

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

July 14, 2023

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

PSF No. 22KD-078  
Kauai

Approval of a Development Agreement for a 40-Year Extension of Lease Term, General Lease No. S-4200, Earl’s, Inc., Lessee; Authorize the Chairperson to Approve and Execute a Lease Extension for General Lease No. S-4200, Earl’s, Inc., Lessee, Kapaa Industrial Park, Kapaa, Kawaihau, Kauai, Tax Map Key: (4) 4-5-015:040.

APPLICANT AND REQUEST:

Earl’s, Inc., a Hawaii corporation (“Lessee”), requested an extension of General Lease S-4200 of 40 years, commencing on August 1, 2023, and expiring on July 31, 2063, for an aggregate term of 95 years.

LEGAL REFERENCE:

Sections 171-36 and 36.5, Hawaii Revised Statutes (HRS) and Act 236, Session Laws of Hawaii 2021, as codified at Section 171-36.5, HRS.

LOCATION:

Kapaa Industrial Park, Kapaa, Kawaihau, Kauai, identified by Tax Map Key: (4) 4-5-015:040, as shown on the attached map and aerial photo labeled **Exhibit A**.

AREA:

2.035 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:

Industrial purposes.

TERM OF LEASE:

Original term of 55 years, commencing on August 1, 1968, and expiring on July 31, 2023.

ANNUAL RENTAL:

Current rent is \$20,200 annually, by virtue of an award by arbitrator for the five-year period from August 1, 2018, to July 31, 2023.

The annual rent for the requested extension shall be determined by an independent appraisal. An independent appraisal has been ordered and is pending. The rent will be the fair market value as determined by the appraisal. Lessee has agreed to pay for the appraisal with the understanding that the Board has the sole discretion to approve the requested lease extension.

RENTAL REOPENINGS:

Rental re-openings in the original term were every ten years on the 20<sup>th</sup>, 30<sup>th</sup>, 40<sup>th</sup> and 50<sup>th</sup> years of the original term.

A rental reopening for the extended term will be determined by an appraisal that will value the rent for the first ten-year period from August 1, 2023 to July 31, 2033 and the second ten-period from August 1, 2033 to July 31, 2043, as well as establish step-up increases after the 5<sup>th</sup> year of the 1<sup>st</sup> and 2<sup>nd</sup> ten-year periods.

The rental re-opening for the remaining ten-year periods of the extension term shall be determined by independent appraisal at a later date but prior to July 31, 2043.

CHAPTER 343 – ENVIRONMENTAL ASSESSMENT:

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

HAR.

DCCA VERIFICATION:

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

APPLICANT REQUIREMENTS:

Lessee shall be required to:

1. Comply with the applicable requirements of Sections 171-36(a) and 171-36.5, HRS to execute the development agreement and requested lease extension in accordance with and pursuant to the Department of Attorney General current lease terms and conditions necessary to implement and conform to the requirements of Act 236, Session Laws of Hawaii 2021 (“Act 236”) and current law, including but not limited to substantive provisions relating to Lease Assignments, Sublease Rents and Ownership of Improvements, as discussed and recommended below.
2. Reimburse the Department \$4,250.00 for the cost of procuring an appraiser to review Lessee’s appraiser’s report regarding the value of the existing improvements on the property.<sup>1</sup>

PROPOSED IMPROVEMENTS

The Lessee’s proposed improvements include a 40-foot kitchen trailer installed adjacent to the existing warehouse (\$256,300), and the rehabilitation/reconstruction of metal siding on the existing warehouse facility (\$326,000), totaling \$576,300.<sup>2</sup> A proposal describing the Lessee’s proposed improvements is attached as **Exhibit B**.

Staff believes the proposed improvements described in **Exhibit B** costing an estimated \$576,300 are sufficient to meet the threshold improvement valuation statutory requirement in Act 236. Staff further believes that the proposed 40-foot kitchen trailer qualifies as an improvement since the Lessee states that it will be permanently installed on the existing concrete foundation adjacent to the existing warehouse facility. Additionally, staff is including a recommendation below that the lease extension document expressly provide that the kitchen trailer shall not be deemed a trade fixture or personal property at any time during the extended lease term and shall instead be deemed a permanent fixture or

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<sup>1</sup> Pursuant to Section 171-36.5(e), HRS, “The applicant for a lease extension shall pay all costs and expenses incurred by the department in connection with processing, analyzing, or negotiating any lease extension request, lease document, or development agreement under this section.”

<sup>2</sup> Staff has verified with Lessee and the Department of Health, State of Hawaii that the subject property is connected to a septic tank installed around 2010. As such, staff believes that the property is compliant with the U.S. Environmental Protection Agency rules regarding large capacity cesspool conversion.

improvement. Lessee states that the new kitchen will replace an existing kitchen with substantially the same purpose and capacity. Accordingly, for the purpose of this submittal, the estimated cost of the proposed improvements is \$576,300. The Lessee states that it will self-finance the improvements.

#### BACKGROUND:

General Lease No. S-4200 was issued through public auction to William E. Fernandes, whose wife is Evelyn P.O. Fernandes, on August 1, 1968.

At its meeting of January 9, 1987, the Board of Land and Natural Resources (Board) approved the Assignment of General Lease No. S-4200 from William E. Fernandes to Earl Y. Kashiwagi and Christine Y. Kashiwagi, husband and wife, and Midori Kashiwagi, unmarried.

At its meeting on June 8, 1990, the Board approved the Assignment of General Lease No. S-4200 from Earl Y. Kashiwagi, Christine Y. Kashiwagi and Midori Kashiwagi to Earl's, Inc.

Staff is informed that Earl's, Inc. also does business as Esaki's Produce.

#### LEASE EXTENSION:

Act 236 allows up to a 40-year extension of commercial, industrial, resort, mixed-use, or government leases that have not been assigned within 10 years prior to the receipt of an application for a lease extension. In this case, the character of use of General Lease No. S-4200 is for industrial purposes and, as noted above, Earl's, Inc. has held the lease since 1990. Extensions under Act 236 must be based on "substantial improvements" to the lease premises:

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

As the estimated cost of the qualifying proposed improvements is \$576,300, and the appraiser, contracted by the Lessee, determined the market value of the existing improvements to be \$1,124,300.00, it appears that the rehabilitation/reconstruction of metal siding on the existing warehouse facility and installation of new kitchen are sufficient to qualify as a "substantial improvements" under Act 236. Earl's, Inc. states that it can complete the improvements within one year after receiving all necessary approvals or 18 months after the execution of the development agreement for the requested lease extension.

