

PETITIONER
PACIFIC MARINE PARTNERS, LLC AND
ITS MEMBERS' RESPONSE TO DOBOR'S
RECOMMENDATION RE **Agenda Item J-1:**

Consent to the Assignment of a 50% Interest in
Boating Lease No. LH-19-002 Held by One of
the Two Members of Lessee PMP, to Its Other
50% Member and Authorize a Lease Extension,
Situating at Honokohau Small Boat Harbor,
North Kona, Island of Hawaii, Hawaii,
Tax Map Key: (3) 7-4-008:003 (Por).

August 23, 2023

VIA EMAIL AND HAND DELIVERY:

The State of Hawai'i Department of Land and Natural Resources ("DLNR"):
Chairperson and Members
Board of Land and Natural Resources
4 Sand Island Access Road
Honolulu, Hawaii 96819
dlnr@hawaii.gov

Re: Application Pursuant to Hawaii Administrative Rules ("HAR") §13-1-11 for Board Consent to Assign a 50% Interest in General Lease No. LH-19-002 Held by One of the Two Members of Lessee Pacific Marine Partners, LLC to its Other 50% Member.

I.
INTRODUCTION

Petitioner Pacific Marine Partners LLC ("PMP") and its members Jonas Ikaika Solliday (Solliday) and International Pacific Enterprises LLCI ("IPE"), whose sole member is Jason Ho'opai, are requesting approval of a lease assignment to founding member Solliday from the other founding member IPE of its 50% interest in DLNR's Boat Lease No. LH-19-002.

DOBOR's August 18, 2023 Recommendation to the Board recommends approval of the lease assignment, however, the recommended approval is subject to the unattainable condition of mandatory payment of a very costly Performance Bond (or else face default and loss of the lease), such that the cost of the assignment would increase from approximately \$80,000 to over \$900,000. Requiring this additional monetary condition would go beyond the statutory and lease terms for approval of a lease assignment. Pursuant to both PMP's lease and HRS §171-36 "Lease Restrictions, generally", there are only two stated monetary requirements for approval of a lease assignment – payment of a premium based on installed improvements and review and approval of the consideration being paid to the party relinquishing its interest in the lease.¹

¹ PMP's Lease Section 13 "Assignments" provides for assignment of all or a portion of an existing lessee's interest under certain monetary terms 1) The right of the Board to review and approve the amount of consideration being paid for the interest being transferred; and, 2) The Board may condition its approval on payment of a premium "based on the amount by which the consideration for the assignment exceeds the straight-line depreciated costs of improvements and trade fixtures being transferred. PMP's Lease Section 13 "Assignments" is attached as **Exhibit 1**. Lease Section 13 "Assignments" mirrors HRS 171-36 "Lease Restrictions", subsection 171(a)(5) and likewise does not require payment of a performance bond. The relevant portions of HRS 171-36(a) and 36(b) are attached as **Exhibit 2**. Lease Section 18 "Performance

PMP has agreed to both of the monetary conditions for the assignment stated in the lease and in the statutory provision on lease assignments. Payment of a Performance Bond (here in the amount of \$846,000) is not a stated requirement for an assignment, and would therefore not be a reasonable expectation. Most importantly, PMP's lease allows for waiver of the performance bond where the petitioning Lessee is in substantial compliance of the lease terms and given the bond may be reimposed for subsequent non-compliance.²

With the current demand for payment of a bond that was otherwise due some five years ago in September of 2018, the cost of this assignment would increase from \$80,619.29 to more than ten times that amount, to approximately \$926,000.³ Doing so will in effect cancel PMP's lease entirely by way of forcing default upon failure to pay the now due performance bond. Doing so would also be inconsistent with the Board's treatment of other lease assignment requests.

Whereas DOBOR may not consider it appropriate to decide or recommend application of the Lease waiver provision, Petitioner asks the Board to apply the waiver provision.

II. BACKGROUND

As DOBOR is well-aware, through binding arbitration and 2021 court decisions, it was PMP member Solliday who prevailed against the other member of PMP International Pacific Enterprises – whose sole member is Jason Ho'opai. Since April of 2021 when Solliday gained control of PMP, he has demonstrated exemplary service to DOBOR – including increasing the number of stall rentals more than 29%, from 275 to 355 and increasing the monthly rent paid to DOBOR from \$35,250 to an average of over \$40,000 -- which is one of the highest monthly lease rents paid in the state. PMP's annual rental is more than double the rent being paid by adjacent harbor lessee GKM (for its far more lucrative harbor lease) and is more than five times the amount GKM was paying as the previous lessee of the subject boat storage premises.

PMP is paying this high lease rent despite having been offered the lease based on full existing utilities, but however, upon delivery of the premises all of those utilities were disconnected and PMP is now at operating off the grid at great expense.

Bond" provides for payment of a performance bond "equal to two times the annual rental then payable" within 15 days of the effective date of the lease and is attached as **Exhibit 3**.

² Lease Section 29 "Waiver, modification, reimposition of bond and liability insurance provisions" provides that in the case of substantial compliance by the lessee with the terms, covenants, and conditions contained in the lease, the Lessor Board may waive or suspend the performance bond or reduce the amount of bonds or liability insurance, and also provides that the Lessor Board reserves the right to reactivate the bond or reimpose the bond or liability insurance in the original amount at any time throughout the term of the lease. PMP Lease Section 29 "Waiver, modification, reimposition of bond and liability insurance provisions" is attached as **Exhibit 4**.

³ Based on the terms of the Lease Section 13, the cost of this assignment would be \$80,619.29 (premium in the amount of \$8,619.29 plus payment to the assigning member in the amount of \$72,000). The proposed addition of a Performance Bond would increase the cost of this lease assignment by at least \$846,000, to a sky-high and impossible cost of \$926,619.29.

Exemplary compliance by PMP under Solliday's management is also demonstrated by the following:

1. PMP's timely payment of monthly rent and accurately filing the required gross receipts reports;
2. PMP is up to date on payment of its liability insurance;
3. PMP has incurred no violations of the lease and is providing full service to its customers despite having been deprived of all the utilities that were promised by DOBOR and upon which promised utilities the high rent appraisal was based. Those utilities included electric, water, internet and bathroom facilities - none of which utilities have been restored since PMP took over the lease in 2018.
4. Solliday has substantially improved the premises including significant upgrading of security features and clearing a firebreak around the perimeter of the premises, as well as by installing security cameras, additional security lighting, and hiring security staff.
5. Whereas in 2020, PMP entered into a Settlement with DOBOR due to the abhorrent condition of the premises delivered to PMP in contrast to what was promised, that Settlement payment amounted to less than one quarter of the estimated damages including the undisclosed environmental problems and undisclosed presence of GKM's former unpermitted sublessee Hotspots Welding;⁴
6. In order to address more of the unanticipated and extensive damage to the premises, in 2020 PMP took out a loan in the amount of \$150,000; and consider;
7. Certain boat storage customers have approached Solliday about assisting PMP in financing certain improvements to the premises provided they are assured PMP will hold the lease long-term, and instead this threat of default of PMP's lease has and will cause great concern among PMP's boat storage customers.

At her Senate confirmation hearing, Chairperson Dawn Chang promised to manage the Department of Land and Natural Resources, and in particular DOBOR, in a fair and consistent manner – that is, rather than by way of arbitrary and preferential treatment of some lessees and inconsistent treatment towards other lessees.⁵ Based on her commitment to fair and consistent treatment of DOBOR lessees, the continued waiver of the performance bond is reasonable and appropriate.

⁴ See August 21, 2019 letter from Starn O'Toole Marcus & Fisher to Deputy Attorney General William J. Wynhoff, attached as **Exhibit 5**, which outlines PMP's damages and environmental remediation claims totaling between \$1,104,000 and \$4,059,000 (averaged at \$2,591,500).

⁵ The confirmation hearing of Dawn Chang is available on YouTube, however the portion of the hearing when Senator McKelvey raises questions about the management of DOBOR appears to have been deleted.

III.
DOBOR'S INCONSISTENT HANDLING OF LEASE ASSIGNMENT
PETITIONS RELATED TO PAYMENT OF THE PERFORMANCE
BOND AND THE ASSIGNMENT PREMIUM

Consider for example, that in contrast to now recommending that Solliday pay the performance bond, in 2019 when co-lessee Jason Ho'opai sought the Board's approval to personally take over 100% interest in PMP inclusive of member Solliday's interest (and without Solliday's consent), DOBOR did not recommend that Ho'opai pay the performance bond. Likewise, PMP is now asked to pay a monetary premium for the lease transfer (and Solliday has agreed to this payment), however in 2019 when Ho'opai petitioned for the same lease transfer, DOBOR likewise did not recommend that he pay *any* premium. To be clear, DOBOR's disparate treatment of the requested lease assignments by the two co-lessees of PMP would be arbitrary and *per se* disparate treatment of the two lease assignment petitions for the same subject parcel.⁶

Likewise consider that when GKM petitioned for lease assignment from certain parties to the original lease to others, that is from Gentry Properties to GKM (Gentry Kona Marina, a corporation), *no performance bond or premium* was made a condition to DOBOR's recommendation or the Board's consent and approval to GKM's requested lease assignment.⁷

According to PMP's lease, the performance bond was due to be paid within 15 days of signing of the lease – on September 19, 2019. Further, payment of the bond (for twice the annual rent) was not included in the public notice for the lease auction, although as made clear in Hawai'i Supreme Court case law and in the Organic Act, all material terms are required to have been included in the Public Notice of DOBOR lease auctions.⁸ Moreover, the Board has on other occasions, for PMP and for other DLNR lessees, waived the payment of a performance bond.⁹

The questions before the Board should be whether application of the waiver provision under the circumstances in this case is appropriate.¹⁰

⁶ A chart labeled "DOBOR's Disparate Treatment - Ho'opai versus Solliday Petitions" (of PMP members' Petitions for Lease Assignment) is attached as **Exhibit 6**.

⁷ A chart comparing the value of GKM's adjacent DOBOR harbor lease with that of PMP is attached as **Exhibit 7**.

⁸ See *State v. Kahua Ranch* 47 Haw. 28, 38, 394 P.2d 581, 588 (1963) including Footnote 2 regarding Section 73(d) of the Organic Act, which in pertinent part provides that the public notice of the public auction for public lands "shall state all terms and conditions of the sale".

⁹ See for example the July 23, 2021 Board approval of the Nagakura lease No. S-3935 and the February 23, 1996 Board-approved waiver of the Balthazar Lease S-5276, in which cases the performance bond was waived.

¹⁰ A chart labeled "Unfair Imposition of Performance Bond in 2023", showing all the reasonable times when imposition of a mandatory performance bond could have been argued as reasonable

The Department's lease commitment to Quiet Enjoyment (PMP Lease Section 30)¹¹ is also worthy of consideration, taking into account the following:

1. The delayed transfer of possession of the small boat storage premises during which period the prior lessee GKM ordered all of the boat storage owners to remove their boats from the premises and during which period significant destruction of the premises occurred including destruction of the security gate and portions of the perimeter fencing and disconnection from all utilities, such that Solliday had to almost constantly remain on the premises for nearly two months until the essential security measures were restored;
2. the failure to restore the promised utilities improvements to the premises (the presence of which improvements the high monthly rent was calculated), but which were disconnected by the prior lessee GKM, and DOBOR management's refusal to allow its property managers to pursue investigation of GKM's extensive vandalism to PMP's leased premises and DOBOR's subsequent refusal to assist PMP with reconnection of the promised utilities;
3. the Department's failure to remove from the premises the prior lessee GKM's un-permitted sublessee Hotspots Welding which operation occupied a substantial portion of the premises and was located in the only permanent structure on the leased parcel and which building Solliday was not allowed to inspect or prior to signing the lease;
4. the failure to evict Hotspots Welding operations such that PMP became ensnared in litigation and has not been able to utilize the permanent structure out of which Hotspots operated, which building has continued to be filled with massive equipment belonging to Hotspots, and;
5. Despite the Department's commitment to clean up the contamination from Hotspots Welding's cesspool and address related environmental problems, there still remain significant issues with the cesspool, including open entry points going into the cesspool.

