of the condition of the lands preparatory to the proposed disposition; provided, however, that any entry and inspection shall be conducted during reasonable hours after notice to enter is first given to the Lessee, and shall, if the Lessee so requires, be made in the company of the Lessee or designated agents of the Lessee; provided, further, that no authorization shall be given more than two years before the expiration of the term of this lease.

25. Acceptance of rent not a waiver. The acceptance of rent by the Lessor shall not be deemed a waiver of any breach



by the Lessee of any term, covenant, or condition of this lease, nor of the Lessor's right of re-entry for breach of covenant, nor of the Lessor's right to declare and enforce a forfeiture for any breach, and the failure of the Lessor 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 term, covenant, condition, or option.

26. Extension of time. Notwithstanding any provision contained in this lease, when applicable, the Board may for good cause shown, allow additional time beyond the time or times specified in this lease for the Lessee to comply, observe, and perform any of the lease terms, conditions, and covenants.

27. Justification of sureties. Any bonds required by this lease 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 personal sureties, corporate or individual, for which justifications shall be filed as provided in Section 78-20, Hawaii Revised Statutes; 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 Lessor security in certified checks, certificates of deposit (payable on demand or after a period the Lessor may stipulate), bonds, stocks or other negotiable securities properly endorsed, or execute and deliver to the Lessor a deed or deeds of trust of real property, all of a character which is satisfactory to Lessor 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 Lessor shall be determined by the Lessor, and that the Lessee may, with the approval of the Lessor, exchange other securities or money for any of the deposited securities if in the judgment of the Lessor 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 Lessor and that until this consent is granted, which shall be discretionary with the Lessor, no surety shall be released or relieved from any obligation.

28. Waiver, modification, reimposition of bond and liability insurance provisions. Upon substantial compliance by the Lessee of the terms, covenants, and conditions contained in



this lease on its part to be observed or performed, the Lessor at its discretion may in writing, waive or suspend the performance bond and/or improvement bond requirements or may, in writing, modify the particular bond(s) or liability insurance requirements by reducing its amount; provided, however, that the Lessor reserves the right to reactivate the bonds or reimpose the bond(s) and/or liability insurance in and to their original tenor and form at any time throughout the term of this lease.

29. Quiet enjoyment. The Lessor covenants and agrees with the Lessee that upon payment of the rent at the times and in the manner provided and the observance and performance of these covenants, terms, and conditions on the part of the Lessee to be observed and performed, the Lessee shall and may have, hold, possess, and enjoy the premises for the term of the lease, without hindrance or interruption by the Lessor or any other person or persons lawfully claiming by, through, or under it.

30. Surrender. The Lessee shall, at the end of the term or other sooner termination of this lease, peaceably deliver unto the Lessor possession of the premises in a clean and orderly condition, together with all improvements existing or constructed thereon or Lessee shall remove such improvements, at the option of the Lessor. Furthermore, upon the expiration, termination, and/or revocation of this lease, should the Lessee fail to remove any and all of Lessee's personal property from the premises, after notice thereof, the Board may remove any and all personal property from the premises and either deem the property abandoned and dispose of the property or place the property in storage at the cost and expense of Lessee, and the Lessee does agree to pay all costs and expenses for disposal, removal, or storage of the personal property. This provision shall survive the termination of the lease.

31. Non-warranty. The Lessor does not warrant the conditions of the premises, as the same are being leased as is.

32. Hazardous materials. Lessee shall not cause or permit the escape, disposal or release of any hazardous materials except as permitted by law. 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 premises any such materials except to use in the ordinary course of Lessee's business, and then only after written notice is given to Lessor of the identity of such materials and upon Lessor's consent which consent may be withheld at Lessor'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 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 Lessor's request concerning Lessee's best knowledge and belief regarding the presence of hazardous materials on the premises placed or released by Lessee.

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

For the purpose of this lease "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 hereof, previously enforced, or subsequently enacted.

33. Hawaii law. This lease shall be construed, interpreted, and governed by the laws of the State of Hawaii.

34. Exhibits - Incorporation in lease. All exhibits referred to are attached to this lease and hereby are deemed incorporated by reference.

35. 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 lease.

36. Partial invalidity. If any term, provision, covenant or condition of this lease should be held to be invalid, void or unenforceable, the remainder of this lease shall continue in full force and effect and shall in no way be affected, impaired or invalidated thereby.

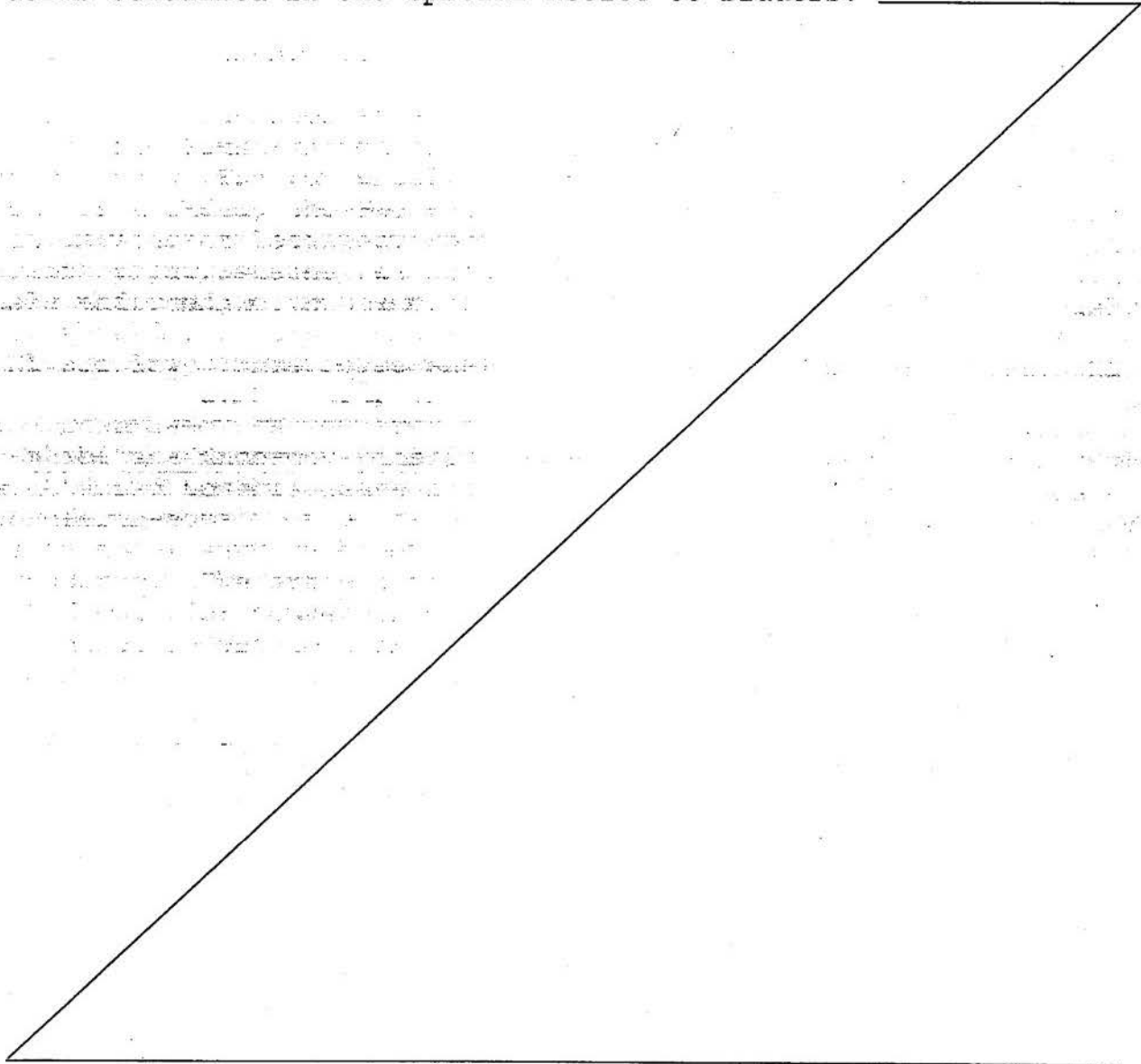
37. Time is of the essence. Time is of the essence in all provisions of this lease.