Staff further notes that Earl's, Inc. has made substantial repairs and replacement

improvements to the premises during the tenure of the current lease. Lessee claims prior replacement and repair renovations to the premises were incurred at a cost in excess of \$338,000.00 (including for a cooler partition wall, roll-up doors, security system, and warehouse repairs to roof, roof vent, gutters, skylight and air conditioning). The warehouse structure on the property is well maintained and in good condition. The Lessee also installed a septic system to replace a cesspool. Such maintenance demonstrates Lessee's continuing efforts to keep the building in good order and repair. A copy of the most recent staff inspection report is attached as **Exhibit C**.

The Land Division procured the services of an appraiser at a cost of \$4,250.00 to review and assess the appraisal submitted by the Lessee ("Appraisal Report") relating to the value of the existing improvements expressly referenced in Act 236 in order to ensure the Lessee's appraisal report and valuation is consistent with Uniform Standards of Professional Appraisal Practice (USPAP) and consistent with industry standards. The Department's appraiser reviewed and analyzed the adequacy and methodology used in Lessee's appraisal as it relates to the market value of existing improvements to determine compliance with USPAP and Act 236. Lessee is required to reimburse the Department for the cost of the appraisal review pursuant to Act 236.

Based on the foregoing, staff recommends that the Board approve the proposed development agreement, a copy of which is attached hereto as **Exhibit D**, and authorize the Chairperson to execute the development agreement as well as the lease extension document. The development agreement and the lease extension document will incorporate the following specific current lease terms and conditions for the 40-year extension in order to implement Act 236 and conform the terms of the extension period to current law. Below is a summary of the three substantive provisions that need to be updated in this lease originally issued in 1968:

- **Lease Assignments.** The current lease form includes an assignment of lease premium analysis that allows the State to share in the consideration paid for an assignment of a lease under some circumstances. This term is consistent with Section 171-36, HRS. GL S-4200 is silent on this provision, and the lease extension period should include this standard assignment of lease premium term, revised as necessary to incorporate the following restriction on assignment set forth in Act 236:

No lease shall be transferable or assignable throughout the first ten years of the extended term, except by devise, bequest, intestate succession, a collateral assignment of lease or other security granted to a leasehold mortgagee in connection with leasehold financing by a lessee, a change in direct ownership of less than fifty per cent of a lessee that is a company or entity, a change in indirect ownership of a lessee that is a company or entity, or by operation of law. The prohibition on assignments and transfer of leases shall include a prohibition on conveyances of leases. During subsequent periods of the extended term of the lease, the lease may be assigned or transferred, subject to approval by the board.

- **Sublease Rents.** The current lease form includes language allowing the State to adjust the lease rent based on the sublease rent charged to the sublessee, which is also consistent with Section 171-36, HRS. GL S-4200 is silent on this provision, and the lease extension period should include this standard sublease rent participation language.
- **Ownership of Improvements.** The current lease form includes a provision on ownership of improvements at lease expiration giving the State the option of assuming ownership or requiring the lessee to remove them at lessee's expense. State leases have incorporated this provision since about the mid-1960s. GL S-4200 simply provides that at the expiration of the lease, lessee delivers possession of the demised premises to the lessor, together with all buildings and improvements in good order, reasonable wear and tear excepted, leaving open the question whether the State is responsible for removing improvements that have outlived their useful lives. The lease extension document and the development agreement should include the current standard terms clarifying the State's options relating to ownership of improvements.

At this time, staff is recommending that these updated lease terms and other current standard lease terms and conditions be limited to the 40-year extension period that the Board, at its discretion, may approve under Act 236.

Incorporating these substantive terms for the extension period is consistent with the legislative intent of Chapter 171, HRS, which allows the State to be paid its fair share of ancillary income arising from the tenant's leasehold interest.

Staff has ordered an appraisal report to determine the rent for the 40-year lease extension period in the manner previously described and will charge the cost of the appraisal to Lessee in accordance with Act 236 and rent will be set a fair market rates for the term of the extension in accordance with Section 171-17, HRS. There are no outstanding rental reopening issues. The Lessee is current with rent, insurance, and performance bond. No agency comments were solicited on the request because it involves a lease extension, not a new disposition.

The staff is of the opinion that an expenditure totaling approximately \$576,300 in new qualifying improvements justifies a 40-year extension pursuant to Act 236.<sup>3</sup>

RECOMMENDATION:

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<sup>3</sup> Lessee's appraisal for the existing improvements stated that the "Remaining Economic Life" of the existing "as is" improvements as 30 years. However, staff believes that the improvements proposed by the Lessee to extend the life of the existing improvements, as well as Lessee's additional planned future improvements justify the request for a 40 year extension.

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


1. Declare that, after considering the potential effects of the proposed disposition as provided by Chapter 343, HRS, and Sections 11-200.1-15 and -16, HAR, the lease extension is expected to have minimal or no significant effect on the environment and is therefore exempt from the preparation of an environmental assessment as a de minimis activity.
2. Determine that: a) the development proposed is of sufficient worth and value to justify the extension of the lease; b) the estimated time to complete the improvements is approximately 18 months from the execution of the development agreement referenced in recommendation 3 below; and c) the minimum revised annual rent for the extension shall be the fair market value as determined by independent appraisal procured by the State pursuant to Section 171-17, HRS.
3. Approve the development agreement with Lessee Earl's Inc., for a 40-year extension of General Lease No. S-4200, covering the State-owned parcel identified by Tax Map Key: (4) 4-5-015:040, pursuant to Act 236, under the terms and conditions cited above, which by this reference are incorporated herein, and further subject to the following terms and conditions:
  - A. The development agreement shall be substantially in the form of Exhibit B attached hereto and shall provide that the lease extension shall incorporate the standard terms and conditions, regarding, and including but not limited to Lease Assignment (tailored as necessary to comply with Act 236), Sublease Rent Participation, and Ownership of Improvements used by the Department of the Attorney General with respect to leasing of public lands.
  - B. Review and approval by the Department of the Attorney General; and
  - C. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.
4. Approve a 40-year extension of lease term of General Lease No. S4200, Earl's Inc., Lessee; Kapaa Industrial Park, Kapaa, Kawaihau, Kauai, Tax Map Key: (4) 4-5-015:040, pursuant to Act 236, under the terms and conditions cited above, which by this reference are incorporated herein, and further subject to the following terms and conditions:
  - A. Incorporation of the standard terms and conditions, regarding, and including but not limited to Lease Assignment (tailored as necessary to comply with Act 236), Sublease Rent Participation, and Ownership of Improvements used by the Department of the Attorney General with

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respect to leasing of public lands; provided further that the lease extension document expressly provide that the kitchen trailer shall not be deemed a trade fixture or personal property at any time during the extended lease term and shall instead be deemed a permanent fixture or improvement.