If PMP's lease is set up for default by way of imposing an unfair and costly additional monetary condition to the lease assignment approval, this will once again cause great turmoil among the boatyard customers. The foreseeable disruption will be added to the chaos caused in 2018 when after PMP was awarded the lease, GKM notified all of the boatyard to immediately remove their boats from the premises, then again there was customer distress in 2019 during the period of arbitration and litigation when Ho'opai, who lives in Honolulu, took over management of the boatyard from Solliday. If there will now be another event of a threatened and clearly disturbing change of management on the immediate horizon, the 350+ boatyard customers will again be pitched into an unpleasant and distressful scenario.

– but did not occur, and is now being proposed *five years later*, after Solliday has worked to achieve PMP's current exceptional performance despite the continuing inadequacies of the premises provided, is attached as **Exhibit 8**.

¹¹ Lease Section 30 "Quiet Enjoyment" provides that if the Lessee timely pays the rent and otherwise observes the terms and covenants of the lease, the Department covenants and agrees that the Lessee shall hold and possess and enjoy the premises for the term of the lease without hindrance or interruption by the Lessor or by other persons claiming through the Lessor. Lease Section 30 "Quiet Enjoyment" page 14 of PMP's Lease here attached as **Exhibit 9**.

Assuming the Board nevertheless votes to require payment of the performance bond as a condition to approval of PMP's requested lease assignment, the Board will likely point to the 1983 case of *State v. Sharma* [63 Haw. 632] to support its decision. In *Sharma*, the Board cancelled the lease of a petitioner who, two years after entering into the lease and in addition to other breaches of the DLNR lease, had not paid the performance bond. However, the *Sharma* case is readily distinguishable from the instant case since, as the Court pointed out, a number of violations had occurred, and the lessee had not demonstrated any breaches by the State. Also important to note in *Sharma*, is that consideration of the waiver provision was not raised and was not at issue in that case.

The principle of equitable estoppel is here applicable as well. That principle dictates that where a party reasonably relied upon the past conduct and practice of the government agency (here not requiring that the performance bond be paid for the past five years), and where the party has made a substantial investment based on the assumption that the agency would continue to waive the performance bond and where loss of the lease would cause significant financial loss and trauma to the party, the agency, which has benefited from the investment of the lessee, is estopped from later demanding payment of an additional material sum. The Court in *Godoy v Hawai'i County* [44 Haw 312, 320, 354 P 2d 78, 82-83 (1960)] aptly explained this principle:

But there is a species of equitable estoppel, sometimes called *quasi-estoppel*, which has its basis in election, waiver, acquiescence, or even acceptance of benefits and which precludes a party from asserting to another's disadvantage, a right inconsistent with a position previously taken by him. . . . This class of estoppel is sometimes expressed in the language of the rule or maxim that one cannot blow both hot and cold. It is based upon the broad equitable principle which courts recognize, that a person, with full knowledge of the facts, shall not be permitted to act in a manner inconsistent with his former position or conduct to the injury of another. To constitute this sort of estoppel the act of the party against whom the estoppel is sought must have gained some advantage for himself or produced some disadvantage to another; or the person invoking the estoppel must have been induced to change his position, or by reason thereof the rights of other parties must have intervened.

In this case DOBOR has significantly benefited by PMP acquiring the lease given both the vast increase in rent being paid and in the vast improvements of the premises, such that it would be unfair for the agency to now take a position to force a default/cancellation of the lease by imposition of a previously waived condition that is not reasonably anticipated or achievable by the lessee.

Simply put, to require payment of a performance bond now, after 5 years of implicit waiver, would be unfair and shameful. For these reasons Petitioner PMP and its members ask the Board to continue waiving the performance bond, as permitted under Section 29 of the Lease (waiver for substantial compliance).

IV.
DOBOR'S INCONSISTENT AND UNFAIR TREATMENT
OF PMP'S REQUEST FOR A LEASE EXTENSION

HRS §171-36 (Lease restrictions; generally) subsection 171(b)(2) authorizes the Board to extend or modify the fixed rental period for the term of the lease at its discretion, provided that the aggregate of the initial term and any extension granted shall not exceed sixty-five years. The statute includes the provision that the lease can be extended to qualify the lessee for any state or private lending institution loan or to amortize the cost of substantial improvements to the demised premises that are paid for by the lessee without institutional financing.¹²

Considering the needed improvements and PMP's outstanding financing burden, in June of 2022, Solliday initially requested a lease extension as part of PMP's Petition for Transfer and submitted a proposal to complete \$202,000 of improvements over a four-year period, by December 31, 2028 (the end of the current lease term). PMP subsequently asked DOBOR to instead consider recommending an extension of 20 years, with a completion deadline of Dec 31, 2028, for substantially more improvements in the amount of over \$294,000.¹³

Instead DOBOR is recommending to the Board a 10-year extension but at the cost commitment PMP had proposed for a 20-year extension and also including a shortened completion period (from December 31, 2028 to December 31, 2025 - just 28 months from now).

PMP is amenable to a 10-year extension for completion by December 31, 2028 for \$202,000 in improvements OR preferably for a 20-year extension for completion by December 31, 2028 at a cost of \$294,000.

Comparison with the Nakakura 2021 Lease Extension Request (General Lease No. S-3935)

DOBOR's recommended 10-year extension for close to \$300,000 in improvements with a short time period for completion is unfair and inconsistent with the approval of other lease extensions. For example, in the case of the Nagakura's Lease with the DLNR (No. S-3935 2021, also a public auction lease), the lessee requested a lease extension of 39 years based on \$130,000 in promised improvements and with \$250,000 in financing with no set date for completion. DOBOR, finding that the lessee was in substantial compliance with the terms of the lease, recommended (and the Board granted) the requested 39-year lease extension, and **WAIVED** the performance bond.

In contrast, PMP which also has financing (in the amount of a 2020 SBA loan for \$150,000), is asking for a 20-year extension based on close to \$300,000 in improvements which is more than **TWICE** the value of the improvements promised by Nagakura, or alternatively for a 10-year

¹² The relevant portions of HRS § 171-36 "Lease restrictions; generally", subsections 36(a) and 36(b) are attached as **Exhibit 2**.

¹³ A Chart entitled "PMP-Solliday Proposed Improvement Commitment Based on Lease Extension of 20 years is attached as **Exhibit 11**.

extension for a commitment of \$202,000 in improvements, with a completion date of December 31, 2028.

DOBOR's recommendation of only a 10-year extension for a commitment of close to \$300,000 in improvements with a short completion period is arbitrary and unfair and is not consistent with other similarly situated DLNR lessees.¹⁴

Comparison with GKM's 2006 Lease Extension Request (General Lease No. H-82-4)

Unlike the 10-year recommendation for PMP (who has made timely rent payment and has otherwise substantially complied and not violated the lease in any way), the Board approved GKM's request for a 20-year lease extension, which started April 1, 2019, despite a plethora of violations in the previous years including extensive damages to the Small Boat Yard premises, unpermitted fuel sales, an unpermitted sublessee – Hotspots Welding, and an illegal cesspool (for which the investigation of these violations by DOBOR property managers was blocked by the Director) and despite the fact that GKM pays **less than half the rent PMP is paying** for its far more valuable lease.

V.

IF THE BOARD INCLUDES PAYMENT OF THE PERFORMANCE BOND AS A CONDITION TO PMP'S REQUESTED LEASE ASSIGNMENT, PETITIONER WILL THEN REQUEST AN EVIDENTIARY HEARING BEFORE A NEUTRAL DECISION MAKER (CONTESTED CASE HEARING)

If the Board votes to demand payment of a performance bond as a condition to approval of the requested lease assignment or face default, then Solliday as the petitioning member of PMP will request a contested case hearing before a neutral decision-maker hearing officer.

In the event of imposition of the impossible additional monetary condition, Solliday will have a due process right to an evidentiary hearing – based on his already acquired property and substantial economic interest in the lease that is at stake and based on his reasonable expectation that at this juncture, five years after payment of a mandatory performance bond was due, the performance bond would continue to be waived.

Bootstrapping the proposed performance bond as a condition of Board approval of Solliday's request for a lease assignment (from one of its 50% members to the other existing 50% member), will result in, and is equivalent to, a cancellation of PMP's lease entirely.

Further, it would be *per se* disparate treatment for DOBOR to now recommend mandatory payment of the performance bond when no payment of a performance bond was recommended by DOBOR in the virtually identical 2019 lease assignment request by the other member of PMP (Jason Ho'opai as the sole member of PMP member IPE) to personally obtain PMP's lease inclusive of Solliday's interest and requested to do so without the consent of PMP member Solliday. At the time of Ho'opai's lease assignment petition, not only did DOBOR not recommend Ho'opai pay a

¹⁴ A Chart entitled "Inconsistent Treatment of PMP's Extension Request" is attached as **Exhibit 10**.

performance bond, but so too DOBOR did not ask that Ho‘opai pay the monetary premium that is the monetary condition set forth in the lease for a lease assignment. Yet now that Solliday is making a similar lease assignment request (and with the consent of Ho‘opai), DOBOR recommends the assignment be subject to payment of the sky-high priced performance bond in addition to the monetary premium that Solliday has agreed to.

If the Board denies Solliday’s request for a contested hearing, the Board will likely seek to justify its decision based on the 1983 *DLNR vs Sharma* decision [63 Haw. 632, 673 P. 2d 1030]. In *Sharma*, the Board cancelled the lease of a petitioner who some two years after the effective date of the lease had not paid the performance bond along with other violations of his lease. Therein the Court ruled in favor of DLNR’s position that the issue involved the internal custodial management of public property as a landlord – tenant matter and pointed out that the lessee had not demonstrated that he was not in default and or that the State had breached its agreement. *Id.* 63 Haw at 641, 673 P. 2d at 1036.

As the Hawai‘i Supreme Court later made clear in *Flores v. Bd. of Land & Nat. Res.*, 143 Haw. 114, 121, 424 P.3d 469, 476 (2018), when the Board acts in relation to a lease of public lands, there is no *per se* property right exemption from matters. Instead, as the Court therein made clear, an independent determination defined by existing rules or understanding[s] as to whether the Petitioner has a statutory, regulatory, or constitutional property interest right to a due process hearing is required. *See Id.* at 480. Again, as relevant to the circumstances in this case, that determination is to be based not only on the agency’s statutes and rules, but also on related (explicit and implicit) understandings on a case-by-case basis. *Id.*

As pointed out in *Sandy Beach Defense Fund vs City Council of City and Cnty of Honolulu*, 70 Haw. 361, 377, 773 P 2d 250, 260 (1989) (“*Sandy Beach*”), Hawaii Courts engage in a two-step analysis for a claim for a due process hearing. First, the Courts must determine whether the particular interest held by the petitioning party is a property interest, and if the interest is property within the meaning of the due process clause, what procedures are required to protect that interest. Citing *Silver v Castle Mem. Hospital* 53 Haw. 475, 497 P 2d 564 (1972), the Court pointed out that a physician’s economic interest in his continued practice of medicine in a federally-funded private hospital rose to the level of a constitutionally-protected property interest. Certainly, at this juncture, Solliday’s economic interest in continuing the boat storage harbor lease is equally a constitutionally-protected property interest.