38. Archaeological sites. In the event any unanticipated historic, prehistoric, or archaeological sites or



remains such as shell, bone or charcoal deposits, human burials, rock or coral alignments, pavings, or walls are found on the premises, the Lessee and the Lessee's agents, employees and representatives shall immediately stop all land utilization and/or work and contact the Historic Preservation Office in compliance with Chapter 6E, Hawaii Revised Statutes.

39. Incorporation by reference. References in this lease to various parcels of land are in accordance with those designated in the Notice of Sale and the Conduct of Sale which, together with the Special Notice to Bidders, are incorporated and made a part of this lease. The terms of this lease shall govern where there is any inconsistency between the lease terms and the terms contained in the Special Notice to Bidders.



SPECIAL CONDITIONS

40. Improvements. The Lessee shall, at its own cost and expense, within three (3) years after the commencement date of the lease, complete the renovation of the existing hotel, at a cost of not less than FIVE MILLION AND NO/100 DOLLARS (\$5,000,000.00), in accordance with plans and specifications submitted by the Lessee to and approved in writing by the Chairperson and in full compliance with all applicable laws, ordinances, rules and regulations. Said amount shall represent hard costs only (including furniture, fixtures and equipment and landscaping improvements) and shall not include soft costs such as design, architectural, planning, and permitting costs. Said improvements shall be in accordance with plans submitted to the Chairperson for approval prior to construction.

41. Bond, improvement. The Lessee, upon submittal and written approval of the construction plan shall within sixty (60) days procure and deposit with the Lessor a surety bond in the amount of FIVE MILLION AND NO/100 DOLLARS (\$5,000,000.00), acceptable to the Chairperson, which bond shall name the State as obligee, conditioned upon the faithful observance and performance of the building requirement contained in this lease, the completion of the building and improvements on or before the specified date of completion free from all liens and claims, and that the Lessee shall 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 building requirement.

42. Fire and extended coverage insurance. The Lessee, at its cost and expense, shall procure and maintain at all times during the term of this lease, fire and extended coverage insurance with an insurance company(s) licensed to do business in the State of Hawaii, insuring all buildings and improvements erected on the land leased in the joint names of Lessor and Lessee, with the standard mortgage clause for Mortgagee, if any, as their interest may appear, in an amount equal to the replacement cost of the facilities and shall pay the premiums at the time and place required under the policy.

In the event of total or partial loss, any proceeds derived from the policy(s) shall be used by the Lessee for rebuilding, repairing, or otherwise reinstating the same buildings in a good and substantial manner according to plans and specifications approved in writing by the Board; provided, however, that with the approval of the Lessor, the Lessee may



surrender this lease and pay the balance owing on any mortgage and the Lessee shall then receive that portion of the proceeds which the unexpired term of this lease at the time of the loss or damage bears to the whole of the term, the Lessor to be paid the balance of the proceeds.

The Lessee shall furnish the Lessor on or before the commencement date of this lease, a certificate showing the policy(s) to be in full force and effect and shall furnish a like certificate upon each renewal of the policy(s). Each certificate(s) shall contain or be accompanied by an assurance of the insurer not to cancel the insurance, limit the scope of the coverage, or fail or refuse to renew the policy(s) until after thirty (30) days written notice has been given to the Lessor.

All rights or claims of subrogation against the State of Hawaii, its officers, employees, and agents are waived.

43. Phase one (1) hazardous waste evaluation. Prior to the termination of this lease or the assignment of the leasehold, Lessee shall conduct a Phase One (1) Hazardous Waste Evaluation and conduct a complete abatement and disposal, if necessary, satisfactory to the standards required by the Federal Environmental Protection Agency and the Department of Land and Natural Resources. Any assignment or voluntary termination by the Lessee will not be approved by the Board of Land and Natural Resources unless this evaluation and abatement provision has been executed. This provision shall survive and continue in effect after termination of this lease.

44. Survey and boundary stakeout. The Lessee shall be solely responsible for any survey and boundary stakeout of the leased premises.

45. Environmental assessment. The Lessee shall be responsible for compliance with Chapter 343, Hawaii Revised Statutes, with respect to any improvements or increased development of the property to be undertaken by Lessee.

46. Subordination of existing subleases. This lease is subject to subleases Nos. 1 through 5, inclusive, as more particularly described in Exhibit "A" of the Board of Land and Natural Resources submittal dated April 12, 2002, item D-29, more particularly described in Exhibit "F," attached hereto and made a part hereof, as subordinate encumbrances to this lease.

47. Reserved.

48. Existing improvements. The premises has existing improvements of a 391-room mid-rise hotel and golf course, including one outdoor swimming pool, two restaurants, three cocktail lounges, six banquet rooms, a hair salon, a gift shop, and a spa facility. The improvements were originally constructed between 1965 and 1969, and renovated in the late 1980's and early 1990's.

49. Hunting. No hunting shall be allowed on the premises during the term of the lease.

50. Audit and examination of books, etc. The Lessee shall, at all reasonable times, permit the Lessor and/or its authorized agents and employees, upon reasonable notice given by the Lessor, to audit, examine and to make copies of all books, accounts, records and receipts of the Lessee concerning its operations under this lease.

51. Environmental regulations. Lessee shall comply with all applicable federal, state and county environmental impact regulations, including but not limited to Chapter 343, Hawaii Revised Statutes, as amended, and regulations governing historic preservation.



Definitions.

1. The use of any gender shall include all genders, and if there is more than one lessee, then all words used in the singular shall extend to and include the plural.

2. As used in this lease, unless clearly repugnant to the context:

(a) "Chairperson" means the Chairperson of the Board of Land and Natural Resources of the State of Hawaii or his successor.