- B. Review and approval by the Department of the Attorney General; and
- C. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

Respectfully Submitted,



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For Alison Neustein  
District Land Agent

APPROVED FOR SUBMITTAL:

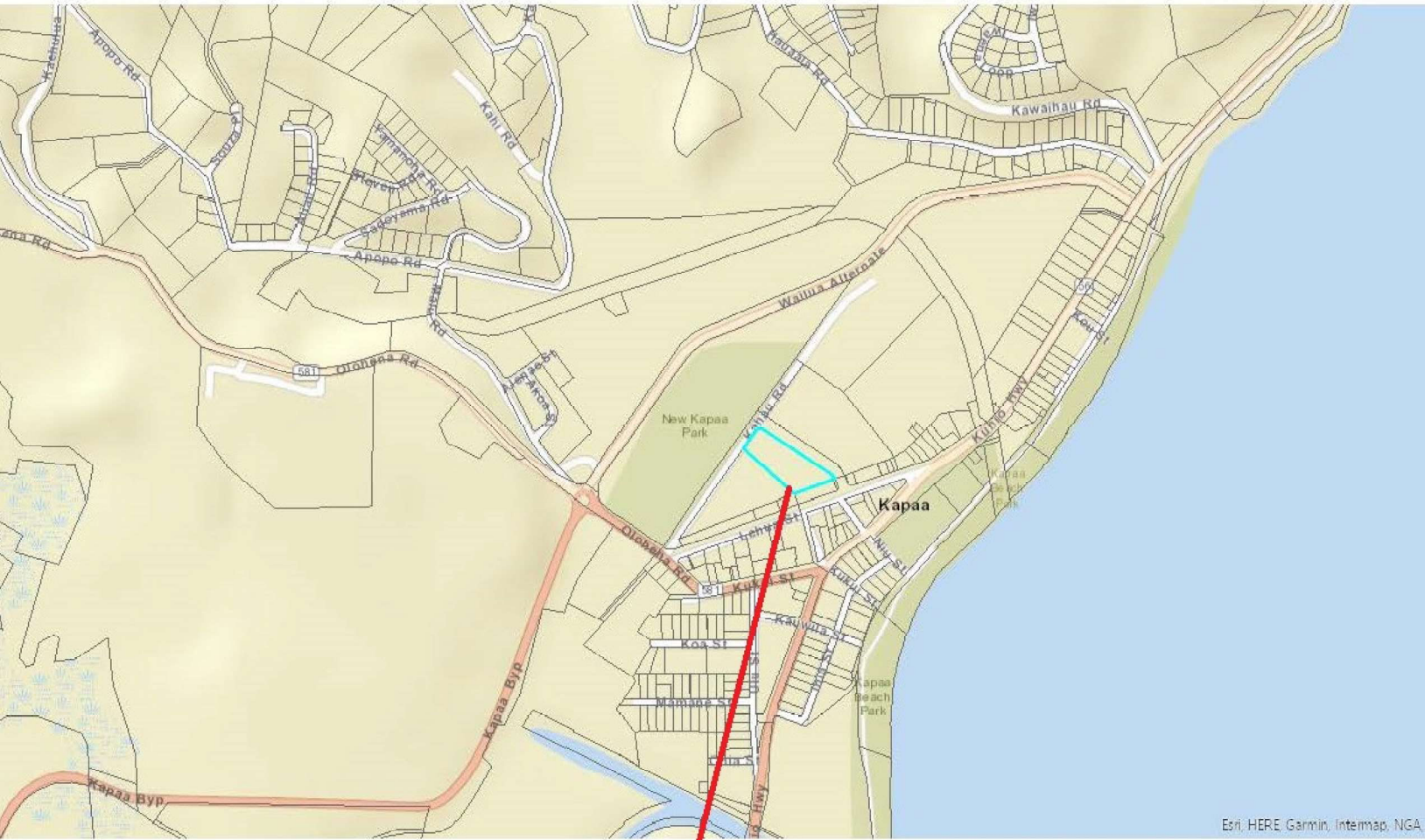


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Dawn N.S. Chang, Chairperson