The U.S. Supreme Court’s landmark decisions in *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701 (1972) (“*Roth*”) and *Perry v. Sindermann*, 408 U.S. 593, 599–603, 92 S. Ct. 2694, 2698–700, 33 L. Ed. 2d 570 (1972) (“*Perry*”) are also particularly instructive. In contrast to the otherwise similar circumstances in *Roth*, in *Perry* the court found that the nonrenewal of a nontenured teacher was a deprivation of his property interest in continuing his employment benefits based not on a contract but on an implied understanding fostered by the educational institution. In *Perry*, the Court distinguished the circumstances in that case from its contrary finding in *Roth* based on the nontenured teacher’s position in *Perry* that his property right was based on the institution’s actions and representations over the course of his tenure, that lead to his reasonable expectation that he would be tenured. The *Perry* court explained:

Explicit contractual provisions may be supplemented by other agreements implied from 'the promisor's words and conduct in the light of the surrounding circumstances. And, (t)he meaning of (the promisor's) words and acts is found by relating them to the usage of the past. (citations and quotations omitted)

It is the same situation here for Solliday – given that after five years of no required mandatory payment of the sky-high performance bond, it was his reasonable understanding and legitimate expectation that DOBOR would continue to waive the performance bond absent some substantial non-compliance with the general terms of the lease.

The decision in *Weinberg v Whatcom County* 241 F. 3d 746 (9th Cir. 2001) is also instructive. In *Weinberg*, the Ninth Circuit held the County government's actions to stop a developer's continued operations at a site along with revoking his existing permits amounted to a deprivation of an existing property interest under the due process clause. As the Court explained:

A procedural due process claim, unlike negligence and takings claims, is not rooted in the notions of adequate compensation and economic restitution but is based on something more - an expectation that the system is fair and has provided an adequate forum for the aggrieved to air his grievance. Aspirations of ensuring procedural due process are founded on a hope that the process of dispute resolution will be just, even when the substantive outcome is not. *See, e.g. Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 162, 71 S.Ct. 624, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring) (describing the paramount importance of a "feeling of just treatment" by the government). *Id.* 241 F.3d at 752.

See also Holman v City of Warrenton 242 F. Supp 791 (U.S. Dist. Or. 2002) wherein the Court held the City's conduct of not granting the requested building permit amounted to a *de facto* revocation of and deprivation of his previously approved conditional use permit with respect to which he was in compliance, would thereby result in the deprivation of an existing property interest. Put simply, the Court looks to whether there was a *legitimate expectation* on the part of the party challenging the government action, where a denial by the government would result in the *de-facto* deprivation of a previously granted existing benefit.

In the instant case, to require a substantial condition (that is not part of the statutory or lease based conditions to approve a lease assignment) that would foreseeably result in the cancellation of PMP's lease would deprive Solliday of an existing property interest in retaining the previously awarded lease. Therefore, affording Solliday, who is otherwise in compliance with the terms of the lease, a pre-deprivation contested case hearing is appropriate.

Moreover, in light of the serious risk of economic loss for Solliday, it would be wrong for the Board to assert that Solliday's opportunity to speak at its regular Board meeting is sufficient in itself and would provide sufficient due process protection. This is especially true given that the circumstances here involve inconsistent and disparate treatment of similarly situated lessees in similar circumstances and involves the need to evaluate equitable considerations related to allegations of breaches by the Department that is now acting as the decision-maker in this case.

As enunciated in *Sandy Beach*:

[D]ue process is flexible and calls for such procedural protections as the particular situation demands. The basic elements of procedural due process of law require notice and an opportunity to be heard at a meaningful time and in a meaningful manner before governmental deprivation of a significant property interest. Determination of the specific procedures required to satisfy due process requires a balancing of several factors: (1) the private interest which will be affected; (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards; and (3) the governmental interest, including the burden that additional procedural safeguards would entail. *Id.* 70 Haw. at 377–78, 773 P.2d at 260–261.

The private interest in this case includes the foreseeable great economic loss to PMP/Solliday at a juncture where he has already had to overcome numerous financial obstacles and has dedicated his full-time efforts to the wellbeing of the leased premises and its customers, and so too has put his family through extreme stress and sacrifice. The risk of deprivation is especially great given the discrepancies and breaches by the Department that is the current decision-maker. With respect to weighing the Department's practical concern of for having to provide a basic evidentiary hearing, that burden is slight compared to the threat of loss of the lease by PMP/Solliday. Under these circumstances, if the Board includes payment of a performance bond as a condition to PMP's requested lease assignment, affording PMP an evidentiary hearing would be appropriate.

Sincerely,


BERNARD BAYS

Attachments:

- Declaration of Jonas Ikaika Solliday
- Exhibits 1-11

DECLARATION OF JONAS IKAIKA SOLLIDAY

I, JONAS IKAIKA SOLLIDAY, declare under penalty of law that the following is true and correct to the best of my knowledge and belief:

1. I reside in the County of Hawai'i, in the State of Hawaii.
2. I am over the age of eighteen (18).
3. I am a 50% member of Pacific Marine Partners, LLC ("**PMP**"), and currently seeking the Board of Land and Natural Resources ("**BLNR**") consent to for a lease assignment of the 50% interest in General Lease No. LH-19-002 held by the other 50% member International Pacific Enterprises, LLC (the sole member of which is Jason Ho'opai).
4. I agree to the terms for a lease assignment that are stated in PMP's lease: payment of a premium according to the Department's formula, and for the Board to review and approve of the consideration being paid to Mr. Ho'opai for his interest in the lease.
5. I do not believe it is fair for the Board to also require payment of a very costly performance bond as a condition to approval of this lease assignment.
6. If that additional condition of the performance bond (or its monetary equivalent) is required, the cost of the lease assignment will be increased from about \$80,000 to over \$800,000.
7. Requiring payment of any substantial performance bond would mean PMP would lose this lease, by way of default for failure to obtain the bond.
8. Loss of the lease would be a great financial loss to me, and would be very disruptive to PMP's customers.
9. Relative to the treatment of other Department of Land and Natural Resources ("**DLNR**") lessees and in particular compared to DNLNR's relations to the adjacent DLNR lessee at Honokōhau, Gentries Kona Marina, GKM, Inc. ("**GKM**"), DNLNR staff's recommendation concerning my lease transfer request is very unfair.

10. On or around November of 2017, I contacted DLNR's boating division ("**DOBOR**") regarding State leases available or coming up for auction and spoke with a property manager named Keiki Kipapa ("**Kipapa**"), who informed me during one of our phone calls that the Honokōhau Harbor dry-land storage facility had been approved for public auction and they were working on a Lahaina, Maui boat storage parcel. Some of my inquiries to DOBOR's Kipapa were by email.
11. On December 18, 2017, I submitted an application with DOBOR to receive notifications of land auctions with my name only as the point of contact.
12. I also started to read the BLNR meeting minutes regarding the Honokohau harbor leases, including the August 11, 2017 BLNR hearing at which the Honokōhau Small Boat Harbor lease was approved for public auction. The rent for the small boat harbor lease was proposed to increase from \$7,311.45 or 5% of gross rent whichever is greater to \$35,250, a month or 50% of gross rental income whichever is greater. GKM's Manager Tina Prettyman vocally opposed the proposed new rent increase DLNR, citing the high cost of maintenance and electricity to operate the boat yard.
13. On or about May 29, 2018, DLNR's Kipapa informed me they were getting ready to put out a public notice for the auction for the Honokōhau boat storage facility, and that she submitted the auction approval to the Attorney General's office.
14. The Public Auction Notice was finally released on June 1, 2018 on DLNR's website and publicized in the Honolulu Star Advertiser. A few weeks later, DOBOR's Kipapa informed me that she and her supervisor DOBOR administrator Edward Underwood traveled to Kona together and visited the Honokōhau harbor boat storage yard prior to the auction. According to the Public Auction Notice, the rent terms were to be:

"Upset Percentage Rent. Percentage annual rent shall be a percentage of gross revenue from all sources within the leased Premises. The percentage rent shall be established by the winning bid at Public Auction with 50% minimum upset percentage. The successful bidder with the highest percentage bid at auction is the winning bid. All subsequent bids must be in whole numbers. The rent shall be determined by either, the base annual rent of \$423,000.00 payable in advance, in equal monthly installments on the first (1st) day of each and every month, or the

percentage, established by the winning bid, of gross revenue payable on the fifteenth (15th) day of the month, whichever is greater.” (Excerpt from section “D”, DLNR’s June 01, 2018 Public Notice)

15. There was nothing in the public notice stating that the lease was contingent upon paying twice the annual rent (\$846,000) within 15 days of signing the lease.
16. In my conversations with DOBOR staff, I was never given the impression that a large surety bond would be required. I was however made aware that a surety deposit in the amount of two months rent would be required.
17. On or about a week prior to the July 13, 2018 public auction, I called DOBOR’s Honolulu office and spoke with property manager Kipapa regarding the upcoming public auction and she informed me that she was resigning from her position after she discovered documents related to her investigation of violations by Gentry’s Properties and GKM had been removed from her desk.
18. DOBOR’s Kipapa also stated that she felt uncomfortable working with DOBOR administrator Edward Underwood, in particular when he prevented her from sending GKM a lease violation related to unauthorized fuel sales at Honokōhau Harbor going back some 30-plus years.
19. A new property manager named Kenyatta Russell was hired by DOBOR a few days prior to the auction. However, Mr. Russell also resigned from the position in mid-September 2018 and mentioned that it was due to experiencing the same treatment that Kipapa experienced dealing with DOBOR Administrator Underwood after he also tried to send a lease violation to GKM.
20. On July 13, 2018, Pacific Marine Partners, LLC was the sole bidder at the DLNR public auction for the Honokōhau Harbor dry-land storage facility.
21. At the auction, GKM’s attorney Stephen Whitaker and GKM representative Gary Lambert made a huge ruckus - yelling and shouting at DLNR staff Stephen Schmelz and Kenyatta Russell, threatening to remove fencing and gates and turn off the electricity, and also

represented that GKM “owns everything at the boatyard” and would “sue everyone involved”, and that the “auction is a sham”.

22. Following the July 2018 public auction, at which PMP won the lease, GKM’s attorney wrote a letter threatening harm to the PMP’s boat storage premises.
23. Shortly thereafter, PMP hired attorney Duane Fisher, who immediately contacted deputy AG Bill Wynhoff. Attorney Duane Fisher informed deputy AG Wynhoff of GKM’s threatening conduct at the public auction.
24. After the auction ended, we requested to visit the boat yard premises, since we had been told we could take possession in 30 days. However, given GKM’s hostility at the auction, DOBOR staff who managed the auction would not allow us to enter the property and inspect the premises.
25. Finally on August 30, 2018, I conducted the required post-auction inspection, which was scheduled with DLNR’s Hawaii Island Manager Stephen Schmelz. During the inspection, I was picked up outside of the boatyard by DLNR Harbor Master Daniel Mersberg and GKM’s manager Tina Prettyman, who was already in the DLNR Toyota 4Runner.
26. We entered the facility through the electric gate. Once inside the facility, they told me to walk around and take notes, while I was followed by DLNR’s Daniel Mersberg and GKM’s Tina Prettyman in the DLNR vehicle.
27. GKM’s Tina Prettyman instructed DLNR’s Daniel Mersberg where to take me and that I could not take any photographs in the boatyard, which restriction the DLNR employee instructed me to follow. Not being able to take any pictures impaired me from properly examining the parcel, as I could only take notes and not properly document the leased premises prior to signing the DLNR lease and PMP’s move in date – which was then planned for September 04, 2018.
28. During the inspection, I observed that GKM had an undocumented tenant occupying a significant portion of the premises. The business was named Hotspots Welding and Fabrication (“*Hotspots*”), which operated in a large warehouse on the boatyard property. This sublease was

not mentioned in the auction's public notice, was not listed in GKM's subleases reported to DOBOR, or mentioned by any DLNR employee, and there was no discount in the rental rate calculated due to the unusable space.