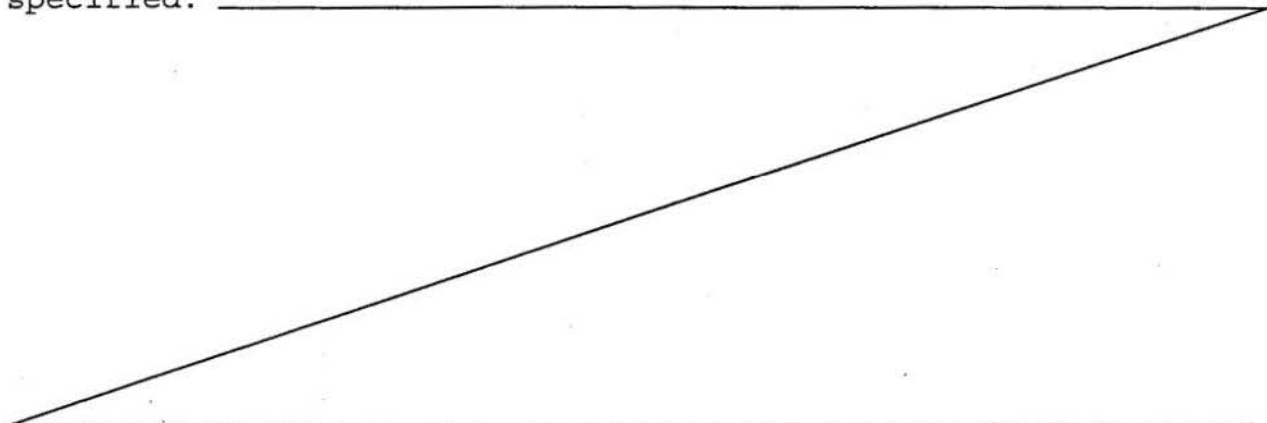
(b) "Lessee" means and includes the Lessee, its officers, employees, invitees, successors or permitted assigns.

(c) "Holder of record of a security interest" means a person who is the owner or possessor of a security interest in the land leased and who has filed with the Department of Land and Natural Resources and with the Bureau of Conveyances of the State of Hawaii a copy of this interest.

(d) "Premises" means the land leased and all buildings and improvements now or hereinafter constructed and installed on the land leased.

(e) "Waste" includes, but is not limited to, (1) permitting the premises, or any portion, to become unduly eroded or failure to take proper precautions or make reasonable effort to prevent or correct the erosion; (2) permitting a substantial increase in noxious weeds in uncultivated portions of the premises; and (3) failure to employ all of the usable portions of the premises.

(f) "Days" shall mean calendar days, unless otherwise specified.



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

By [Signature]
Chairperson
Board of Land and
Natural Resources

Approved by the Board of Land and Natural Resources at its meetings held on December 14, 2001, April 12, 2002, June 13, 2003, and July 9, 2004.

LESSOR

HAWAII OUTDOOR TOURS, INC., a
Hawaii corporation

By [Signature]
Its CEO

By _____
Its _____

LESSEE

APPROVED AS TO FORM:

[Signature]
Deputy Attorney General

Dated: 1/23/06

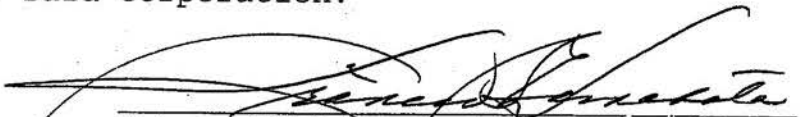


STATE OF HAWAII

)
) SS.

COUNTY OF HAWAII

On this 18th day of January, 2006,
before me appeared Kenneth Fujiyama and _____
_____, to me personally known, who, being by me duly
sworn, did say that ~~they~~ ^{are} the CEO
~~and~~ _____, respectively of HAWAII
OUTDOOR TOURS, INC., a Hawaii corporation, and that said
instrument was signed in behalf of said corporation by authority
of its Board of Directors, and the said Kenneth Fujiyama
~~and~~ _____ acknowledged said instrument to be
the free act and deed of said corporation.



Notary Public, State of Hawaii
Frances S. Hamabata

My commission expires: 7-16-06





STATE OF HAWAII

SURVEY DIVISION

DEPT. OF ACCOUNTING AND GENERAL SERVICES
HONOLULU

C.S.F. No. 23,963

January 26, 2005

(REVISED - JANUARY 2005)
RESORT SITE

Waiakea, South Hilo, Island of Hawaii, Hawaii

Comprising the following:

- A. Portion of the Government (Crown) Land of Waiakea including all of Lots 5 (Revised), 6 (Revised), 7 and 8 of Ocean View Lots, Lot A and Remnant A-1 of Government Remnants.
- B. All of Land Court Application 1300, as shown on Map 1, filed in the Office of the Assistant Registrar of the Land Court of the State of Hawaii covered by Transfer Certificate of Title 108,763 issued to the State of Hawaii (Land Office Deed S-24138).

Beginning at the southwest corner of this parcel of land and on the north side of Banyan Drive, the coordinates of said point of beginning referred to Government Survey Triangulation Station "HALAI" being 4324.00 feet North and 10,813.61 feet East, thence running by azimuths measured clockwise from True South:-

1. 128° 28' 442.42 feet along Government Remnants B-1 and Lot B, Lot 4 (Revised) of Ocean View Lots and the remainder of the Government (Crown) Land of Waiakea to highwater mark at seashore;



2. Thence along highwater mark at seashore, the direct azimuth and distance between points near highwater mark at seashore being:
168° 52' 122.30 feet;
3. 308° 28' 106.82 feet along the remainder of the Government (Crown) Land of Waiakea;
4. 228° 21' 30" 168.68 feet along the remainder of the Government (Crown) Land of Waiakea;
5. 145° 38' 26.93 feet along the remainder of the Government (Crown) Land of Waiakea to highwater mark at seashore;

Thence along highwater mark at seashore for the next four (4) courses, the direct azimuths and distances between points near highwater mark at seashore being:

6. 205° 04' 95.08 feet;
7. 257° 47' 224.00 feet;
8. 306° 20' 258.57 feet;
9. 291° 02' 30" 184.28 feet;
10. 52° 35' 362.20 feet along Grant 10119 to Harriet Blanche Rose;
11. 4° 13' 145.30 feet along Grant 10377 to Harriet Blanche Rose and Government Remnant 10377-A;



12. Thence along the north side of Banyan Drive on a curve to the left with a radius of 370.00 feet, the chord azimuth and distance being:
85° 46' 48" 166.08 feet
to the point of beginning and containing
an AREA OF 6.35 ACRES, MORE OR
LESS.

SUBJECT, HOWEVER, to the following easements as shown on plan attached hereto and made a part hereof:

1. Easement for Switching Transclosure in favor of Hilo Electric Light Co., Ltd.
2. Sewer Right-of-Way (3.00 ft. wide) in favor of the State of Hawaii, its successors and assigns.
3. Gas Line Easement (5.00 ft. wide) in favor of Honolulu Gas Co.
4. Sanitary Sewer Line Easement (5.00 ft. wide) in favor of the County of Hawaii.
5. Underground Electric Power Line Easement (5.00 ft. wide) in favor of Hilo Electric Light Co., Ltd.
6. Underground Telephone Line Easement (5.00 ft. wide) in favor of Hawaiian Telephone Co.
7. Water Pipe Line Easement (10.00 ft. wide) in favor of County of Hawaii.
8. Road Easement (30.00 ft. wide) in favor of the State of Hawaii, its successors and assigns.
9. Water Pipe Line Easement (5.00 ft. wide) in favor of County of Hawaii.