*RT*





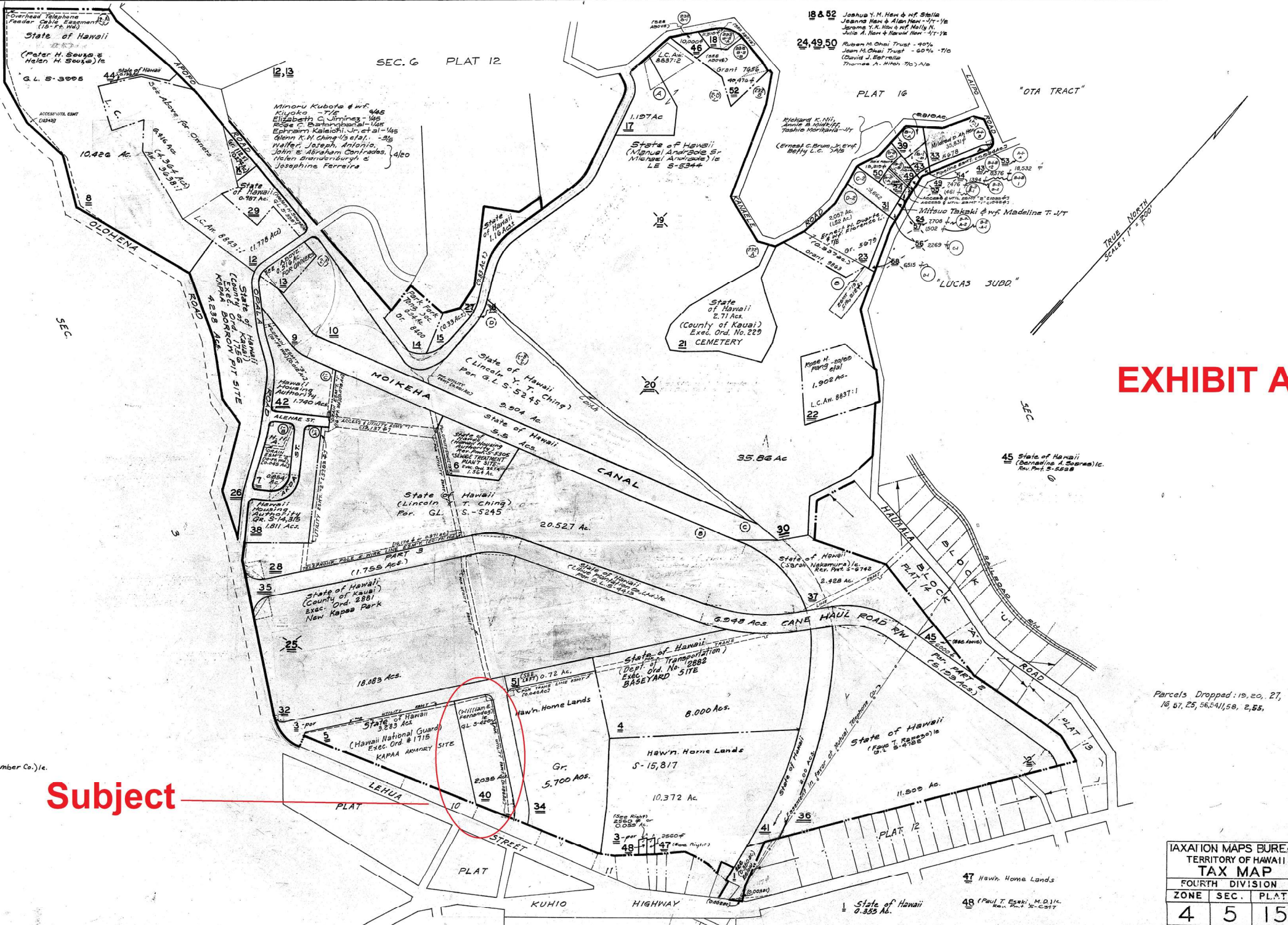
Eri, HERE, Garmin, Intermap, NGA

**SUBJECT**



Resource Mapping Hawaii, Map

**EXHIBIT A**



**EXHIBIT A**

**Subject**

Parcels Dropped: 10, 20, 27, 16, 67, 25, 56, 54, 58, 2, 55,

TAXATION MAPS BUREAU		
TERRITORY OF HAWAII		
TAX MAP		
FOURTH DIVISION		
ZONE	SEC.	PLAT
4	5	15
CONTAINING PARCELS		
SCALE: 1 in. = 200 ft.		

SUBJECT TO CHANGE

PRICE & KULA LOTS, KAWAIIHAU, KAUAI



KOBAYASHI SUGITA & GODA, LLP  
Attorneys at Law

June 20, 2023

VIA EMAIL

Mr. Ian Hirokawa  
Mr. Derek Wong  
State of Hawaii  
Department of Land and Natural Resources  
Land Division  
1151 Punchbowl Street, Room 220  
Honolulu, Hawaii 96813

Ms. Alison Neustein  
State of Hawaii  
Department of Land and Natural Resources  
Land Division  
3060 Eiwa Street, Room 208  
Lihue, Hawaii 96766

Re: General Lease No. S-4200  
Earl's, Inc. dba Esaki's Produce

Dear Mr. Hirokawa, Mr. Wong and Ms. Neustein:

This letter supplements the application submitted by Earl's, Inc. dba Esaki's Produce (the "**Lessee**") to extend the term of General Lease No. S-4200 (the "**Lease**") pursuant to Section 171-36.5 of the Hawaii Revised Statutes, as amended ("**HRS**"). Lessee is the current "lessee" under the Lease. HRS Section 171-36.5 generally provides that upon approval by the Board of Land and Natural Resources (the "**Board**"), and subject to certain other conditions, a lease for public lands for commercial purposes may be extended for up to forty (40) years if the lessee makes "substantial improvements" to the existing improvements on the leased property.

"Substantial Improvements" is defined as "**any renovation, rehabilitation, reconstruction, or construction of existing improvements**, including minimum requirements for off-site and on-site improvements, **the cost of which equals or exceeds thirty per cent of the market value of the existing improvements**, that the lessee or the lessee and developer

Mr. Ian Hirokawa  
Mr. Derek Wong  
Ms. Alison Neustein  
Department of Land and Natural Resources  
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installs, constructs, and completes by the date of completion of the total development.” See HRS Section 171-36.5(f) (emphasis added).

Lessee’s appraisal of the market value of the existing improvements to the leased property was determined to be **\$1,124,300** (see Lessee’s Restricted Use Appraisal Report dated February 19, 2023, prepared by Steven J. Nishimura of Steven Nishimura & Associates, Inc., submitted on June 6, 2023).

In order to satisfy HRS Section 171-36.5, the Lessee intends to make “substantial improvements” to the existing improvements on the leased property as further described below (the “**Project**”). We understand that under HRS Section 171-36.5, the Lessee and Board will need to agree on a development agreement governing the terms and conditions for the Project. Following agreement on said development agreement, the Lessee will promptly seek to obtain all necessary building and other permit approvals for the Project (the “**Project Approvals**”) and, thereafter, the Lessee will commence construction of the Project and substantially complete the same within approximately one (1) year after receiving all Project Approvals.

The Project currently entails the following work which will be done concurrently as a single construction project (subject to availability of materials):

1. Construction of a new 40-foot kitchen trailer to be permanently installed on existing concrete foundation adjacent to the existing warehouse facility. The new kitchen will replace the existing kitchen located inside of the existing warehouse facility and will have substantially the same purpose and capacity as the existing kitchen. Estimated cost is **\$256,300**. (See Exhibit A, attached to this letter, for a copy of the construction proposal for this portion of the work.)
2. Rehabilitation/reconstruction of metal siding on existing warehouse facility by removing existing metal siding and replacing it with new metal siding of equal or better quality. Estimated cost is **\$320,000**. (See Exhibit B, attached to this letter, for a copy of the construction proposal for this portion of the work.)


The total estimated cost for the Project is **\$576,300**, which is **51.3%** of the market value of the existing improvements (based on Lessee’s appraisal) and exceeds the 30% threshold required under HRS Section 171-36.5.

Please let me know if you need any other information at this time (i) in order to determine whether Lessee satisfies the “substantial improvement” requirement under HRS

Mr. Ian Hirokawa  
Mr. Derek Wong  
Ms. Alison Neustein  
Department of Land and Natural Resources  
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Section 171-36.5, and/or (ii) relating to Lessee's application for the extension of the term of the Lease.

Very truly yours,

A handwritten signature in black ink, appearing to read "David B. Tongg". The signature is fluid and cursive, with a large initial "D" and "T".