29. It is my understanding that DOBOR staff never made an issue of GKM's un-permitted sublease to Hotspots, and even hired Hotspots to repair fencing at the Kailua Kona pier and other work around Honokōhau harbor.

30. The utilities represented and existed at the time of my August 2018 inspection included electricity and running water, bathroom facilities and an operational electric gate that boat owners used to access the facility at the premises and the water transmission line was coming from pipes in the ground and not from a tank. In other words, the electricity and water, including bathroom facilities were established utilities that were in place on the property at the time of the auction and inspection. There was also a "Hawaiian Tel" telephone transmission line connection to the premises.

31. I also discovered that only six of the nine acres were usable, due to illegal dumping of construction debris, large holes and uneven ground in the three acres in the rear portion of the property, and not the nine acres of graded-gravel land as represented in the June 01, 2018 "Notice of Public Auction", that DOBOR posted in the Star Advertiser, yet PMP was paying for an additional three acres we could not use as well as for the large warehouse occupied by the undocumented tenant Hotspots.

32. The existence of electric utilities was installed prior to GKM purchasing the business from Gentry Properties in 2002 and was included in the August 01, 1999 sublease from Gentry Properties to Loran Chapple, the previous owner of Hotspots.

33. The sublease between Gentry Properties and Hotspots, included that "**water, sewer, and electricity**" would be made available to the Hotspots location on the premises (by way of underground transmission lines).

34. PMP waited almost three months following the auction to take over the boatyard, and during that time, GKM ordered all the boat storage tenants vacate the premises so that PMP would be left with no tenants prior to moving in.

35. On November 1, 2018, DLNR finally allowed PMP to move in and we were extremely upset to find that GKM had vandalized the premises including to perimeter fencing and to the electric gate and motor such that the gate was unusable rendering the property completely unsecured. The gate is the only access that PMP Customers have to enter and exit the facility. Deputy AG Bill Wynhoff was present on our move in day and witnessed the extensive damages to the premises.
36. Utilities, including electricity and water, were present on the move-in date and an electrical sub-main box at the Hotspots warehouse on the property, but were cut off by GKM's employees sometime subsequent to that date. The Hotspots warehouse also had an established telephone and internet service that was disconnected a few days after our move-in date by GKM.
37. Upon move-in, we discovered an un-permitted cesspool on our leased parcel, numerous abandoned derelict vessels, and dumped construction debris left behind from GKM. We also discovered a full restroom including a shower near Hotspot's operations, which is still connected to the cesspool as of today. We were also informed by Hotspot's owner Cameron Noftz that "Wilton Construction" in Kona built the warehouse and cesspool for Gentry Properties in 1999.
38. In a July 24, 2020 BLNR submittal, DOBOR documented the numerous and substantial problems PMP encountered with the lease and the leased property. These problems included, the following actions by the prior lessee GKM, Inc:
1. GKM entered into a sublease with an entity called Hot Spots Welding and Fabrication LLC which was improperly occupying a portion of the leased premises without Board approval.
 2. GKM installed a cesspool on the leased premises without the necessary permits and authorizations.
 3. GKM destroyed the electrical connection to the property.
 4. GKM interfered with water to the property.
 5. GKM interfered with transfer of the boat storage customers to PMP.
 6. GKM removed personal property from the parcel, including the gate motor.
 7. GKM allowed numerous apparently abandoned vessels on the parcel, not paying storage fees.

8. GKM left large amounts of trash, abandoned property, and solid waste on the property.
 9. Both GKM and PMP did Phase I environmental site assessments of the property. There was considerable disparity. PMP was concerned that the property might be contaminated with waste oil, paint, or other contaminants.
 10. The property is fenced on two sides. PMP believes that the property should be fully enclosed.
39. Based on the abhorrent condition of the premises, PMP's attorneys estimated the damages and environmental remediation at between \$1,104,000 and \$4,059,000 (averaged at \$2,591,500) (See **Exhibit 5** - August 21, 2019 letter from Starn O'Toole Marcus & Fisher to Deputy Attorney General William J. Wynhoff).
40. In light of the extensive damages in 2020 DLNR and PMP entered into a agreement for a reduction in PMP's rent from \$35,250.00 to \$17,000.00 for 20 months - totaling less than a quarter of the calculated damages and did not take into account the mounting attorney's fees.
41. In the 2020 settlement agreement, DNLR remained responsible for completing clean-up of the contamination resulting from Hotspots Welding.
42. Sometime in May 2023, DOBOR staff sent us a cesspool closure report showing that the cesspool was backfilled with Sixty Cubic Yards of CLSM (controlled low strength material) into a hole measuring less than 12"x12", which is quite substantial and the equivalent to six full cement trucks.
43. As of today, when it's high tide, water still comes to the surface through the other ports that connect to the cesspool that were not closed. Yet astonishingly, GKM or Gentry Properties were not held accountable for installing a cesspool that polluted the boatyard and Honokōhau harbor with raw sewage and chemicals for over twenty years.
44. After reviewing the cesspool closure report we received almost three years after completion, there is still questions with how PMP should deal with the multiple openings that still feed directly into the cesspool, including a toilet/shower, and the groundwater and/or ocean tide water that comes to the surface.

45. The financial impact on PMP of still not having access to utilities *to this day* is truly astronomical. In July of 2019, PMP purchased a small solar system that can only handle a portion of the electrical load, so a backup diesel generator fills in the void when the weather is not cooperating to charge the solar systems batteries, and the diesel Generator produces electricity that is far more expensive and time consuming than an electrical service from the harbor's utility grid. If access to electrical service is not soon provided to PMP, an additional larger generator will have to be purchased.
46. Because GKM also cut the water transmission lines, PMP ability to keep down dust and PMP's staff to wash their hands after using the portable outhouse is close to non-existent. Shortly after taking possession of the premises, Deputy AG Bill Wynhoff said we could connect a water hose from DLNR's boat wash down area nearby perimeter until water access was reestablished. It has not been reestablished.
47. Given that the waterlines and bathroom facilities were cut by GKM staff and *still* have not been restored, PMP employees and customers must use portable toilets – which continues to add considerable additional expense for PMP. The portable toilet that PMP has to rent is woefully inadequate for the amount of boatyard traffic and requires weekly pumping and cleaning.
48. Since November 2018, and nearly five years after initially being awarded the lease at Honokōhau, PMP is still operating without any of those utilities the property was supposed to include. PMP is currently utilizing a combination of solar and a diesel generator for electricity to power the facility. The solar power is extremely unreliable on cloudy days and the diesel generator is expensive and often fills the boatyard office with noxious fumes.
49. PMP was also forced to deal with GKM's hostile un-permitted tenant Hotspots Welding, which business had actively occupied the boatyard premises for nearly two years after our move-in date of November 1, 2018, and which business DOBOR was fully aware of and failed to require its removal prior to PMP taking possession of the leased premises. As of today, the warehouse on our leased parcel is still filled with large industrial equipment that was abandoned by Hotspots Welding and is therefore still unusable by PMP.

50. There have continued to be additional problems related to the unauthorized occupancy of GKM's Hotspots tenant. For example, on November 15, 2019, I discovered a person who I knew to be an associate of Hotspots' business owner Cameron Noftz sneaking into the boatyard and followed him into the rear portion of the yard. When I approached his vehicle, I noticed that he was naked with a woman out in the open. I called Hawaii County Police Department ("HCPD") who responded quickly and located the trespassers hiding at Hotspot's Welding warehouse on the boatyard premises. I then witnessed Cameron Noftz himself exit the welding shop to speak with the officers by the road. His associates received a warning from HCPD not to enter the boat storage facility without permission again.

51. Less than an hour after HCPD left the Harbor, I noticed that PMP's two surveillance cameras that are located on the exterior of Hotspot's warehouse went offline, and it appeared that the wires to the cameras (located inside the warehouse) were intentionally cut and damaged. I drove down to the Kona Police Department to make a report and was told that I should seek a temporary restraining order against Cameron Noftz.

52. In the next several days after that incident, I noticed that Cameron Noftz was following me around the harbor in his SUV and every time I left the boat yard he would park outside of the gate and watch me.

53. Shortly after PMP moved in, GKM was given a 20-year extension on its lease of the more valuable adjoining property at Honokōhau for which it pays about half as much in rent and also is now permitted to sell fuel despite the DOBOR's previous position that to do so would be contrary to GKM's **AUCTIONED** lease.

54. GKM's harbor lease is far more valuable than that of PMP. See the attached chart comparing the scope of sales and services on the GKM lease to that allowed on PMP's leased premises. Yet GKM's monthly base rent is approximately half that of PMP. It is my understanding that GKM makes about \$1 a gallon for fuel sales, and of that \$1, DOBOR only receives 5% (5 cents) per gallon, which fuel sales are significant, and estimated at \$30,000 to \$50,000 per month, and for which no additional rent is paid to DOBOR.

55. One of the most important parts of operating such a large facility is having reliable internet to operate our surveillance system. Currently, the only internet service PMP has access to is an unreliable satellite system that constantly disconnects, making it more difficult to monitor trespassers, communicate with customers and keep our customers' boats safe.
56. After litigation with my business partner Jason Ho'opai and my being vindicated as 50% owner of PMP following a lengthy arbitration, I resumed operation of the boat yard in May of 2021. Since that time and under my sole leadership the number of PMP tenants has increased by more than 29%, from 275 to 355 customers under contract. Since that time, PMP has also been in substantial compliance with all terms and conditions under the lease, including making timely lease payments to DLNR (something which did not occur during the time period in which I was effectively shut out of PMP operations).
57. PMP currently pays DLNR around \$40,000 per month, which includes the 50% gross receipts payment, the previous lessee GKM only paid \$7,311.45 per month.
58. As of today, August 20, 2023, the warehouse which occupies a portion of our leased parcel is still unusable due to the fact that there is no electricity at the warehouse (so it is very dark and dangerous inside) and because Hotspots Welding left behind large industrial equipment that takes up most of the warehouse space.
59. I am profoundly shocked that DLNR staff has not made GKM accountable for the damages caused to the small boat harbor premises and likewise has not made the effort to reestablish utilities to PMP.
60. PMP has now been operating **OFF GRID** for nearly 5 years, and as my understanding, we are the **ONLY** business in Honokōhau harbor without utilities. PMP is open twenty four hours a day, seven days a week, and PMP staff (including myself) are forced to use a portable outhouse and constantly monitor a limited solar energy system every two hours or, in the alternative (when it's cloudy), turn on a noisy generator which must be refueled every six hours around the clock.
61. Not surprisingly, due to the high monthly rent paid to DOBOR and the high operating costs, there is only a small profit margin, mainly due to the fact that as the owner-operator, I am

responsible for handling both the boatyard operations and all of the financial accounting under the direction of a Kona CPA.