January 26, 2005

SUBJECT, ALSO, to all encumbrances that may be noted on Transfer Certificate of Title 108,763 issued to the State of Hawaii.

Reserving to the State of Hawaii, its successors and assigns, easement to any existing trail along seacoast within the above-described Resort Site. Said easement to be designated by the Chairman of the Board of Land and Natural Resources at such time and for such width as deemed proper and necessary.

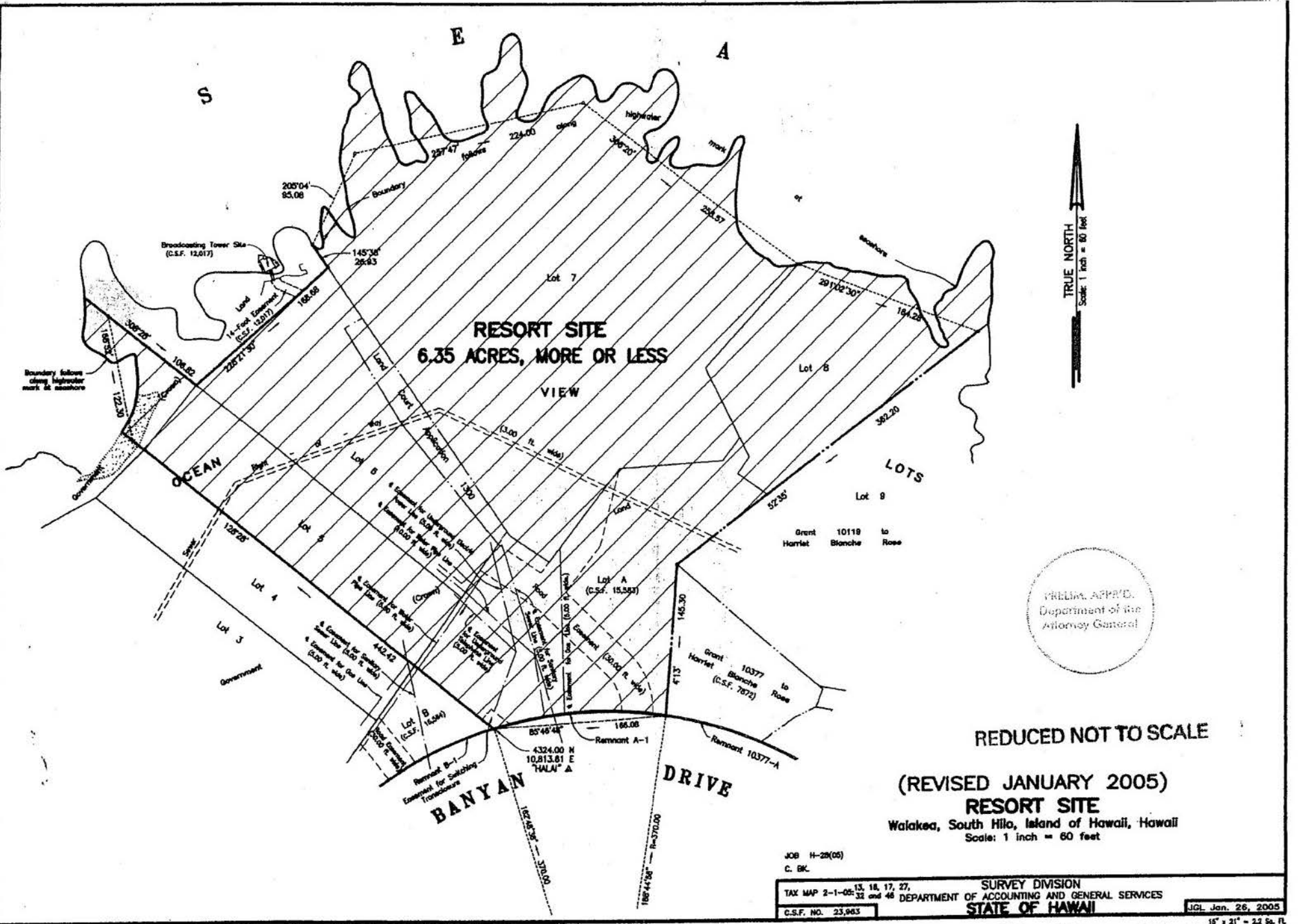
SURVEY DIVISION
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
STATE OF HAWAII

By: Glenn J. Kodani
Glenn J. Kodani
Land Surveyor

gm

Compiled from CSF 23223
and other Govt. Survey Records.





TRUE NORTH
Scale: 1 inch = 60 feet

FIELD APPROVED
Department of the
Attorney General

REDUCED NOT TO SCALE

(REVISED JANUARY 2005)
RESORT SITE
Waialea, South Hilo, Island of Hawaii, Hawaii
Scale: 1 inch = 60 feet

JOB H-28(05)
C. BK.
SURVEY DIVISION
TAX MAP 2-1-05: 13, 18, 17, 27, 32 and 46 DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
STATE OF HAWAII
C.S.F. NO. 23,983
JGL Jan. 26, 2005
16" x 21" = 2.2 Sq. Ft.

EXHIBIT "B"



STATE OF HAWAII

SURVEY DIVISION

DEPT. OF ACCOUNTING AND GENERAL SERVICES

HONOLULU

C.S.F. No. 23,964
H.S.S. Plat 942-B

January 26, 2005

(REVISED - JANUARY 2005)
GOLF COURSE AND ALLIED FACILITIES SITE

Bounded by Kamehameha Avenue, Lihikai Street and Banyan Drive

Waiakea, South Hilo, Island of Hawaii, Hawaii

Comprising the following:

- a. Portion of the Government (Crown) Land of Waiakea.
- b. Lot 1-A as shown on Map 2 and Lots 2 and 3 as shown on Map 1 of Land Court Application 1748 covered by Transfer Certificate of Title 106,776 issued to the State of Hawaii.
- c. Lot 2 as shown on Map 1, Lot 3-B as shown on Map 2, Lot 6-A as shown on Map 4 and Lot 8 as shown on Map 2 of Land Court Application 1626 covered by Transfer Certificate of Title 106,776 issued to the State of Hawaii.
- d. Lot 1-A as shown on Map 4 of Land Court Application 428 covered by Transfer Certificate of Title 106,776 issued to the State of Hawaii.
- e. Land Commission Awards, Grants and Deeds acquired by the State of Hawaii from the Hawaii Redevelopment Agency identified by Land Office Deeds as listed on Government Survey Registered Map H.S.S. Plat 942-A attached hereto and made a part hereof.