DAVID B. TONGG

for

KOBAYASHI, SUGITA & GODA, LLP

DBT/dbt (1947960\_1)

Encls. Exhibits A and B

## EXHIBIT A

**THE CONSOLIDATED CORP.**

**4-901 KUHIO HIGHWAY**

**KAPAA, HI 96746**

**(808) 821-9771**

**c.corp2@hawaiiantel.net**

Earl Kashwagi

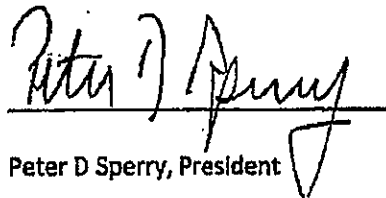
Esaki Produce

4780 Kahau Rd

Kapaa HI 96746

The following are current estimated cost for the following improvements, including all labor, materials and equipment necessary to complete in place:

1. 40-foot Prep Kitchen Trailer installed and operational at front south east corner of existing warehouse. See attached drawings for specifics. (\$256,300.00 tax included)
- ~~2. 9,000-square-foot warehouse building to match existing building with covered container loading and unloading dock, including 90' x 40' x 26' drive in chill with accessories located off the north west corner of existing warehouse (\$3,500,000.00 to \$3,700,000.00)~~



Peter D Sperry, President

The Consolidated Corp

## EXHIBIT B



PRODUCT 218 **NEBS** Inc., Groton, Mass. 01471. To Order PHONE TOLL FREE 1-800-225-6380

40% Pre-Consumer Content • 10% Post-Consumer Content

# Proposal

Page No. of Pages

## THE CONSOLIDATED CORP.

4-901 KUHIO HIGHWAY  
KAPAA, HAWAII 96746  
(808) 822-2304  
FAX (808) 822-9319

PROPOSAL SUBMITTED TO <b>ESAKI'S Produce</b>		PHONE <b>(808) 822-7722</b>	DATE <b>6/20/23</b>
STREET <b>4780 KAHAU Rd.</b>		JOB NAME <b>Replace Siding</b>	
CITY, STATE and ZIP CODE <b>KAPAA HI 96746</b>		JOB LOCATION <b>KAPAA</b>	
ARCHITECT <b>None</b>	DATE OF PLANS <b>None</b>	JOB PHONE	

We **Propose** hereby to furnish material and labor — complete in accordance with specifications below, for the sum of:

**Three hundred Twenty thousand and <sup>00</sup>/<sub>100</sub> dollars (\$ 320,000.<sup>00</sup>)**

Payment to be made as follows:

**25% deposit then 30 day Progress Payments**

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

Authorized Signature \_\_\_\_\_

Note: This proposal may be withdrawn by us if not accepted within \_\_\_\_\_ day

We hereby submit specifications and estimates for:

**Remove And Replace 26 ga Metal Siding (corrugated panels) on warehouse w/all necessary trim.**

**By owner: Power, water, Restroom + clear work Area**

**Not included: Plans or Permits if needed or anything else NOT specified Above**

**INSPECTION REPORT**  
Commercial/Industrial/Resort/Other Business

**General Information**

Document Number: GLS 4200 or RPS \_\_\_\_\_ Character of Use Industrial  
 Inspection Date: 3/31/23 <sup>4/1/23</sup> Inspection Time: 1530-0830 Land Agent: AN/JCT

**TENANT INFORMATION**

Name: Esaki's Produce Home Phone: \_\_\_\_\_  
 Address: 4780 Kahaun Rd. Business Phone: (808) 822-7722  
Kapua HI 96746 Fax: \_\_\_\_\_  
 Contact Person: \_\_\_\_\_ Contact Phone: \_\_\_\_\_

**SITE INFORMATION**

TMK: (4) 4-5-015:040 Area: 2.035 Acre's  
 Site Address: 4780 Kahaun Rd.  
Kapua HI 96746

**FISCAL INFORMATION**

ITEM	N/A	CURRENT= COMPLIANCE	DEFAULT = NON-COMPLIANCE	COMMENTS
Rent		X		
Liability Insurance		X		
Fire Insurance		X		
Bond		X		

**FIELD INSPECTION RESULTS** (refer to Field Inspection Worksheet)

ITEM	N/A	COMPLIANCE	NONCOMPLIANCE	COMMENTS
Subleases	X			
Improvements		X		
Premises		X		
Character of Use		X		

**Field Inspection Worksheet**  
Commercial/Industrial/Resort/Other Business

**File Review**

**LICENSES/PERMITS/CONSENTS**

ITEM	DLNR Approval Docs in File			COMMENTS/NOTES/LISTS
	N/A	YES	NO	
Subletting	X			attach copy of list or map if applicable
Improvement Construction Buildings		X		note deadlines for % completion
Improvement Construction Other structures/misc.		X		note deadlines for % completion

**Field Inspection**

ITEM	SATISFACTORY?			COMMENTS/NOTES
	N/A	YES	NO	
<b>SUBLEASES</b>				
Consents approved	✓			
Use adheres to lease purpose	✓			
<b>IMPROVEMENTS</b>				
<u>Buildings/Residences:</u> roof		X		
paint		X		
exterior		X		
interior		X		
<u>Structures:</u> roads		X		
walkways		X		
fencelines		X		
others		X		
<b>PREMISES</b>				
clean, sanitary, orderly		X		
appropriate storage/use of hazardous materials		X		
<b>CHARACTER OF USE</b>				
adheres to lease purpose		X		

ITEM	SATISFACTORY?			COMMENTS/NOTES
	N/A	YES	NO	
Other:				







**DEVELOPMENT AGREEMENT**

**FOR**

**EARL'S, INC.**

\* \* \*

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

**State of Hawaii**

**EXHIBIT D**



## DEVELOPMENT AGREEMENT

THIS DEVELOPMENT AGREEMENT (the “**Agreement**”) is made and dated effective as of this \_\_\_\_\_ day of \_\_\_\_\_, 2023 (“**Effective Date**”), by and between the **STATE OF HAWAII**, by its Chairperson of the Board of Land and Natural Resources (“**Chairperson**”) by the authority granted by the Board of Land and Natural Resources (“**Board**”) at its meeting held on July \_\_\_, 2023, under agenda Item D-\_\_\_, for the Department of Land and Natural Resources, Land Division, whose principal place of business and post office address is 1151 Punchbowl Street, Room 220, Honolulu, Hawaii 96813 (“**State**”), and **EARL’S, INC.**, a Hawaii corporation, whose business address is \_\_\_\_\_ (“**Lessee**”).