62. As an experienced and licensed crane and heavy equipment operator, I am fortunately able to address numerous problems immediately and without need of outside contract services.

63. Customers repeatedly express their appreciation of my operation of the boatyard, and some have indicated a willingness to assist with financing of improvements provided they are assured of my long-term presence running the operation.

64. My family is supportive of my dedication and service to the boatyard and its customers, but the uncertainty as to whether I may lose the lease despite all of my dedication and efforts because of the unexpected imposition of a mandatory performance bond has placed considerable stress on myself, my wife and my children.

65. In reliance upon the good faith of DOBOR and the high rent being timely paid each month, PMP, under my direction, has continued to spend significant sums to improve the site, from upgrading security features to now expanding the useable area for boat storage stalls, and is working on upgrading the perimeter fencing.

66. Now after five years and documentation of my exemplary operation of the lease, it is unimaginable and extremely unfair to think that DOBOR now wants to condition this lease assignment from one member of the lessee PMP, to the other 50% member with the unexpected imposition of a mandatory performance bond.

67. I am also very distressed that DOBOR is suggesting approval of only a 10-year lease extension and requiring completing within some 16 months (December 31, 2025) for the improvements that I offered in exchange for a 30 year or at least 20 year extension at a cost of over \$290,000 and to be completed within approximately four years - by December 31, 2028 (the end of the current lease term).

68. If the Board does impose a mandatory performance bond, the business will be in chaos and cause great worry to our boat storage customers, many of whom have annual rental agreements.

69. Based on my lease term that allows for waiver of the performance bond in the case of an existing lessee who has demonstrated substantial compliance with the lease terms, it seems wrong and unfair to not allow for the waiver given PMP substantial compliance under my management.

70. If the Board desires to limit the extension period to 10 years, then I ask that the cost of the improvements required to be reduced substantially and the period for completion be set at December 31, 2028, the end date of the current lease term.

DECLARANT FURTHER SAYETH NAUGHT

This Declaration is based on upon my personal knowledge, and I am competent to testify as to the truth of the statements contained herein.

DATED: Kaloko-Honokōhau, Hawaii: August 22, 2023.

Signed: _____

A handwritten signature in black ink, appearing to read 'Jonas Ikaika Solliday', is written over a horizontal line. The signature is stylized with large, sweeping loops.

Jonas Ikaika Solliday

INDEX OF EXHIBITS

- Exhibit 1:** PMP Lease Section 13, "Assignments"
- Exhibit 2:** HRS 171-36 "Lease Restrictions" Sections 36(a) and 36(b)
(re Assignments and Extensions)
- Exhibit 3:** PMP Lease Section 18, "Performance Bond"
- Exhibit 4:** PMP Lease Section 29, "Waiver, modification, reimposition of bond
and liability insurance provisions"
- Exhibit 5:** August 21, 2019 letter from Starn O'Toole Marcus & Fisher to
Deputy Attorney General William J. Wynhoff
- Exhibit 6:** Chart - "Disparate Treatment of PMP Members' Petitions for Lease
Assignment"
- Exhibit 7:** Chart - "Value Comparison of GKM and PMP Harbor Leases"
- Exhibit 8:** Chart - "Unfair Imposition of Performance Bond in 2023"
- Exhibit 9:** PMP Lease Section 30, "Quiet Enjoyment"
- Exhibit 10:** Chart - "Inconsistent Treatment of PMP's Lease Extension Request"
- Exhibit 11:** Chart - "PMP - Solliday Proposed Improvement Commitment Based
on Proposed Lease Extension of 20 Years"

EXHIBIT 1

Lease Section 13 “Assignments, etc.”

[PMP’s Boat Lease No. LH-19-002 dated September 10, 2018, page 7]

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 prior to the approval of any assignment of lease, the Board shall have the right to review and approve the consideration 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 straight-line depreciated cost of improvements and trade fixtures being transferred to the Assignee pursuant 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 "C." The premium on any subsequent assignments shall be determined as specified in the above-mentioned Evaluation Policy.

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 and subject to the right of the Lessor to impose the foregoing premium as set forth in Exhibit "C."

EXHIBIT 2

Hawaii Revised Statutes 171-36
Sections 36(a) and 36(b)
“Lease restrictions; generally”

Hawaii Revised Statutes §171-36 Lease restrictions; generally.

(a) Except as otherwise provided, the following restrictions shall apply to all leases:...

- (5) No lease shall be transferable or assignable, except by devise, bequest, or intestate succession; provided that with the approval of the board, the assignment and transfer of a lease or unit thereof may be made in accordance with current industry standards, as determined by the board; 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;. . . .

(b) The board, from time to time, upon the issuance or during the term of any intensive agricultural, aquaculture, commercial, mariculture, special livestock, pasture, or industrial lease, may:

- (1) Modify or eliminate any of the restrictions specified in subsection (a);
- (2) Extend or modify the fixed rental period of the lease; provided that the aggregate of the initial term and any extension granted shall not exceed sixty-five years; or
- (3) Extend the term of the lease, to the extent necessary to qualify the lease for mortgage lending or guaranty purposes with any federal mortgage lending agency, to qualify the lessee for any state or private lending institution loan, private loan guaranteed by the State, or any loan in which the State and any private lender participates, or to amortize the cost of substantial improvements to the demised premises that are paid for by the lessee without institutional financing. . . .(emphasis added)

EXHIBIT 3

Lease Section 18 “Bond, performance”

[PMP’s Boat Lease No. LH-19-002 dated September 10, 2018, page 9]

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 not as a penalty.

EXHIBIT 4

Lease Section 29

“Waiver, modification, reimposition of bond and liability insurance provisions”

[PMP's Boat Lease No. LH-19-002 dated September 10, 2018, page 14]

The DLNR-Pacific Marine Partners, LLC (“PMP”)

Lease Waiver Provision

29. Waiver, modification, reimposition of bond and liability insurance provisions. Upon substantial compliance by the Lessee with 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 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 the Lessor 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 lease. **(emphasis added).**

EXHIBIT 5

Letter from Starn O'Toole Marcus & Fisher to
Deputy Attorney General William J. Wynhoff
[Dated August 21, 2019]

STARN • O'TOOLE • MARCUS & FISHER

A LAW CORPORATION

August 21, 2019

VIA U.S. MAIL AND ELECTRONIC MAIL

Mr. William J. Wynhoff
Dept. of the Attorney General
Kekuanaoa Building
465 South King Street, Room 300
Honolulu, Hawaii 96813
bill.j.wynhoff@hawaii.gov

Re: Rent Abatement and Environmental Remediation Claims Letter
Pacific Marine Partners LLC Honokohau Small Boat Harbor
Boating Lease No. LH-19-002 (the "*Lease*")
TMK (3) 7-4-008:003 Portion

Dear Bill:

In follow-up to our ongoing discussions regarding the above-referenced Lease, Pacific Marine Partners LLC ("*Pacific Marine*") hereby requests that the Board of Land and Natural Resources ("*BLNR*") approve: (i) rent abatement in the maximum amount permitted by law and (ii) environmental remediation, as further described below. Capitalized terms not defined in this letter have the meanings ascribed to them in the Lease.

I. Background

Pursuant to the Lease, Pacific Marine currently occupies the "Honokohau Small Boat Harbor, Lease Parcel" in North Kona, identified by Tax Map Key No. (3) 7-4-008-003 (portion) (the "*Premises*"). For decades, and up until the commencement of the Lease, Gentry Kona Marine ("*GKM*") occupied the Premises under a revocable permit from the Department of Land and Natural Resources ("*DLNR*").

In 2018, DLNR advertised the Premises for rent via a Notice of Public Auction dated June 1, 2018 (the "*Notice*"). The Notice described the Premises as approximately 392,040 square feet (nine acres) of unimproved, graded-gravel land with a chain-link fence, intended for use as a boat/trailer storage facility. The Notice also instructed interested parties on the public bidding process for the Lease. Pacific Marine bid on the Lease in reliance on the Notice, Lease, and the description of the Premises at the auction.

Although Pacific Marine attempted to conduct a due diligence inspection of the Premises prior to bidding on the Lease, GKM refused to allow access. Pacific Marine could only observe the Premises from outside the perimeter chain-link fence. After Pacific Marine won the auction for the Lease, DLNR facilitated a twenty-minute inspection of the Premises. During this brief

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inspection, Pacific Marine observed utilities, including electricity, serving the Premises, and a functioning motorized security gate, but was not allowed to walk the entire property and discover the lack of perimeter fencing.

DLNR did not allow Pacific Marine to perform its own Phase I environmental study of the Premises until after execution of the Lease. After Pacific Marine bid on the Lease, GKM provided a Phase I report, which contained a number of irregularities. Pacific Marine questioned the reliability of GKM's Phase I report and, with DLNR's concurrence and approval, conducted its own Phase I study. We confirmed in writing with DLNR that, as between Pacific Marine and DLNR, Pacific Marine would not be liable for any pre-existing environmental conditions at the Premises.

After a fairly chaotic and disorganized few weeks leading up to the Lease commencement, Pacific Marine took possession of the Premises on November 1, 2018. Pacific Marine subsequently discovered the following issues, without limitation:

- (1) **Property Damage.** GKM appeared to have caused significant damage to the Premises prior to vacating, including, without limitation: disconnecting utility services and damaging utility lines (resulting in loss of electrical service, among other things), and ripping out the motorized security gate. Pacific Marine is not able to restore electrical service through the existing infrastructure because the control point for the electrical lines is located on a separate lot leased by GKM.
- (2) **Derelict Vessels.** GKM left approximately two dozen derelict vessels at the Premises, ranging from approximately 19 feet long to over 40 feet long.
- (3) **Solid Waste.** GKM left metal, equipment, and other debris at the Premises, in a volume estimated to fill the equivalent of approximately nine boat stalls.
- (4) **Illegal Tenant.** GKM entered into an illegal subtenancy of the Premises to Hotspots, a welding and fabrication company. Hotspots currently occupies approximately 7,000 square feet. GKM's arrangement with Hotspots was never approved by the DLNR or BLNR.
- (5) **No Grading.** Contrary to the advertised description of the Premises, the Premises is not graded-gravel land.
- (6) **Pre-existing Environmental Conditions.** Pacific Marine's Phase I study revealed serious pre-existing environmental conditions that were not disclosed by GKM's Phase I report. The pre-existing environmental conditions are described in more detail in Ian Sandison's February 20, 2019 letter (the "*Environmental Issues Letter*"), a copy of which is also enclosed herewith as Exhibit B for reference.

As a result of the issues described above, through no fault of its own, Pacific Marine has been deprived of the benefit of its bargain under the Lease, has been damaged in excess of one year's rent for the Premises, and has been forced to operate the Premises at a loss. Accordingly, Pacific Marine hereby requests rent abatement in the maximum amount permitted by law, in order to make the substantial improvements required to bring the Premises into the advertised and reasonably expected condition. In addition, Pacific Marine requests that DLNR reimburse Pacific Marine for the cost of completing the environmental remediation. These actions are proper and warranted given the circumstances here and the unacceptable condition in which the Premises were delivered to Pacific Marine.