Beginning at the southeast corner of this parcel of land, at the west corner of Grant 7521 to H. V. Patten, Trustee and on the north side of Kamehameha Avenue, the coordinates of said point of beginning referred to Government Survey Triangulation Station "HALAI" being 2197.00 feet North and 10,747.67 feet East, thence running by azimuths measured clockwise from True South:-

1. 90° 00' 422.50 feet along the north side of Kamehameha Avenue;
2. 90° 00' 626.78 feet along the north side of Parcel 1 of Kamehameha Avenue, Wailoa Bridge Replacement and Approaches, Federal Aid Project No. BR-019-2(25);
3. 180° 00' 39.74 feet along Parcel 9 of Kamehameha Avenue, Wailoa Bridge Replacement and Approaches, Federal Aid Project No. BR-019-2(25);
4. Thence along Parcel 9 of Kamehameha Avenue, Wailoa Bridge Replacement and Approaches, Federal Aid Project No. BR-019-2(25) on a curve to the left with a radius of 9060.00 feet, the chord azimuth and distance being:
86° 28' 11" 253.96 feet;
5. 85° 40' 209.17 feet along Parcel 9 of Kamehameha Avenue, Wailoa Bridge Replacement and Approaches, Federal Aid Project No. BR-019-2(25);



6. Thence along Parcel 9 of Kamehameha Avenue, Wailoa Bridge Replacement and Approaches, Federal Aid Project No. BR-019-2(25) on a curve to the right with a radius of 40.00 feet, the direct azimuth and distance being:
130° 40' 56.57 feet;
7. 175° 40' 3.33 feet along Parcel 9 of Kamehameha Avenue, Wailoa Bridge Replacement and Approaches, Federal Aid Project No. BR-019-2(25);
8. 175° 40' 519.23 feet along Parcels 9-A, 10, 11 and 12 of Kamehameha Avenue, Wailoa Bridge Replacement and Approaches, Federal Aid Project No. BR-019-2(25);
9. Thence along Parcel 12 of Kamehameha Avenue, Wailoa Bridge Replacement and Approaches, Federal Aid Project No. BR-019-2(25) on a curve to the right with a radius of 50.00 feet, the chord azimuth and distance being:
222° 50' 73.33 feet;
10. 270° 00' 458.98 feet along the south side of Banyan Drive;
11. Thence along the southeast side of Banyan Drive on a curve to the left with a radius of 350.00 feet, the chord azimuth and distance being:
231° 49' 30" 432.65 feet;
12. 193° 39' 632.46 feet along the southeast side of Banyan Drive;
13. Thence along the southeast side of Banyan Drive on a curve to the right with a radius of 190.00 feet, the chord azimuth and distance being:
215° 19' 30" 140.35 feet;
14. 237° 00' 428.33 feet along the southeast side of Banyan Drive;



15. Thence along the southeast side of Banyan Drive on a curve to the left with a radius of 350.00 feet, the chord azimuth and distance being:
233° 07' 37.5" 47.28 feet;
16. 229° 15' 15" 153.94 feet along the southeast side of Banyan Drive;
17. Thence along the south side of Banyan Drive on a curve to the right with a radius of 270.00 feet, the chord azimuth and distance being:
279° 32' 07.5" 415.36 feet;
18. 329° 49' 160.00 feet along the southwest side of Banyan Drive;
19. Thence along the southwest side of Banyan Drive on a curve to the right with a radius of 1081.80 feet, the chord azimuth and distance being:
340° 47' 30" 411.91 feet;
20. 351° 46' 484.32 feet along the southwest side of Banyan Drive;
21. 81° 46' 55.00 feet along Waiakea Peninsula Pump Station Site, Governor's Executive Order 2381;
22. 351° 46' 55.00 feet along Waiakea Peninsula Pump Station Site, Governor's Executive Order 2381;
23. 261° 46' 55.00 feet along Waiakea Peninsula Pump Station Site, Governor's Executive Order 2381;
24. 351° 46' 16.54 feet along the southwest side of Banyan Drive;
25. Thence along the west side of Banyan Drive on a curve to the right with a radius of 300.00 feet, the chord azimuth and distance being:
18° 38' 271.15 feet;



- 26. 45° 30' 218.64 feet along the northwest side of Banyan Drive;
- 27. Thence along the northwest side of Banyan Drive on a curve to the left with a radius of 450.00 feet, the chord azimuth and distance being:
31° 19' 01" 220.52 feet;
- 28. 56° 02' 48" 19.54 feet along Grant 7521 to W. H. Patten, Trustee;
- 29. 146° 02' 48" 120.00 feet along the remainder of the Government (Crown) Land of Waiakea;
- 30. 56° 02' 48" 248.91 feet along the remainder of the Government (Crown) Land of Waiakea;
- 31. 360° 00' 144.67 feet along the remainder of the Government (Crown) Land of Waiakea;
- 32. 56° 02' 48" 69.44 feet along Grant 7521 to H. V. Patten, Trustee to the point of beginning and containing a GROSS AREA OF 63.775 ACRES and a NET AREA OF 62.576 ACRES, after excluding therefrom the following:

EXCLUSION:

<u>Lot</u>	<u>Map</u>	<u>Land Court Application</u>	<u>Area</u>
1-B	4	428	0.525 Acre
3-A	2	1626	0.006 Acre
4	1	1626	0.096 Acre
7	2	1626	<u>0.572 Acre</u>
TOTAL AREA OF EXCLUSION			1.199 Acres



January 26, 2005

The above-described Golf Course and Allied Facilities Site is subject, however, to the following as shown on plan attached hereto and made a part hereof:

1. Easements A and B as shown on Map 3 and Easement C as shown on Map 4 of Land Court Application 1626.
2. Easement C as shown on Map 5 and Easement D as shown on Map 6 of Land Court Application 428.
3. Easement A as shown on Map 3 of Land Court Application 1748.
4. Perpetual Non-Exclusive Easement for Underground Fuel Oil Pipeline covered by Grant of Easement: State of Hawaii to Hawaii Electric Light Co., Inc. dated April 22, 1976 and recorded in Liber 11536, Page 85 (Land Office Deed S-26734).
5. Perpetual Non-Exclusive Easement for Underground Power Line Purposes covered by Grant of Easement: State of Hawaii to Hawaii Electric Light Co., Inc. dated April 22, 1976 and recorded in Liber 11536, Page 85 (Land Office Deed S-26734).
6. Clear Zone Easements of Hilo Airport (General Lyman Field) Extension of Runway 8-26 covered by Governor's Executive Order 2151.
7. Perpetual Non-Exclusive Easement for Drainage Purposes covered by Grant of Easement: State of Hawaii to Hawaii Electric Light Co., Inc. dated November 14, 2003 and recorded as Document No. 2003-256145 (Land Office Deed S-28684).
8. Perpetual Non-Exclusive Easements 1, 2, 3 and 6 for Transmission Line and Anchor Purposes covered by Grant of Easement: State of Hawaii to Hawaii Electric Light Co., Inc. and Verizon Hawaii, Inc. dated December 1, 2003 and recorded as Document No. 2003-272342 (Land Office Deed S-28657).

January 26, 2005

9. Proposed Road Widening along Kamehameha Avenue as shown on plan attached hereto and made a part hereof.

Reserving, to the State of Hawaii, its successors and assigns Perpetual Non-Exclusive Easement for Sewer Line Purposes as shown on plan attached hereto and made a part hereof.