### **RECITALS:**

- A. The State owns in fee simple that certain parcel of land, a portion of government lands, situated at Kapaa Industrial Park, Kapaa, Kawaihau, Kauai, shown as the shaded area on **Exhibit A** attached hereto, incorporated herein and made a part hereof. The parcel consists of approximately 2.035 acres and is identified by Tax Map Key No.: (4) 4-5-015:040 (“**Subject Property**”).
- B. The parcel is currently leased to Lessee under General Lease No. S-4200 for a term of fifty-five (55) years from August 1, 1968 to July 31, 2023 (“**Lease**”).
- C. Act 236 Session Laws of Hawaii 2021 ("**Act 236**"), codified at Section 171-36.5, Hawaii Revised Statutes ("**HRS**"), authorizes the Board to extend the term of a commercial, industrial, resort, mixed-use, or government lease that has not been assigned within 10 years prior to the receipt of an application for a lease extension in exchange for the lessee making substantial improvements to the lease premises. The last assignment of the Lease occurred in 1990, more than 30 years prior to the receipt of Lessee’s application for a lease extension under Act 236.
- D. Act 236 defines "substantial improvements" to mean “any renovation, rehabilitation, reconstruction, or construction of existing improvements, including minimum requirements for off-site and on-site improvements, the cost of which equals or exceeds thirty per cent of the market value of the existing improvements, that the lessee or the lessee and developer installs, constructs, and completes by the date of completion of the total development.” Lease extensions under Act 236 are limited to 40 years.
- E. A Restricted Use Appraisal Report prepared for the Lessee determined the market value of the leasehold improvements on the Subject Property to be \$1,124,300.00 as of February 19, 2023. Thirty percent of this amount is \$337,290.00.
- F. Lessee has requested that the term of the lease be extended to July 31, 2063, and is planning to make substantial improvements to the Subject Property in an amount exceeding the minimum required to be eligible for a lease extension under Act 236, as the total cost of Lessee’s substantial improvements will be approximately \$576,300.00.

- G. Act 236 further provides that, “No lease extension shall be approved until the board and the lessee or the lessee and developer mutually agree to the terms and conditions of the development agreement.”
- H. Lessee’s plans and specifications for its substantial improvements to the Subject Property were presented to the Board at its meeting of July \_\_, 2023, under agenda Item D-\_\_, together with Lessee’s request for a 40-year extension of the Lease to amortize the cost of the substantial improvements. The Board reviewed the plans and specifications and statutory requirements for a lease extension Act 236 and \_\_\_\_\_ the extension of the Lease.
- I. This Agreement sets forth the terms and conditions that Lessee must satisfy and successfully perform in order for the requested extension of the Lease to be issued, and for Lessee to retain the benefit of the requested extension of the term of the Lease for the Subject Property pursuant to Act 236.

**AGREEMENT:**

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

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

2. Continuation of the Payment of Lease Rental. Lessee shall continue to pay to the State, throughout the term of this Agreement, all rent and other charges due by Lessee under the Lease, or the extension of the Lease provided for under this Agreement (the “**Extended Lease**”), pursuant to the terms and conditions of the Lease or the Extended Lease, as applicable, including the Revised Annual Rent as defined in Paragraph 3.A.(iii) herein, and all other rent and other charges due by Lessee under the Lease or Extended Lease pursuant to their terms and conditions.

3. Development Plan.

A. Pursuant to Act 236, prior to entering into this Agreement, Lessee prepared and submitted to the Board the plans and specifications of its proposed development plan for the substantial improvements to the Subject Property dated \_\_\_\_\_, a copy of which is attached hereto as **Exhibit B** incorporated herein and made a part hereof (such plans and specifications are collectively referred to as the “**Development Plan**”). All such plans and specifications of the Development Plan shall meet the requirements of and be in full compliance with this Agreement and all applicable municipal, county, state and federal regulations, rules, codes and ordinances. The Board reviewed the Development Plan at its meeting held on July \_\_\_\_, 2023, under agenda Item D-\_\_, and determined that:

(i) The Development Plan proposed in this Agreement is of sufficient worth and value to justify the extension of the term of the Lease to July 31, 2063;

(ii) The estimated period of time to complete the Development Plan shall be twenty-four (18) months from the Effective Date of this Agreement, which is reasonable; and

(iii) The minimum revised annual rent to be paid by Lessee shall be based on the fair market value of the lands comprising the Subject Property to be developed, as determined by independent appraisal in accordance with Section 171-17, HRS ("**Revised Annual Rent**").

B. The Board granted final approval of the Development Plan and this Agreement at its meeting held on July \_\_\_\_, 2023, Item D-\_\_.

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

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

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

5. Construction Period. Lessee shall have eighteen (18) months from the Effective Date to complete the substantial upgrades to the existing improvements on the Subject Property in accordance with the approved Development Plan ("**Construction Period**").

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

use diligent and all commercially reasonable efforts to obtain all required permits and/or other regulatory approvals from the Federal Government, State of Hawaii and/or County.

6. Hazardous Materials. Lessee shall not cause or permit the escape, disposal or release of any hazardous material in completing the approved Development Plan at the Subject Property, 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 Subject Property any such materials except to use in the ordinary course of Lessee's business, and then only after written notice is given to the State of the identity of such materials and upon the State's consent, which consent may be withheld at the State's sole and absolute discretion. If any lender or governmental agency shall ever require testing to ascertain whether or not there has been any release of hazardous materials by the Lessee, then the Lessee shall be responsible for the reasonable costs thereof. In addition, Lessee shall execute affidavits, representations and the like from time to time at the State's request concerning Lessee's best knowledge and belief regarding the presence of hazardous materials on the Subject Property placed or released by Lessee.

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

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

7. Bonds. Lessee shall not commence construction of the improvements until Lessee has filed with the State sufficient bonds conditioned upon the full and faithful performance of all the terms and conditions of this Agreement, including a completion bond for the full, faithful and timely completion of this Agreement, free from all liens and claims, including the completion of the substantial improvements described in this Agreement, and a labor and materialmen's bond in the amount of \$576,300.00, in such form and upon such terms and conditions as may be approved by the State. The Lessee shall, at its own cost and expense, within fifteen (15) days from the Effective Date of this Agreement, procure and deposit with the State and thereafter keep in full force and effect during the term of this Agreement, such bonds acceptable to the State in the amount of \$576,300.00 as aforesaid, which bonds shall name the State as obligee, conditioned upon the full and faithful observance and performance by Lessee of all the terms, conditions and covenants of this Agreement, including, but not limited to, the completion of the substantial improvements requirement in accordance with the approved Development Plan at the Subject Property on or before the date of completion, free from all liens and claims, pursuant to the approved Development Plan. Lessee shall indemnify, defend, and hold the State harmless from all liens, suits, actions or damages arising out of, caused from or

attributable to the work performed pursuant to the substantial improvements requirement in accordance with the approved Development Plan at the Subject Property incorporated herein this Agreement. These bonds shall provide that in case of a breach or default of any of the terms of this Agreement, covenants, conditions and agreements of such bonds, the full amounts payable pursuant to the terms and conditions of such bonds shall be paid to the State as liquidated and ascertained damages and not as a penalty.