II. BLNR Should Approve Rent Abatement for Pacific Marine in the Maximum Amount Authorized by Law.

As we have discussed on many prior occasions, HRS § 171-6(7) authorizes BLNR to waive up to one year of rent if substantial improvements are required to the leased land.¹ Here, the Premises were not delivered in the advertised condition, and GKM's actions have caused significant damages and negatively impacted Pacific Marine's ability to operate the Premises as a boat/trailer storage facility. Substantial improvements are therefore required to restore the damaged Premises to the advertised condition and afford Pacific Marine full use and enjoyment of the Premises.

Pacific Marine's conservative estimate of damages is summarized without limitation below and on Exhibit A.

¹ HRS § 171-6(7) states in relevant part that BLNR is authorized to:

Reduce or waive the lease rental at the beginning of the lease on any lease of public land to be used for any agricultural or pastoral use, or for resort, commercial, industrial, or other business use where the land being leased requires substantial improvements to be placed thereon; provided that such reduction or waiver shall not exceed . . . one year for land to be used for resort, commercial, industrial, or other business use.

BLNR generally supports rent abatement when warranted, and, in fact, Chair Case has testified in support of expanding the rent abatement authorized under HRS § 171-6(7). More specifically, Chair Case stated in support of SB 1252 (proposed to increase the number of years for which rent may be waived or reduced) that "in many cases, a rent reduction or waiver equal to one year of ground rent would be an insufficient incentive to induce a developer to invest in the demolition of aged improvements on and redevelopment of public land, or in the provision of basic infrastructure necessary to facilitate the further development of unimproved public land."

Pacific Marine Damages Estimate²

Item	Basis for Damages	Total
Property Damage	Cost of full perimeter fence (2 sides missing)	\$118,000
	Cost of security personnel to mitigate risk caused by lack of complete fence	\$7,311
	Cost to install solar power system	\$55,614
	Cost of generator and fuel for interim power	\$18,950
	Cost to replace security gate damaged by GKM	\$14,350
Derelict Vessels	Damages estimated at \$10 per foot of vessel length per month	\$66,280
Solid Waste	Damages estimated based on rental rate of \$260 per boat stall per month	\$20,280
Illegal Tenant	Hotspots illegally occupies approximately 7,000 square feet	\$56,000
No Grading	Cost to grade and level lot	\$58,720
TOTAL		\$415,505

A. Property Damage

1. Lack of Full Perimeter Fence

Pacific Marine reasonably expected to take possession of the Premises with a complete and secure perimeter fence. The Notice and the description of the Premises during the auction specified nine acres of graded-gravel land fenced with chain-link fencing. However, when Pacific Marine took possession of the Premises, Pacific Marine discovered that only two of the four sides of the perimeter were fenced.

² Totals are for the period from November 2018 through August 20, 2019 (the commencement of the Lease through the present). Estimates for repairs and other remediation work not yet completed are based on proposals obtained by Pacific Marine for the applicable work. Where work has been completed (e.g., installation of the solar power system), estimated actual costs are provided. An itemized monthly breakdown of damages estimates for lost space is provided in Exhibit A.

The lack of a complete perimeter fence interferes with Pacific Marine's full use and enjoyment of the Premises as a boat/trailer storage facility because it leaves the Premises and the boats and trailers stored there vulnerable to trespass, thefts, and vandalism. Pacific Marine has incurred \$7,311 to date in costs for 24-hour security to patrol the Premises and has also had to provide additional lighting and signage. Because security cannot monitor all of the open Premises simultaneously, multiple instances of theft and trespass have occurred. The Premises will likely continue to be plagued by theft, trespass, and vandalism without a complete perimeter fence to secure it. Pacific Marine has obtained an estimate for the perimeter fence in the amount of \$118,000.

2. Lack of Power/Damage to Utilities

During its inspection, Pacific Marine observed electricity serving the Premises. Pacific Marine reasonably expected that it would have access to existing utility lines and infrastructure (and would contract with a utility provider for service). Instead, after taking possession of the Premises, Pacific Marine discovered that GKM had disconnected utility services and damaged utility lines, resulting in loss of electrical service, water service, and waste management service.

Pacific Marine is not able to restore electrical service through the existing infrastructure because the control point for the electrical line lines is located on a separate lot leased by GKM, and GKM has been "uncooperative" to say the least. Pacific Marine therefore installed a solar power system at a cost of approximately \$55,614. The solar power system is currently the only financially viable power solution for Pacific Marine, and it has forced Pacific Marine to operate at a lower power capacity than it anticipated. In order to increase capacity in the future, a different (and significantly more expensive) solution will be necessary. In addition, before the solar power system was installed, Pacific Marine incurred approximately \$18,950 in costs for a generator and fuel in order to conduct its operations.

3. Damage to Motorized Security Gate

After Pacific Marine's inspection, GKM appears to have caused significant damage to the motorized security gate and related equipment. Pacific Marine observed the gate functioning during its inspection and reasonably expected it to still be functioning when Pacific Marine took possession of the Premises. An operational security gate at the entrance and exit of the Premises is critical to the security and functionality of the Premises as a boat/trailer storage facility. The estimated cost to replace the gate and related equipment is approximately \$14,350.

B. Derelict Vessels

GKM left behind approximately two dozen derelict vessels at the Premises, ranging from approximately 19 feet long to over 40 feet long. Since the commencement of the Lease term, some vessels have been removed, but the majority of the derelict vessels remain on the Premises.

Pacific Marine reasonably expected to take possession of the Premises without derelict vessels left by the prior occupant. The derelict vessels restrict Pacific Marine's full use and enjoyment of the Premises by occupying space that Pacific Marine could otherwise rent for boat/trailer storage and by creating potential safety hazards and detracting from the overall appearance of the Premises. Pacific Marine estimates that the derelict vessels have caused damages in the amount of approximately \$66,280. This estimate is based on \$10 per foot of vessel length per month, based on current monthly rent rates, and takes into account the removal of some of the vessels. An itemized monthly breakdown of the estimate is included in Exhibit A.

C. Solid Waste

GKM also left behind solid waste, consisting of metal, equipment, and other debris. The solid waste occupied the equivalent of approximately nine boat stalls. Since the commencement of the Lease term, BLNR has made some efforts to clean up the solid waste. However, its contractors have not adequately completed the job, and approximately three boat stalls worth of solid waste remains at the Premises. The solid waste restricts Pacific Marine's full use and enjoyment of the Premises by occupying space that Pacific Marine could otherwise rent for boat/trailer storage and by creating potential safety hazards and detracting from the overall appearance of the Premises.

Pacific Marine estimates that the solid waste has caused damages in the amount of approximately \$20,280. This estimate is based on the current monthly rental rate of \$260 per boat stall per month and takes into account the removal of some of the waste. An itemized monthly breakdown of the estimate is included in Exhibit A.

In addition to the rent abatement requested by Pacific Marine for the damages it has already incurred as a result of the solid waste, Pacific Marine requests that, as a part of the environmental remediation described in Section III below, BLNR promptly clean-up the remainder of the solid waste to a standard acceptable to Pacific Marine or agree to reimburse Pacific Marine for the cost of cleaning up the solid waste itself.

D. Illegal Tenant

GKM appears to have sublet the Premises to Hotspots, a welding and fabrication company. Hotspots currently occupies approximately 7,000 square feet, and Pacific Marine is unable to use that space for operations of its boat/trailer storage facility.

Pacific Marine reasonably expected to take possession of the Premises without a subtenant. There was no mention of a subtenant in the Lease or Notice, and no sublease documents were ever given to Pacific Marine, as would be customary if a lessee is taking possession of property subject to an existing subtenant. Moreover, the termination of GKM's license should have terminated any subtenant or sublicensee of GKM as a matter of law.

Pacific Marine estimates that it has been damaged in the amount of approximately \$56,000 as a result of the lost space occupied by Hotspots. The estimate is based on the current rental rate of \$0.80 per square foot per month, and an itemized monthly breakdown of the estimate is included in Exhibit A. This figure does not include the thousands of dollars of attorneys' fees Pacific Marine has incurred to deal with Hotspots.³

Pacific Marine will not take responsibility for the illegal subtenant, but it is willing to assist the State in evicting Hotspots.

E. No Grading

The Notice expressly stated that the Premises would be "graded-gravel land." Pacific Marine therefore reasonably expected to take possession of a graded and leveled Premises. However, the Premises was not delivered as a graded-gravel lot, negatively impacting the rental rate that Pacific Marine is able to charge for the boat stalls. The estimated cost of grading and leveling the Premises is approximately \$58,720.

For all of the reasons stated above, substantial improvements are needed to restore the damaged Premises to the advertised condition and afford Pacific Marine full use and enjoyment of the Premises. The cost of restoring the Premises and the damages already incurred by Pacific Marine as a result of the unacceptable condition of the Premises are estimated to be at least \$415,505. Therefore, waiver of the first year's rent for the Premises is appropriate and warranted under HRS § 171-6(7), and Pacific Marine requests that the BLNR approve the same.

III. BLNR Should Approve Environmental Remediation for the Premises.

As set forth in the Environmental Issues Letter, the total estimated costs for environmental investigation and remediation of the pre-existing conditions on the Premises (as identified by the Phase I environmental assessment) range between \$1,104,000 and \$4,059,000.

Since the Environmental Issues Letter was sent, DLNR has undertaken removal of certain accessible solid waste and derelict vessels, and Pacific Marine has undertaken National Pollutant Discharge Elimination System permitting. The estimated costs of addressing the remaining pre-existing conditions on the Premises range between \$474,000 and \$1,864,000. The remaining pre-existing conditions on the Premises include, without limitation: Hotspots' septic tank / cesspool (both closure and installing a new septic system), Hotspots' hazardous waste disposal, light maintenance areas investigation and cleanup, perimeter berms investigation and cleanup, and Premises-wide impacted soil investigation.

³ The situation with Hotspots is still not resolved as of this writing. Hotspots remains in possession despite demand being made that Hotspots vacate the Premises.

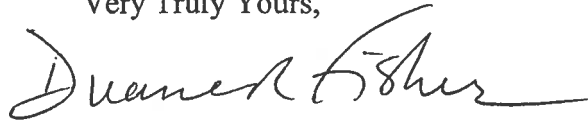
Pacific Marine requests that BLNR approve the environmental remediation claims identified in the Environmental Issues Letter and agree to reimburse Pacific Marine for the costs to complete the environmental remediation. Pacific Marine has consistently asserted that it will not be liable for pre-existing environmental conditions and has put DLNR on notice that it will not bear the costs of remediation for such conditions. Accordingly, BLNR should approve environmental remediation for the pre-existing environmental conditions at the Premises.

IV. Conclusion

Pacific Marine has mitigated damages in good faith but has not received the benefit of its bargain under the Lease. For all of the reasons stated above, BLNR should approve Pacific Marine's request for: (1) rent abatement equal to one year's rent under the Lease, pursuant to HRS §171-6(7), and (2) reimburse Pacific Marine for environmental remediation as described in the Environmental Issues Letter.

We appreciate your efforts to date and hope that we are able to mutually resolve this matter. If we are unable to reach a satisfactory resolution, Pacific Marine may be forced to consider other options for pursuing its claims. Please contact me at your earliest convenience to discuss availability for a meeting with you and Chair Case.

Very Truly Yours,



Duane R. Fisher
Counsel for Pacific Marine Partners LLC

Enclosures

c. Jason Ho'opai
Ian Sandison, Esq.

compliance with Environmental Laws, and, that Pacific Marine did not bear any responsibility for those pre-existing Environmental Conditions on the Property.