SURVEY DIVISION
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
STATE OF HAWAII

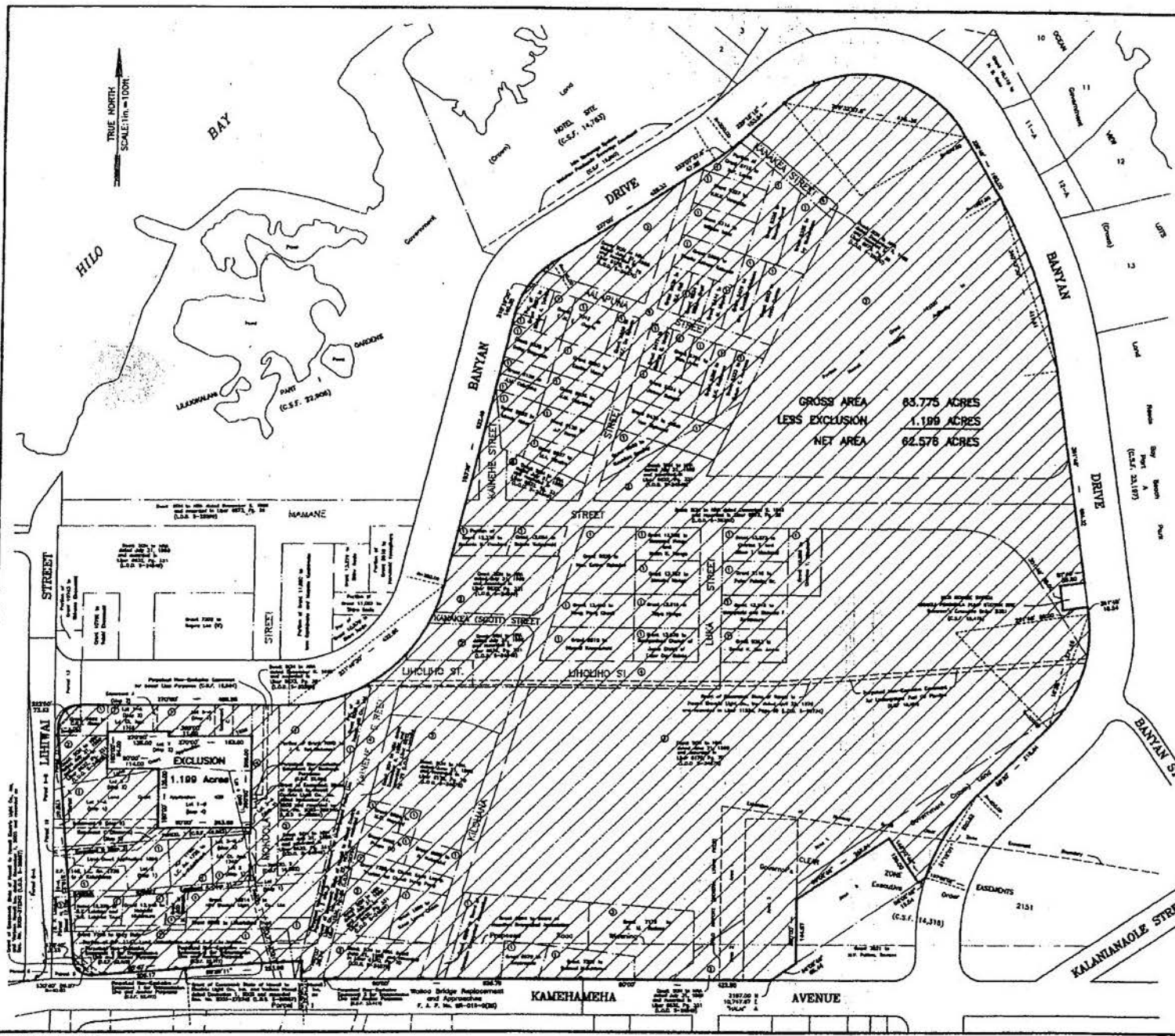
By: Glenn J. Kodani
Glenn J. Kodani
Land Surveyor

gm

Compiled from CSF 23425
and other Govt. Survey Records.



No.	L.O.D.	Grantee	Grantee	Date	Libr	Page
1	8-21-90	State of Hawaii	State of Hawaii	12-12-90	6211	201
2	8-21-90	State of Hawaii	State of Hawaii	7-31-90	6220	204
3	8-21-90	State of Hawaii	State of Hawaii	12-02-90	6230	113
4	8-18-91	State of Hawaii	State of Hawaii	12-09-90	6272	71



REDUCED NOT TO SCALE

STATE OF HAWAII
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES
SURVEY DIVISION

Reid K. Siarot - Acting State Land Surveyor

**(REVISED JANUARY 2005)
GOLF COURSE
AND ALLIED FACILITIES SITE**

Waialae, South Hilo, Island of Hawaii, Hawaii

Scale: 1 inch = 100 feet
January 28, 2005

Tracing By: J. G. Lucas
Job No. H-280(05)

For Description See C.S.F. 23,084

H.S.S. PLAT 942-B

ADDITIONAL ENCUMBRANCES

In addition to the easements and encumbrances listed in Exhibit "C" of the Lease, the "Golf Course and Allied Facilities Site" is also subject to the following encumbrances:

1. Reservation contained in deed dated August 12, 1963, filed as Land Court Doc. No. 319847 and recorded in Liber 4632, Page 263.
2. Amended Urban Renewal Plan for the Kaiko'o Project, dated June 25, 1965, filed as Land Court Document No. 370175 and recorded in Liber 5157, Page 574.
3. Declaration of Restrictions Affecting Redevelopment Sites in the Kaiko'o Project Designated for Open Area Uses dated October 9, 1965, filed as Land Court Document No. 372717 and recorded in Liber 5166, Page 528; and dated July 1, 1963, recorded in Liber 4555, Page 17.
4. Disposition Redevelopment Agreement dated December 10, 1965, filed as Land Court Doc. No. 377384 and recorded in Liber 5211, Page 269; as amended by Amendatory Agreement dated July 22, 1966, filed as Land Court Doc 451264.
5. Covenants contained in instruments dated December 15, 1965, filed as Land Court Doc. 377875 and recorded in Liber 5211, Page 391; dated October 13, 1967, recorded in Liber 5834, page 211; dated October 2, 1969, recorded in Liber 6249, Page 113; and dated July 31, 1969, recorded in Liber 6632, Page 356.

PRELIM. APPROV.
Department of the
Attorney General

EXHIBIT "E"

LIST OF APPROVED SUBLEASES

1. Commercial Lease dated June 1, 1995 between Nakano Co., Ltd. and Pearl Kang dba Ben & Company for approximately 792 square feet of commercial space located within the Hawaii Naniiloa Hotel.
2. Sublease dated December 22, 1995 between Nakano Co., Ltd. and Fairy Islands International, Corporation for approximately 3,024 square feet of commercial space located within the Hawaii Naniiloa Hotel.
3. Rooftop Site License with Option dated October 3, 1996 between Nakano Co., Ltd. and Voicestream PCS II Corporation (formerly known as Western PCS II Corporation) for a portion of TMK (3) 2-1-05:17 consisting of approximately 128 square feet on the roof of the Hawaii Naniiloa Hotel.
4. Lease and Agreement Regarding Transmission Facilities dated August 27, 1998 between Nakano Co., Ltd. and Hearst-Argyle Stations, Inc. (successor to Hawaii Hearst-Argyle Television, Inc.) for approximately 304 square feet on the roof of the Hawaii Naniiloa Hotel.
5. Site Agreement dated August 23, 2000 between Nakano Co., Ltd. and SprintCom, Inc. for a portion of TMK (3) 2-1-05:16 consisting of approximately 300 square feet on the roof of the Hawaii Naniiloa Hotel.