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

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

9. Justification of Sureties. Any bonds required by this Agreement shall be supported by the obligation of a corporate surety organized for the purpose of being a surety and qualified to do business in the State of Hawaii, or by not less than two (2) personal sureties, corporate or individual, for which justifications shall be filed as provided in Section 78-20, HRS; provided, however, the Lessee may furnish a bond in like amount, conditioned as aforesaid, executed by it alone as obligor, if, in lieu of any surety or sureties, it shall also furnish and at all times thereafter keep and maintain on deposit with the State security in certified checks, certificates of deposit (payable on demand or after a period the State may stipulate), bonds, stocks or other negotiable securities properly endorsed, or execute and deliver to the State a deed or deeds of trust of real property, all of a character which is satisfactory to State and valued in the aggregate at not less than the principal amount of the bond. It is agreed that the value of any securities which may be accepted and at any time thereafter held by the State shall be determined by the State, and that the Lessee may, with the approval of the State, exchange other securities or money for any of the deposited securities if in the judgment of the State the substitute securities or money shall be at least equal in value to those withdrawn. It is further agreed that substitution of sureties or the substitution of a deposit of security for the obligation of

a surety or sureties may be made by the Lessee, but only upon the written consent of the State and that until this consent is granted, which shall be discretionary with the State, no surety shall be released or relieved from any obligation, except for any bonds terminated by Lessee after the Completion Date pursuant to the terms of Paragraph 8 hereinabove.

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

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

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

12. Agreement to Issue Extension of Term of Lease. Upon execution of this Agreement, the State will request the Department of the Attorney General to prepare the Extended Lease document. Pursuant to Act 236, the Extended Lease document (heretofore and hereinafter sometimes also simply referred to as the "Extended Lease") shall reflect an extension

term of forty (40) years and shall contain the Department's and the Department of the Attorney General's most current lease terms and conditions for leasing of public lands to for-profit entities, including but not limited to Lease Assignment (tailored as necessary to comply with the lease assignment restrictions contained in Act 236), Sublease Rent Participation, and Ownership of Improvements. The Extended Lease document will cover the aggregate extended term between August 1, 2023 through July 31, 2063, and will provide that in the event that the Lessee fails to successfully perform, timely satisfy or fully comply with any of the terms and conditions of this Agreement and/or approved Development Plan, the Extended Lease term will be rescinded and the Lease, together with its current termination date of July 31, 2023, will be reinstated. The State and Lessee will promptly sign the Extended Lease document when the form thereof is approved by the Department of the Attorney General.

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

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

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

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

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

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

- (iv) If the Lessee is not in compliance with Section 171-36.5, HRS.

Any default under this Agreement, the Lease, or Extended Lease by the Lessee shall be cause by the State to terminate this Agreement and rescind the Extended Lease, and the State shall have all other rights and remedies provided herein, in the Lease or the Extended Lease, as applicable, or as otherwise provided by law with respect to a default by the Lessee under this Agreement, the Lease or Extended Lease. Provided further, a default under this Agreement shall cause the Extended Lease to be void ab initio.

Upon any early termination by the State under this Agreement, this Agreement shall terminate on the date as provided for in the State's written notice and shall become null and void except as to any provisions which expressly survive termination in this Agreement. The Extended Lease shall be rescinded and Lessee shall not be entitled to an extension of the term of the Lease for the Subject Property pursuant to Act 236. Upon the effective date of termination and without waiving any other remedies to which it may be entitled, the State shall be entitled to: (1) prosecute any claim against Lessee for fees, costs or other payments or charges that accrued prior to the effective date of termination, including the interest thereon; and (2) assert any claim that it may have against Lessee for any damages, costs, or expenses, suffered or incurred by the State, which obligations shall survive termination of this Agreement, the Lease and/or Extended Lease.

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

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

16. Expenses to be Paid by Lessee. Pursuant to Act 236, Lessee shall pay all costs and expenses incurred by the State in connection with the processing, analyzing and negotiating of any request for a lease term extension and document, and this Agreement.

17. Observance of Laws, Ordinances and Regulations. Each party hereto, and their respective officers, agents, assigns, employees, consultants and/or contractors, or persons acting



for or on its behalf, shall at all times observe and comply with all applicable laws, ordinances, rules and regulations of the federal, state, county and municipal governments, now in force or which may be in force.

18. Archaeology; Historic Preservation. Lessee, including any agent or contractor, upon encountering any previously unidentified archaeological resources such as artifacts, shell, bone or charcoal deposits, human remains, or any historic properties or burials, on the Subject Property, will immediately stop all work and contact the State DLNR Historic Preservation Division in compliance with Chapter 6E, HRS.

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

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

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

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

If to Lessee: Earl's, Inc.  
P.O. Box 555  
Anahola, Hawaii 96703  
Attention: Earl Kashigawa  
Fax No.: (808) 882-0402

And a copy to: David B. Tongg  
Kobayashi, Sugita & Goda, LLP  
999 Bishop Street, Suite 2600  
Honolulu, Hawaii 96813  
Fax No.: (808) 535-5799

21. Status Reports; Lessee Cooperation. Lessee acknowledges that the State's staff may be required to periodically report to the Board during the term of this Agreement on the status of Lessee's progress of the approved Development Plan incorporated in this Agreement. Lessee agrees to reasonably assist and meet with the State's staff in making such reports, including without limitation, upon commercially reasonable advance written notice, having a representative available to answer questions at any meetings of the Board at which such reports are given, providing information that State's staff reasonably requests for the purposes of making such reports, and being available to meet with the State's staff prior to the time such reports are made.

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

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

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

25. Ratification. To the extent of any conflict or inconsistency between the terms of this Agreement and the terms of the Lease, the terms of this Agreement shall govern and control to the extent only where there is any conflict or inconsistency with regard to the terms and

conditions that Lessee must satisfy and successfully perform in order for it to be issued an extension of the term of the Lease by the State for the Subject Property pursuant to Act 236.