The parties have also generally agreed that the Preexisting Conditions need to be accurately identified and ultimately resolved in accordance with applicable Environmental Laws. Because of the uncertainty of the extent and severity of the Preexisting Conditions and unknown cost to resolve them, BLNR and Pacific Marine have agreed to a stepwise approach toward resolution, starting with the efforts outlined in this letter. In that regard BLNR has agreed to abate or reduce the rent owed under the Lease for the purpose of paying for the environmental consulting work necessary to (1) conduct a new Phase I environmental site investigation, (2) prepare aerial photographic documentation of the condition of the Property and (3) prepare a cost estimate for remediating RECs identified in the new Phase I report.

As a conceptual model, BLNR has proposed that it will use a rent abatement/reduction approach to paying for Pacific Marine's engagement of environmental consultants to remediate Preexisting Conditions on the Property.

II. Phase I Environmental Investigation

Pacific Marine's environmental consultant, Environmental Science International ("ESI") conducted a Phase I environmental investigation of the Property including a December 6, 2018 site inspection and video reconnaissance. Enclosed is the resulting Phase I environmental report ("Report"). The reconnaissance video has been sent to you via a Dropbox file sharing link. The Report observed, among other things, the following:

- A number of temporary structures, including an office trailer and one permanent structure with a concrete slab floor.
- An unpaved, small boat storage yard near its apparent storage capacity.
- Small-capacity petroleum storage tanks and pails (fuel and lubricating oil), and de minimis releases of oil from boats and vehicles indicating poor housekeeping.
- A welding and fabrication shop (Hot Spot Marine Fabrication) with small quantities of hazardous materials, such as paints, solvents/thinners, coolant, cleaners, compressed gases, and solid waste.
- Two openings or portals to an apparent septic system, or cesspool, at the location of the Hot Spot fabrication shop at the northwest corner of the Subject Property.
- Uncontrolled dumping of waste materials or waste-like materials consisting of scrap metal, old tires, construction debris, wood and metal debris, unidentifiable materials, a tractor, and an old air compressor on or around the berms at the eastern and northern boundaries of the Subject Property, also indicating poor housekeeping .

The lack of any DOH records for the Hot Spot's waste water system could therefore indicate a potential violation of Chapter 342D and HAR Chapter 11-62. Such violations are subject to a civil fine of up to \$25,000 per day for each offense.³

2. Federal Safe Drinking Water Act

The Federal Safe Drinking Water Act ("SDWA")⁴ was enacted in 1974 and under the federal regulations adopted to implement the SDWA, all "large capacity cesspools" ("LCCs") were to be closed by April 5, 2005. All LCCs not operational or not already under construction by April 5, 2000 were prohibited.⁵

LCCs include cesspools at commercial business facilities that have the capacity to serve more than 19 people a day⁶. The owner (including the owner of the land on which the cesspool is located) and operator of such cesspools may both face fines for failure to abide by the April 5, 2005 closure deadline.

In the event of noncompliance, SDWA authorizes the EPA to impose penalties of up to \$11,000/day for violations occurring before January 12, 2009, and up to \$16,000/day for violations thereafter, with a maximum penalty of \$187,500.⁷ These fines are in addition to the requirement for compliance (i.e., the cost of closure of the LCC).⁸

Based on our experience with EPA enforcement, if the undocumented waste water system at the Hot Spot facility is a cesspool, then EPA would likely consider it a LCC.

B. Uncontrolled dumping, abandoned and derelict vessels, and other releases of solid waste, and hazardous substances and materials

1. Hawaii's Environmental Response Law⁹ (Chapter 128D)

Chapter 128D is the Hawaii analog of the federal Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). Chapter 128D imposes strict liability for remediation costs and damages associated with the release or disposal of hazardous substances. As such, Chapter 128D would be a statutory basis of any state law claim against either Pacific Marine and / or BLNR in connection with environmental cleanup of the Property. HRS § 128D-6 imposes liability on, *inter alia*, the "owner or operator or both of a facility or

³ HRS § 342D-30.

⁴ See 42 U.S.C.A. §§ 300f to 300j.

⁵ See 40 CFR § 144.88.

⁶ 40 CFR § 144.81(2).

⁷ See 42 USC § 300h-2(c)(1); 40 CFR § 19.4

⁸ See 42 U.S.C. §300h-2(c)(1) (authorizing the EPA to impose fines or require compliance).

⁹ Haw. Rev. Stat. Chap. 128D.

vessel,” as well as “any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances are disposed of.”

In addition to the liability for costs, any person who willfully, knowingly, or recklessly violates or fails or refuses to comply with Chapter 128D shall be subject to a civil penalty of up to \$50,000 per day for each separate violation.

Oil is included in Chapter 128D's definition of hazardous substances, whereas in CERCLA, oil is specifically excluded from the definition of hazardous substances. This is important because the RECs identified in the Phase I Environmental Site Assessments refer to oil related contamination.

2. Hawaii Solid Waste Disposal Law (Chapter 342H)

Chapter 342H governs solid waste pollution in the State of Hawaii, and sets forth a permitting requirement for solid waste management facilities, landfills, *etc.* The uncontrolled dumping of solid waste on or around the berms at the eastern and northern boundaries of the Property likely fall within HRS § 342H-30 prohibitions against operation of an open dump,¹⁰ operation of an unpermitted solid waste management system,¹¹ and / or improper disposal of solid waste.¹²

HRS § 342H-9 provides for penalties of up to \$10,000 for violations of Chapter 342H.

C. National Pollutant Discharge Elimination System (NPDES) Permit

While not specifically noted as a REC, in its report, ESI noted that there is no record of an NPDES permit for the Property. Based on the past and current use of the Property for boat

¹⁰ "Open dump" means a disposal site that is operating in nonconformance with applicable standards, relevant permit conditions, rules, or this chapter. *See* HRS § 342H-1.

¹¹ "Solid waste management system" means a system for the storage, processing, treatment, transfer, or disposal of solid waste. *See* HRS § 342H-1.

¹² "Solid waste" means garbage, refuse, and other discarded materials, including solid, liquid, semisolid, or contained gaseous materials resulting from industrial, commercial, mining, and agricultural operations, sludge from waste treatment plants and water supply treatment plants, and residues from air pollution control facilities and community activities, but does not include solid or dissolved materials in domestic sewage or other substances in water sources such as silt, dissolved or suspended solids in industrial waste water effluents, dissolved materials in irrigation return flows, or other common water pollutants, or source, special nuclear, or by-product material as defined by the federal Atomic Energy Act of 1954, as amended (68 Stat. 923). *See* HRS § 342H-1.

"Waste" means sewage, industrial and agricultural matter, and all other liquid, gaseous, or solid substance, including radioactive substance, whether treated or not, which may pollute or tend to pollute the atmosphere, lands or waters of this State. *See* HRS § 342H-1.

storage and light maintenance, it is possible that an NPDES is required for industrial storm water discharge. We are working with our client to determine whether and when to apply for an NPDES permit.

1. Federal Clean Water Act

The federal Clean Water Act ("CWA")¹³ was enacted to restore and maintain the integrity of the waters of the United States.¹⁴ The CWA accomplishes this goal in large part by regulating discharges of pollutants into the waters of the United States. One of the key provisions of the CWA is Section 402,¹⁵ which requires that parties obtain permits (an NPDES permit) before discharging any pollutant into the navigable waters of the United States.

Under Section 402, the EPA may authorize states to administer the NPDES permit program within their borders. In 1974, the EPA delegated administration of the NPDES permit program within the State of Hawaii to the Department of Health. The State NPDES permit program is governed by HRS Chapter 342D and HAR Chapter 11-55, and is discussed in further detail below.¹⁶

Chapter 40, Part 122 of the Code of Federal Regulations ("CFR"), the implementing federal regulations for the NPDES program, requires an NPDES permit for, *inter alia*, "discharge associated with industrial activity."¹⁷ In 40 CFR §122.26(1)(14), "storm water discharge associated with industrial activity" is defined as including storm water discharge from transportation facilities classified as Standard Industrial Classifications ("SIC") 40, 41, 42 (except 4221-25), 43, 44, 45, and 5171.

The Property likely falls within SIC 44 (water transportation), specifically 4493 corresponding to Marinas.¹⁸

Establishments primarily engaged in operating marinas. These establishments rent boat slips and store boats, and generally perform a range of other services including cleaning and incidental boat repair. They frequently sell food, fuel, and fishing supplies,

¹³ The CWA was originally enacted in 1948 as the Federal Water Pollution Control Act. The Act became known as the CWA by way of amendments in 1977.

¹⁴ See 33 U.S.C. § 1251.

¹⁵ Section 402 of the CWA is codified in 33 U.S.C. § 1342.

¹⁶ See *Molokai Chamber of Commerce v. Kukui (Molokai), Inc.*, 891 F. Supp. 1389, 1392 (D. Haw. 1995) ("Section 402(b) also permits each state to implement the Clean Water Act through its own permit program, so long as the program conforms to federal guidelines approved by the EPA administrator. The EPA administrator has authorized the Department of Health of Hawaii to issue and enforce discharge permits").

¹⁷ 40 CFR § 122.26.

¹⁸ https://www.osha.gov/pls/imis/sic_manual.display?id=921&tab=description

and may sell boats. Establishments primarily engaged in building or repairing boats and ships are classified in Manufacturing, Industry Group 373. Establishments primarily engaged in the operation of charter or party fishing boats or rental of small recreational boats are classified in Services, Industry 7999.

- Boat yards, storage and incidental repair
- Marinas
- Marine basins, operation of
- Yacht basins, operation of

Since the Property is used for the storage and incidental repair of boats, it probably requires an NPDES permit under the Hawaii NPDES Permit Program. Once again, we are working with our client to determine whether and when to apply for a Hawaii NPDES permit.

D. Hawai'i Clean Water Act (Chapter 342D)

1. Hawaii NPDES Permit Program (Chapter 342D)

Chapter 342D governs water pollution in the State of Hawaii. As discussed above, under Section 402 of the CWA, parties must obtain an NPDES permit before discharging any pollutant into the navigable waters of the United States. In Hawaii, this permit requirement is rooted in HRS Chapter 342D, and is implemented by HAR Chapter 11-15. The HAR provisions require NPDES permits for two major categories of activities: i) "point source"¹⁹ pollutant discharges flowing into State waters; and ii) construction activities disturbing one or more acres of land. Any such activities occurring on the Property must be properly permitted, or penalties may be imposed. Such penalties can include monetary fines of up \$25,000/day.²⁰

III. Cost Estimate for Remediation

Below are the estimated costs to remediate the RECs identified in the Report.

¹⁹ The term "point source" is defined as "any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged. The term does not include return flows from irrigated agriculture or agriculture storm water runoff, except return flows from agriculture irrigated with reclaimed water." See HAR § 11-55-04(a).

²⁰ See HRS § 342D-30 through 39 for a specific list of applicable penalties. See also HAR 11-55-35 (referring to the HRS Chapter 342D penalty provisions).

A. Abandoned or Derelict Vessels

There are about 26 abandoned or derelict vessels on the Property. Pacific Marine obtained the following quote from a potential contractor for the removal and disposal of the abandoned or derelict vessels.

	Estimated Cost ²¹
Initial Vehicle Inspection	\$1,000.00 - \$3,500.00 for each vessel
Lab Testing	\$800.00 - \$1,500.00 each vessel sample
On-site Disassembly/Demolition	\$20,000.00 - \$75,000.00 each vessel
Waste Disposal	Dump Fees \$108.00 cost plus 15% per ton -Special handling fees \$108.00 cost plus 15% per ton

Pacific Marine is in the process of obtaining quotes from additional contractors.²²

B. Other Environmental Conditions

The following are estimates for the cost²³ to investigate and remediate the other ECs identified in the Report.