RECEIVED
Department of the
Attorney General

ASSIGNMENT OF LEASE EVALUATION POLICY

1. Enabling Statute.

Act 104, effective May 24, 1989, amended Chapter 171-36(a) (5) to read in part:

"... provided further that prior to the approval of any assignment of lease, the board shall have the right to review and approve the consideration to be paid by the assignee and may condition its consent to the assignment of the lease on payment by the lessee of a premium based on the amount by which the consideration for the assignment, whether by cash, credit, or otherwise, exceeds the depreciated cost of improvements and trade fixtures being transferred to the assignee;" (revision underlined)

2. Qualifying Leases.

This policy shall be applicable to the subject lease.

3. Prior Approval.

Prior to giving its consent to an assignment, DLNR must receive (i) the name, legal composition and address of any proposed assignee, (ii) a complete copy of the purchase agreement and the proposed assignment agreement, including the total consideration to be paid by the assignee for the assignment whether by cash, credit or otherwise, and (iii) the best available financial statement or balance sheet no older than 1 year prior to date of purchase agreement of the proposed assignee or any other such statement, audited or certified as correct by a financial officer of the proposed assignee.

Assignments of lease shall not be entered into until the Attorney General has reviewed the proposed assignment and the Land Board have given their approval. Such assignments shall be entertained only if they meet the criteria set forth in Section 171-36(a) (5), HRS.

4. Qualifications of Assignee.

If qualification was required of a lessee as a pre-condition of the lease, the prospective assignee must also be qualified to assume the lease.

EXHIBIT "G"



5. Consideration to be Paid.

Prior to review by the Attorney General and approval by the Land Board, the lessee (assignor) must present with written evidence of the consideration to be paid by the assignee and any other cost data that the state may require.

6. Payment of Premium.

The act permits the state to receive from the lessee (assignor) a premium based on the amount by which the consideration for the assignment, whether by cash, credit, or otherwise, exceeds the depreciated cost of improvements and trade fixtures being transferred to the assignee. The value of the inventory of merchandise and any other tangible assets in the sale of a business shall be deducted from the consideration paid. The appropriate cost index is then applied to determine the adjusted depreciated cost.

All lessees shall be required to furnish the state with the actual costs of construction of all improvements and renovations within 30 calendar days after its completion as well as the purchase costs of all trade fixtures acquired for the lessee's operation on the premises within 30 calendar days after their purchase. Lessees shall be required to furnish evidence of the actual costs by copy of the construction contract, receipts or otherwise. Lessees shall also be required to furnish an inventory of all personal property placed on the premises. Records of all costs incurred by the lessee for construction of improvements or renovations as well as trade fixtures submitted by the lessee shall be maintained in the lease file and shall include the Construction Cost Index for Apartments, Hotels, Office Buildings (CCI) and the Honolulu Consumer Price Index for All Urban Consumers (CPI) as published by the U.S. Department of Labor, Bureau of Labor Statistics for the year construction is completed.

The replacement cost for improvements or renovations is calculated by using the CCI for the evaluation year divided by the CCI for the year in which the improvements or renovations were completed (base year). The result is then multiplied by the original cost of the improvements or renovations. For trade fixtures, the cost is similarly calculated by using the CPI for the purchase year (base year) and the evaluation year.

Depreciation of improvements and trade fixtures will be determined on a straight line basis. Depreciation of improvements or renovations will be determined in the same proportion that the expired term of the improvements or renovations bear to the whole term. The whole term will be



from the date the construction of the improvements or renovations are completed until the termination date of the lease. Depreciation of trade fixtures will be determined in the same manner, except that the whole term will be the anticipated life of the trade fixture.

The premium will be a maximum of 50% of the excess. The percentage will decrease by 5% after every 5 years of the term has elapsed in accordance with Schedule C. The sliding scale will encourage long term occupancy and prevent speculation as well as recognize the investment, effort, and risk of the lessee.

In cases where the lessee is unable to furnish the Department of Land and Natural Resources with evidence of the actual cost of construction of improvements because the lessee has performed the work itself, the State may determine the cost or the lessee shall have the option of paying for an appraiser, to be selected by the Department of Land and Natural Resources, to determine what the improvements would have cost if the labor had been performed by a third party rather than the lessee. The lessee shall exercise its option by giving written notice to the lessor within thirty (30) calendar days after completion of construction of the improvements. If the lessee fails to exercise its option within this period, the lessor shall have the right to determine the cost of the improvements.

Schedule D attached provides a typical example of the evaluation calculations using Schedule A to calculate the replacement cost for improvements or renovations and depreciation, Schedule B to calculate the cost and depreciation for trade fixtures, and Schedule C to obtain the premium percentage.

7. Non-qualifying Deductions.

The statute only recognizes tangible items. Intangibles such as "goodwill", business name recognition, etc., are not deductible.

8. Subsequent Assignments.

If the consideration for any subsequent assignment includes the purchase of existing tenant owned improvements, the evaluation will be conducted in a similar manner as the first assignment. An example is shown on Schedule E.

Using Schedule E, the consideration the assignor paid less included inventory and any premiums will be used to obtain the adjusted depreciated cost of improvements and trade fixtures. Also, the Base Year is redefined to be the date



the assignor received the Consent of the Board to occupy the premises. The holding period (redefined Base Year to assignment date), or actual occupancy of the assignor, is used in place of the "expired term" when calculating depreciation. Depreciation will be calculated by dividing the holding period by the whole term of the lease (The whole term will remain unchanged).

The change in the CCI will be reflected by comparing the CCI for the redefined base year to the most current CCI.

The holding period will be the basis for determining the appropriate premium percentage. Subtracting the included inventory and any premiums from the consideration the assignor paid will result in a reassessment of the market value of the improvements. If additional improvements were constructed by the assignor, they will be treated in the same manner as improvements constructed by an original lessee.

The excess of subtracting the adjusted depreciated consideration the assignor paid and the adjusted depreciated cost of additional improvements, if any, from the consideration the assignor received will be used against the appropriate premium percentage to determine the amount payable to the state.

9. Rights of Holders of Security Interest-Agricultural Leases only.

In the event of foreclosure or sale, the premium, if any, shall be assessed only after the encumbrances of record and any other advances made by the holder of a security interest are paid.

10. When state-owned improvements are included in the leased premises, improvement renovation requirements shall be recognized as being tenant-owned improvements for evaluation in the policy.

In other words, the total expenditure of the lessee to fulfill the requirement would be treated as though a new improvement was constructed.



SCHEDULE A. Adjusted Depreciated Cost of Improvements or Renovations

1. Adjusted Cost of Improvements or Renovations.

Multiply the actual cost of the improvements or renovations by the most recent U.S. Construction Cost Index for Apartments, Hotels, Office Buildings (CCI)* and divide the result by the CCI of the year construction was completed (base year) to get the adjusted cost of improvements or renovations.

2. Depreciation

Determine the depreciation percentage on a straight-line basis by dividing the expired term of the improvements or renovations by the whole term of the improvements or renovations, the whole term beginning on the date the improvements or renovations are completed to the expiration date of the lease. Multiply the adjusted cost of the improvements or renovations by the depreciation percentage to determine the depreciation.