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

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

28. Assignment. Any and all rights under this Agreement granted to Lessee may not be sold, assigned, conveyed or transferred in any manner by Lessee to any other person or entity. Notwithstanding the foregoing, however, Lessee may assign this entire Agreement and the development rights provided for herein to an institutional lender or lenders providing financing for the development of all or any portion of the Subject Property as security for the repayment of such loan or loans, with the prior written consent of the State.

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

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

31. DLNR. Notwithstanding anything herein to the contrary, it is specifically understood and agreed by the parties that: (a) the "State" as used herein means the Department of Land and Natural Resources, State of Hawaii, and the "Chairperson" as used herein means the Chairperson of the Board of Land and Natural Resources; (b) whenever action is taken, or required to be taken by the "State" under this Agreement (e.g., approve, disapprove, consent or otherwise), it shall be deemed to be an act of only the Board of Land and Natural Resources, and

shall not be construed to be the act of any other department or agency of the State of Hawaii. Lessee acknowledges and accepts the responsibility for obtaining all entitlements and governmental approvals from the other applicable governing boards, agencies and departments of the State, County and Federal Government.

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

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

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

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

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

Exhibit A: Map of Subject Property

Exhibit B: Lessee's Development Plan dated \_\_\_\_\_.

[THE NEXT PAGE IS THE SIGNATURE PAGE.]

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

Approved and Executed by the Chairperson pursuant to authority granted by the Board of Land and Natural Resources at its meeting held on July \_\_, 2023

**STATE OF HAWAII**

By \_\_\_\_\_  
DAWN N. S. CHANG  
Chairperson of the Board of Land and Natural Resources

APPROVED AS TO FORM:

\_\_\_\_\_

Name: \_\_\_\_\_

Deputy Attorney General

Dated: \_\_\_\_\_

**EARL'S, INC.**  
a Hawaii corporation

By \_\_\_\_\_

Name: \_\_\_\_\_

Title:

Lessee

STATE OF HAWAII )  
 ) SS.  
COUNTY OF \_\_\_\_\_ )

On this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, before me personally appeared \_\_\_\_\_ to me personally known, who, being by me duly sworn, did say that he/she is the \_\_\_\_\_ of **EARL'S, INC.** a Hawaii corporation, and that the foregoing instrument was signed in behalf of said company by authority of its \_\_\_\_\_, and the said \_\_\_\_\_ acknowledged said instrument to be the free act and deed of said company.

Notary Public, State of Hawaii

\_\_\_\_\_

My commission expires: \_\_\_\_\_

**EXHIBIT A**

**TMK: (4) 4-5-015:040**



**EXHIBIT B**  
**LESSEE’S DEVELOPMENT PLAN DATED JUNE 20, 2023**

The Project currently entails the following work which will be done concurrently as a single construction project (subject to availability of materials):

<b>Item</b>	<b>Estimated Cost</b>
1. Construction of a new 40-foot kitchen trailer to be permanently installed on existing concrete foundation adjacent to the existing warehouse facility. The new kitchen will replace the existing kitchen located inside of the existing warehouse facility and will have substantially the same purpose and capacity as the existing kitchen.	\$256,300. (See Exhibit 1 attached for a copy of the construction proposal for this portion of the work.)
2. Rehabilitation/reconstruction of metal siding on existing warehouse facility by removing existing metal siding and replacing it with new metal siding of equal or better quality.	\$320,000. (See Exhibit 2 attached for a copy of the construction proposal for this portion of the work.)
<b>Total:</b>	<b>\$576,300</b>

The total estimated cost for the Project is \$576,300, which is 51.3% of the market value of the existing improvements (based on Lessee’s appraisal) and exceeds the 30% threshold required under HRS Section 171-36.5.



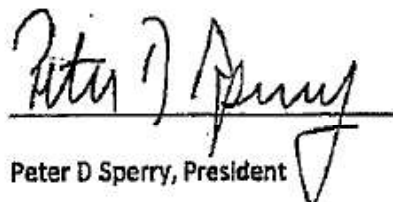
**THE CONSOLIDATED CORP.**

**4-901 KUHIO HIGHWAY  
KAPAA, HI 96746  
(808) 821-9771  
c.corp2@hawaiiantel.net**

Earl Kashiwagi  
Esaki Produce  
4780 Kahau Rd  
Kapaa HI 96746

The following are current estimated cost for the following improvements, including all labor, materials and equipment necessary to complete in place:

1. 40-foot Prep Kitchen Trailer installed and operational at front south east corner of existing warehouse. See attached drawings for specifics. (\$256,300.00 tax included)
- ~~2. 9,000-square-foot warehouse building to match existing building with covered container loading and unloading dock, including 90' x 40' x 26' drive in chill with accessories located off the north west corner of existing warehouse (\$3,500,000.00 to \$3,700,000.00)~~



Peter D Sperry, President

The Consolidated Corp

# EXHIBIT 1

PRODUCT 711 **GREEN** Inc., Cores, Boxes, CIGETS, 5000 PAPER TUBS, PAPER + BOTTLES/BOXES

40% Pre-Consumer Content + 10% Post-Consumer Content

# Proposal

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## THE CONSOLIDATED CORP.

4-901 KUHIO HIGHWAY  
KAPAA, HAWAII 96746  
(808) 822-2304  
FAX (808) 822-9319

PROPOSAL SUBMITTED TO <b>ESAKI'S Produce</b>	PHONE <b>(808) 822-7722</b>	DATE <b>6/20/23</b>
STREET <b>4780 KAHAU Rd.</b>	JOB NAME <b>Replace Siding</b>	
CITY, STATE and ZIP CODE <b>Kapaa HI 96746</b>	JOB LOCATION <b>Kapaa</b>	
ARCHITECT <b>None</b>	DATE OF PLANS <b>None</b>	JOB PHONE

We **Propose** hereby to furnish material and labor — complete in accordance with specifications below, for the sum of:

**Three hundred Twenty thousand and  $\frac{00}{100}$  dollars (\$ 320,000.<sup>00</sup>)**

Payment to be made as follows:

**25% deposit then 30 day Progress Payments**

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

Authorized Signature \_\_\_\_\_

Note: This proposal may be withdrawn by us if not accepted within \_\_\_\_\_ days

We hereby submit specifications and estimates for:

**Remove And Replace 26 sq Metal Siding (Corrugated Panels) low warehouse w/all necessary trim.**

**By owner: Power, water, Restroom + clear work Area**

**Not included: Plugs or Permits if needed or anything Else NOT Specified Above**

# EXHIBIT 2