



*Hawaii Island Paddlesports Association*  
*Ka I Ka Hoe*

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09/13/2023

Aloha Board of Land and Natural Resources,

I would like to submit testimony on behalf of our organization, Hawaii Island Paddlesports Association, located in the Honokohau Harbor on the Big Island of Hawaii.

We are a non-profit with the IRS status of a 501 (c) 3, and are paying \$756.00 per month, which comes up to \$9072.00 per year. We are aware that other non-profit canoe paddling clubs/associations pay a rate of \$480 per year.

I would like to ask the board to consider giving our organization the same non-profit rate as the other canoe paddling clubs/associations.

Thank you in advance for your time and consideration in this matter.

Aloha,

*Leila Duim*

Leila Duim, Treasurer  
Hawaii Island Paddlesport Association  
808-989-8048

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 DNLN’s relations to the adjacent DLNR lessee at Honokōhau, Gentries Kona Marina, GKM, Inc. (“**GKM**”), DNLN 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: \_\_\_\_\_



Jonas Ikaika Solliday

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, Situated 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](mailto: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.<sup>1</sup>

<sup>1</sup> 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.<sup>2</sup>

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.<sup>3</sup> 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.

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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**.

<sup>2</sup> 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**.

<sup>3</sup> 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;<sup>4</sup>
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.<sup>5</sup> Based on her commitment to fair and consistent treatment of DOBOR lessees, the continued waiver of the performance bond is reasonable and appropriate.

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<sup>4</sup> 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).

<sup>5</sup> 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.<sup>6</sup>

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.<sup>7</sup>

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.<sup>8</sup> Moreover, the Board has on other occasions, for PMP and for other DLNR lessees, waived the payment of a performance bond.<sup>9</sup>

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

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<sup>6</sup> A chart labeled “DOBOR’s Disparate Treatment - Ho‘opai versus Solliday Petitions” (of PMP members’ Petitions for Lease Assignment) is attached as **Exhibit 6**.

<sup>7</sup> A chart comparing the value of GKM’s adjacent DOBOR harbor lease with that of PMP is attached as **Exhibit 7**.

<sup>8</sup> 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”.

<sup>9</sup> 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.

<sup>10</sup> 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)<sup>11</sup> 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.

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– 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**.

<sup>11</sup> 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.<sup>12</sup>

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.<sup>13</sup>

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

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

<sup>13</sup> 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.<sup>14</sup>

#### **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

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<sup>14</sup> 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 (9<sup>th</sup> 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 *defacto* 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 DNLN’s relations to the adjacent DLNR lessee at Honokōhau, Gentries Kona Marina, GKM, Inc. (“**GKM**”), DNLN 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: \_\_\_\_\_



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:

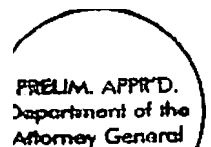
- (1) Modify or eliminate any of the restrictions specified in subsection (a);
- (2) Extend or modify the fixed rental period of the lease; provided that the aggregate of the initial term and any extension granted shall not exceed sixty-five years; or
- (3) Extend the term of the lease, to the extent 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]

August 21, 2019

**VIA U.S. MAIL AND ELECTRONIC MAIL**

Mr. William J. Wynhoff  
Dept. of the Attorney General  
Kekuaanoa 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



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.<sup>1</sup> 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.

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<sup>1</sup> 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 Estimate<sup>2</sup>**

<b>Item</b>	<b>Basis for Damages</b>	<b>Total</b>
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
<b>TOTAL</b>		<b>\$415,505</b>

**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.

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<sup>2</sup> 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.<sup>3</sup>

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.

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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.

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<sup>3</sup> 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.

Mr. William J. Wynhoff  
Dept. of the Attorney General  
August 21, 2019  
Page 8 of 8

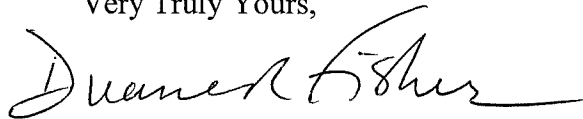
Pacific Marine requests that BLNR approve the environmental remediation claims identified in the Environmental Issues Letter and agree to reimburse Pacific Marine for the costs to complete the environmental remediation. Pacific Marine has consistently asserted that it will not be liable for pre-existing 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.





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OUR REFERENCE NO.:  
069882-1

February 20, 2019

## VIA E-MAIL

William J. Wynhoff  
Department of the Attorney General  
Land Transportation Division  
425 Queen St.  
Honolulu, HI 96813

Re: Environmental Remediation of Honokāu Harbor, Kailua-Kona, Hawai'i  
TMK No. (3) 7-4-008:003 (Portion)

Dear Bill:

This letter follows up on our discussions regarding environmental issues at the Pacific Marine Partners, LLC d/b/a Honokohau Marine Storage ("**Pacific Marine**") site at Honokau Harbor, 74-429 Kealakehe Parkway, Kailua-Kona, Hawaii, located on a 9-acre portion of the parcel designated by TMK No. (3) 7-4-008:003 (the "**Property**"). We have been retained by Pacific Marine for the purpose of coordinating the work pertaining to the Property by environmental consultants separately hired by Pacific Marine to (1) conduct a Phase I environmental site investigation, (2) prepare aerial photographic documentation of the condition of the Property and (3) prepare a cost estimate for remediating "recognized environmental conditions" ("**RECs**") identified in the Phase I report. In addition, we have briefly analyzed the certain environmental laws implicated by each REC.