	Low Range	High Range	Average
Perimeter Berms - Investigation and Remedial Actions	\$160,000	\$1,030,000	\$595,000
Light Maintenance Areas - Investigations and Remedial Actions	\$74,000	\$194,000	\$134,000
Septic Tank/Cesspool - Close, Investigate, and Remedial Action	\$90,000	\$360,000	\$225,000

²¹ Abandoned or derelict vessel cost estimates provided by PENCO.

²² Additional cost estimates are being requested from Sea Engineering, Parker Marine and Cates International.

²³ Cost estimates provided by Marietta Canty, LLC.

Install New Septic Tank (Possible option)	\$75,000	\$125,000	\$100,000
Welding and Fabrication Shop - Housekeeping/disposal	\$15,000	\$50,000	\$32,500
Property-Wide Potentially Impacted Soil - Investigation	\$60,000	\$105,000	\$82,500
Derelict Vessel Inspection/Testing/Disposal	\$610,000	\$2,160,000	\$1,385,000
NPDES Permit/Storm Water Pollution Control Plan	\$20,000	\$35,000	\$37,500
Totals	\$1,104,000	\$4,059,000	\$2,591,500

We would like to set up a meeting with you, Chair Case our client and our client's other counsel, Duane Fisher, to discuss how best to proceed. We look forward to hearing from you.

Sincerely,



Ian L. Sandison

Enclosure (1)

CC: Jason Ho'opai (w/enclosure)
Duane Fisher, Esq. (w/enclosure)

4846-6701-5302.4.069882-00001

EXHIBIT 6

CHART:

“Disparate Treatment of PMP Members’
Petitions for Lease Assignment”

Disparate Treatment in the Timing of DOBOR Response to Petitions Filed

Date of filing	Petition Filed	Date of DOBOR staff action	DOBOR staff action	Time between filing and DOBOR staff action
Oct. 18, 2019	Ho'opai submitted Petition for Lease Assignment to DOBOR	Oct. 25, 2019	DOBOR issued recommendation to the Board	1 week
June 22, 2022	Solliday submitted Petition for Lease Assignment to DOBOR	Aug. 18, 2023	DOBOR issued recommendation to the Board	62 weeks

Disparate Treatment in Recommendations of Payment of Performance Bond (2x Annual rent)

PMP member	DOBOR staff action
Ho'opai	NO Performance bond recommended (waived)
Solliday	Performance bond RECOMMENDED (Not waived)

Disparate Treatment in Recommendations of Premium (Based on value of improvements to property)

PMP member	DOBOR staff action
Ho'opai	NO Premium recommended (waived)
Solliday	Premium RECOMMENDED (Not waived)

EXHIBIT 7

CHART:

“Value Comparison of GKM and
PMP Harbor Leases”

VALUE COMPARISON OF GKM AND PMP HARBOR LEASES

<p><u>GKM's Allowed Usage</u></p> <p>GKM's rental rate is a flat \$16,666.67 per month, plus \$0.05 per gallon of fuel sales</p> <p><u>SALES:</u></p> <ol style="list-style-type: none"> 1. Sailboats and power boats and other watercraft (new and brokerage). 2. Charts, maps, and nautical publications. 3. Navigation instruments and supplies. 4. Marine electrical and electronic gear and radios. 5. Fishing tackle, lures, ice and fresh bait. 6. Outboard and inboard engines and supplies. <p><u>SERVICES:</u></p> <ol style="list-style-type: none"> 1. Sail making, canvas goods and repair. 2. Repair and maintenance of marine electrical and electronic equipment. 3. Marine surveys. 	<p><u>GKM's Allowed Usage</u> (continued)</p> <ol style="list-style-type: none"> 4. The construction, operation and maintenance of vessels and marine equipment storage facilities. 5. Scuba/skin diving services associated with marine repair and salvage. 6. Repair and maintenance of marine instruments and navigation equipment. 7. Marine upholstery, draperies and interior finishes. 8. Repair facility for the maintenance and repair of boats. 9. Cold storage facility or icehouse. 10. Vending machines for the sale of sandwiches, snacks, hot and cold drinks, candies, cigarettes, etc <p><i>PLUS</i></p> <ol style="list-style-type: none"> 11. Fuel sales and other related activities as approved in writing by the Lessor. [fuel sales income to GKM \$1 a gallon; estimate sales at \$120,000 + a month] <p><i>PLUS</i></p> <p>Income from 20 + subleases at no additional charge</p>	<p><u>PMP's Allowed Usage</u></p> <p>PMP's rental rate is \$35,250.00 per month, or 50% of gross receipt sales, whichever is greater.</p> <p><u>SALES (RENTALS):</u></p> <p>Solely for the rental of boat/trailer storage facility and vehicle parking.</p>
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EXHIBIT 8

CHART: “Unfair Imposition of Performance Bond in 2023”

UNFAIR IMPOSITION OF PERFORMANCE BOND IN 2023

Times when reasonable to impose/require substantial performance bond

Timeline Marker	Time period	Event	Performance Bond
2017/2018	Dec. 2017 June 2018	When PMP's proposed bid was discussed with DOBOR staff prior to July 2018 auction.	NOT discussed that payment would be required
	July 13 2018	Around the time of the lease public auction	Payment NOT required
	Sept. 4 2018	At or prior to the signing of PMP's lease.	Payment NOT required
	Sept.19 2018	The date payment of the Bond was required (within 15 days of signing lease)	Payment NOT required
	Nov. 1 2018	When payment of the security fee of \$73,000 required (equal to 2 month's rent).	Payment NOT required
	Nov. 1 2018	Prior to PMP taking possession of the leased premises (and thereafter taking out significant loans to improve the premises).	Payment NOT required
2019	Oct .25 2019	When DOBOR's recommended approval of Jason Ho'opai's petition to assign PMP's lease to himself personally.	Payment NOT required
2020	April 12 and May 5 2020	When PMP's finances were being managed by Ho'opai and PMP was held in default for nonpayment of rent.	Payment NOT required
through 2021- 23	July 31 2020 and throughout 2021 – 2022	When DOBOR and PMP entered into a settlement to in part address the extensive destruction of the premises by prior lessee GKM and the cesspool contamination by GKM's sublessee (some cesspool contamination still exists); PMP estimated damages at over 2 million – settlement was for less than a quarter of that amount	Payment NOT required

Unreasonable time to require performance bond

Timeline Marker	Time period	Event	Bond imposed/demanded
2023	Aug. 25 2023	5 years after PMP acquired the lease and Solliday has agreed to the lease's monetary conditions for an assignment and given his substantial compliance with the lease terms – which allows for waiver of the bond	Bond demanded as condition to Board approval of lease transfer (\$846,000)

EXHIBIT 9

Lease Section 30 “Quiet enjoyment”

[PMP’s Boat Lease No. LH-19-002 dated September 10, 2018, page 14]

30. 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.

EXHIBIT 10

CHART: “Inconsistent Treatment of PMP’s Lease Extension Request”

INCONSISTENT TREATMENT OF PMP'S EXTENSION REQUEST

(Compared to another recent extension request)

COMPARE TERMS	Nagakura Extension Request (Lease No. S-3935 2021)	PMP Extension Request (Lease No. LH-19-002 2018)	DOBOR's Recommendation in PMP's Extension Request
EXTENSION REQUESTED:	39 years (recommended and approved)	20 years	10 years
IMPROVEMENTS PROMISED:	\$130,000	\$294,000 (more than twice the amount proposed by Nagakura)	\$294,000
DATE FOR IMPROVEMENTS TO BE COMPLETED:	not specified in approval	12/31/28 (end of current lease term)	12/31/25 (3 years prior to end of current lease)
AMOUNT FINANCING:	\$250,000	\$150,000 (2020)	
PERFORMANCE BOND:	WAIVED	WAIVER REQUESTED	NO WAIVER – (recommended imposition of \$846,000 bond)
COMPLIANCE:	Substantial compliance by existing lessee	Substantial compliance by existing lessee	
DOBOR BREACHES OF CONDITION OF LEASED PREMISES:	NONE	Substantial breaches by DOBOR (See Exhibit 5 - Starn O'Toole Marcus & Fisher letter)	

EXHIBIT 11

CHART:

**“PMP - SOLLIDAY PROPOSED
IMPROVEMENT COMMITMENT BASED
ON PROPOSED
LEASE EXTENSION OF 20 YEARS”**

**PMP - SOLIDAY PROPOSED IMPROVEMENT COMMITMENT BASED ON PROPOSED
LEASE EXTENSION OF 20 YEARS**

Substantial Improvements	Vendor / Contractor	Estimated Cost	Estimated Completion Date
GRUB AND GRADE: Grub, grade and level the remaining portion of parcel - roughly 65,000 square feet – to maximize the area available for boat storage	Hawaii Isle General Contracting	\$71,204.16	December 31, 2028
STALL DIVIDERS: Install 100 – five (5) foot tall, galvanized parking stall dividers in newly-graded area, permanently cemented in place	Home Depot and Pacific Marine Partners, LLC	\$5,242.00	December 31, 2028
GATE: Replace existing front electric gate, motor and guide	Vogt Welding & Gate	\$29,190	December 31, 2028
RESTROOM: Toilet waste water facilities for employees and customers - septic or if possible use composting/ toilet; reconnect to previously functioning Hotspot shed toilet	Septic Systems Hawaii, Pacific Marine Partners, LLC \$13,238.74 for Septic system, and \$5000.00 for toilet connection and repairs.	\$18,238.74	December 31, 2028
DISPOSAL: Remove remaining abandoned property (massive equipment) occupying the one built structure from occupancy by Hotspots Welding (the unpermitted sublessee of previous lessee GKM) and remaining concrete and metal debris on the premises	Big Island Metal Recycling; Conen's Trucking; Pacific Marine Partners	\$20,000	December 31, 2028

FENCING: Install new chain-link fence as needed around the entire parcel which is roughly 1,940 feet	Hawaii Isle General Contracting and Pacific Marine Partners LLC	\$89,332.78	December 31, 2028
POWER: Replace the existing backup diesel generator with 6500 hours, with a new and larger generator. Plus foundation, accessory equipment, trucking, and shipping from mainland.	Multiquip 15kw Generator \$20,065.00, Shipping and delivery \$2,000, Installation and connection \$4,000.	\$26,065.00	December 31, 2028
WATER: Tap into the county water main on Kealahou Parkway; PMP will arrange for offsite and onsite installation	Plumbing Strategies Inc. Kona	\$8,587.04	December 31, 2028
INTERNET: Install broad internet satellite services.	Starlink Satellite Internet	\$705.76	December 31, 2023
LANDSCAPING: Install low maintenance landscaping and sidewalks near office and patio area for customers.	Pacific Marine Partners, LLC, 'Ili Kūpono Gardens Nursery & Farm	\$9000.00	December 31, 2028
GRAVEL: Spread 300 tons of base course gravel throughout the boatyard to fill in potholes and low areas.	West Hawaii Concrete	\$10,532.37	December 31, 2028
SOLAR LIGHTING: Install 10 solar street lights in the rear portion of the boatyard.	Pacific Pipe Kona, West Hawaii Concrete, Werise Solar Lights.	\$6,542.40	December 31, 2028
<u>Total Estimated Cost</u>		\$294,640.25	