3. Depreciated Cost of Improvements or Renovations

Subtract the depreciation from the adjusted cost of improvements or renovations. The balance is the depreciated cost of improvements or renovations.

*As published by the U.S. Department of Labor, Bureau of Labor Statistics

<u>Example</u>	Actual cost:	\$500,000
	CCI (most recent):	121.1
	CCI (base year):	102.3
1. Adjusted Cost of Improvements or Renovations	Expired term:	57 mos.
	Whole term:	408 mos.

$$\text{Actual Cost} \times \frac{\text{CCI (most recent)}}{\text{CCI (base year)}}$$

$$\$500,000 \times \frac{121.1}{102.3} = \$591,887$$

2. Depreciation

$$\$591,887 \times \frac{57 \text{ mos.}}{408 \text{ mos.}} = \$82,690$$

3. Adjusted Depreciated Cost of Improvements or Renovations

$$\$591,887 - \$82,690 = \underline{\underline{\$509,197}}$$



SCHEDULE B. Adjusted Depreciated Cost of Trade Fixtures

1. Adjusted Cost of Trade Fixture.

Multiply the actual cost of the trade fixture by the most recent Honolulu Consumer Price Index for All Urban Consumers (CPI)* and divide the result by the CPI of the year in which the purchase was made (base year).

2. Depreciation.

Determine the depreciation percentage on a straight-line basis by dividing the expired term of the trade fixture by its anticipated life. Multiply the adjusted cost of the trade fixture by the depreciation percentage to determine the depreciation.

3. Depreciated Cost of Trade Fixtures.

Subtract the depreciation from the adjusted cost of the trade fixture. The balance is the depreciated cost of the trade fixture.

*As published by the U.S. Department of Labor, Bureau of labor Statistics

Refrigerator

Example

1. Adjusted Cost of Trade Fixture

Actual cost:	\$1,510
CPI (most recent):	118.1
CPI (base year):	104.6
Expired term:	57 mos.
Whole term:	96 mos.
(Anticipated life)	

Actual Cost X $\frac{\text{CPI (most recent)}}{\text{CPI (base year)}}$

$$\$1,510 \times \frac{118.1}{104.6} + \$1,705$$

2. Depreciation

$$\$1,705 \times \frac{57 \text{ mos.}}{96 \text{ mos.}} = \$1,012$$

3. Adjusted Depreciated Cost of Trade Fixture

$$\$1,705 - \$1,012 = \$ 693$$

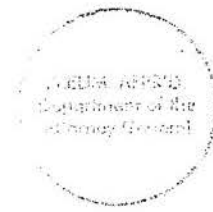
SCHEDULE C. Premium Percentages

1. For the first 5 years, the premium is 50% of the amount by which the consideration for the assignment, whether by cash, credit, or otherwise, exceeds the depreciated cost of improvements and trade fixtures being transferred to the assignee. The percentage will decrease by 5% after every 5 years of the total term has elapsed.

<u>Years</u>	<u>Percentage</u>
1 - 5	50%
6 - 10	45%
11 - 15	40%
16 - 20	35%
21 - 25	30%
26 - 30	25%
31 - 35	20%
36 - 40	15%
41 - 45	10%
46 - 50	5%
51 -	0%

As an example, if a 55 year lease was assigned after 57 months, the premium percentage would be 50%. If the assignment occurs after 130 months (10+ years), the percentage would be 40%.

2. The Board of Land and Natural Resources may impose a ten percent (10%) surcharge if the assignor has not performed lease covenants to improve or use the property.



SCHEDULE D. Assignment of Lease Calculations

1. Subtract from the consideration for the assignment that amount, if any, that is attributable to inventory.
2. Calculate the Adjusted Depreciated Cost of Improvements or Renovations (see Schedule A).
3. Calculate the Adjusted Depreciated Cost of Trade Fixtures (see Schedule B).
4. Calculate the amount by which the consideration for the assignment, whether by cash, credit, or otherwise, exceeds the depreciated cost of improvements and trade fixtures being transferred to the assignee by subtracting the amounts derived by no. 2 and 3 from the amount in no. 1 above.
5. Determine the appropriate premium percentage (see Schedule C). Multiply by the excess, if any, derived by no. 4.

Example

A lease is being assigned 57 months after completion of the improvements at a consideration of \$600,000.

The initial cost of the improvements was \$500,000 while the current year CCI and base year CCI were 121.1 and 102.3, respectively. The whole term for the improvements is 408 months.

For the trade fixtures, the initial cost was \$1,510 with the current year CPI and base year CPI being 118.1 and 104.6, respectively. The total life expectancy is 96 months.

1.	Net Consideration:		\$600,000
2.	Adj Cost Imp/Ren:	\$591,887	
	Depreciation:	<u>- 82,690</u>	
	Adj Dep Cost Imp/Ren:		-509,197
3.	Adj Cost Trade Fixtures:	1,705	
	Depreciation:	<u>- 1,012</u>	
	Adj Dep Cost Trade Fixtures:		<u>- 693</u>
4.	Excess:		\$ 90,110
5.	Premium:	Percentage: 50%	\$ 45,055



SCHEDULE E. Subsequent Assignment of Lease Calculations

1. Subtract from the consideration the assignor received for the assignment that amount, if any, that is attributable to inventory to derive the net consideration received.
2. Subtract from the consideration the assignor previously paid for the assignment that amount, if any, that was attributable to inventory. Also, subtract from the consideration the assignor previously paid for the assignment that amount, if any, that was attributable to premiums. The net consideration paid is now defined to be the value of improvements as of the date of the occupancy by the assignor.
3. Using the result from no. 2, calculate the Adjusted Depreciated Value of Improvements or Renovations (see Schedule A).
4. Subtract the amount derived by no. 3 from the amount in no. 1 to determine the amount by which the consideration received for the assignment, whether by cash, credit, or otherwise, exceeds the adjusted depreciated value of improvements being transferred to the assignee.
5. Determine the appropriate premium percentage (see Schedule C). Multiply by the excess, if any, derived by no. 4.

Example

An assignor is assigning a lease 107 months after receiving the consent of the Board. Occupancy or the holding period is defined to be 107 months. The consideration received is \$1,000,000.

The consideration paid by the assignor was \$600,000 while the current year CCI and redefined base year CCI were 156.4 and 121.1, respectively. The whole term was 408 months.



No inventory was included in either consideration. However, a premium of \$45,055 was paid to the state by the previous occupant from the \$600,000 consideration.

1.	Net Consideration <u>Received</u> :		\$1,000,000
2.	Consideration <u>Paid</u> :	\$600,000	
	Premium:	<u>- 45,055</u>	
	Net Consideration <u>Paid</u> :		\$554,945
3.	Adj Value Consideration (improvements):		
	\$554,945 X $\frac{156.4}{121.1}$	=	\$716,708
	Depreciation:		
	\$716,708 X $\frac{107 \text{ mos.}}{408 \text{ mos.}}$	=	<u>-187,960</u>
	Adj Dep Value Consideration:		- <u>528,748</u>
4.	Excess:		\$ 471,252
5.	Premium: Percentage:	45%	\$ <u>212,063</u>