## **I. Background**

Pacific Marine currently leases the Property from the State of Hawai'i, Board of Land and Natural Resources ("**BLNR**") pursuant to Boating Lease No. LH-19-002 ("**Lease**") for the operation of a boat/trailer storage facility and vehicle parking purposes. Among other things, the Lease requires Pacific Marine to comply with all applicable federal, state, and county environmental impact regulations (collectively, "**Environmental Laws**").

It is our understanding that at the time Pacific Marine and the BLNR entered into the Lease, the parties were generally aware that the Property contained numerous preexisting environmental / contamination / hazardous materials / environmental conditions (collectively "**Preexisting Conditions**") that needed to be addressed in order to bring the Property into

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EXHIBIT B

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 .

- Apparent abandoned or derelict vessels and trailers, some with highly weathered exteriors that have resulted in releases of paints, metals, and other debris to the ground surface.
- An adjacent property to the west with numerous commercial businesses and activities, septic systems, and above ground and underground fuel storage tanks.

In connection with the foregoing observations, ESI considers the following issues to be RECs:

- The undocumented waste water system at the Hot Spot fabrication shop;
- Uncontrolled dumping;
- Collection of otherwise *de minimis* release of oil, paint, or other hazardous substances, solid wastes; and
- Abandoned or derelict vessels.

In addition, the accumulation of contamination on the surface soil due to historical use of the Property for, *inter alia*, storage, repair, and alteration of vessels since around 1983 is considered a REC.

### **Applicable Environmental Laws**

The RECs identified in the Report trigger certain statutory and regulatory regimes, including, but not limited to, the following:

- A. Undocumented waste water system at the Hot Spot fabrication shop
1. Hawai'i Clean Water Act (HRS Chapter 342D) - Individual Wastewater Systems

The permit requirements for individual wastewater systems (“IWS”) are set forth in HAR Chapter 11-62, which was promulgated pursuant to the Department of Health's authority under, *inter alia*, Chapter 342D to regulate discharges of water pollution. HAR Chapter 11-62 requires the owner to apply for a permit, and defines an “owner” as the person who has legal title to the individual wastewater system, or a duly authorized representative of that owner.<sup>1</sup> HAR Chapter 11-62 also prohibits any “person” from using any IWS, including a cesspool or septic system, without written authorization from the director of the Hawaii Department of Health (“DOH”).<sup>2</sup>

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<sup>1</sup> HAR § 11-62-03. Note that under the terms of Lease ownership of all improvements located on the land prior to or on the commencement date of the lease is reserved to the Lessor.

<sup>2</sup> HAR 11-62.31.1(f).

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.<sup>3</sup>

## 2. Federal Safe Drinking Water Act

The Federal Safe Drinking Water Act ("SDWA")<sup>4</sup> 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.<sup>5</sup>

LCCs include cesspools at commercial business facilities that have the capacity to serve more than 19 people a day<sup>6</sup>. 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.<sup>7</sup> These fines are in addition to the requirement for compliance (i.e., the cost of closure of the LCC).<sup>8</sup>

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 Law<sup>9</sup> (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

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<sup>3</sup> HRS § 342D-30.

<sup>4</sup> See 42 U.S.C.A. §§ 300f to 300j.

<sup>5</sup> See 40 CFR § 144.88.

<sup>6</sup> 40 CFR § 144.81(2).

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

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

<sup>9</sup> 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,<sup>10</sup> operation of an unpermitted solid waste management system,<sup>11</sup> and / or improper disposal of solid waste.<sup>12</sup>

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

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<sup>10</sup> "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.

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

<sup>12</sup> "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")<sup>13</sup> was enacted to restore and maintain the integrity of the waters of the United States.<sup>14</sup> 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,<sup>15</sup> 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.<sup>16</sup>

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."<sup>17</sup> 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:<sup>18</sup>

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,

<sup>13</sup> 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.

<sup>14</sup> See 33 U.S.C. § 1251.

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

<sup>16</sup> 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").

<sup>17</sup> 40 CFR § 122.26.

<sup>18</sup> [https://www.osha.gov/pls/imis/sic\\_manual.display?id=921&tab=description](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"<sup>19</sup> 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.<sup>20</sup>

**III. Cost Estimate for Remediation**

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

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<sup>19</sup> 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).

<sup>20</sup> 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.

	<b>Estimated Cost<sup>21</sup></b>
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.<sup>22</sup>

B. Other Environmental Conditions

The following are estimates for the cost<sup>23</sup> to investigate and remediate the other ECs identified in the Report.

	<b>Low Range</b>	<b>High Range</b>	<b>Average</b>
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

<sup>21</sup> Abandoned or derelict vessel cost estimates provided by PENCO.

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

<sup>23</sup> 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
<b>Totals</b>	<b>\$1,104,000</b>	<b>\$4,059,000</b>	<b>\$2,591,500</b>

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	<b>1 week</b>
June 22, 2022	Solliday submitted Petition for Lease Assignment to DOBOR	Aug. 18, 2023	DOBOR issued recommendation to the Board	<b>62 weeks</b>

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

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

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

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

# EXHIBIT 7

## CHART:

“Value Comparison of GKM and  
PMP Harbor Leases”

# VALUE COMPARISON OF GKM AND PMP HARBOR LEASES

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

# EXHIBIT 8

## CHART:

“Unfair Imposition of Performance Bond in  
2023”

## UNFAIR IMPOSITION OF PERFORMANCE BOND IN 2023

<b>Times when reasonable to impose/require substantial performance bond</b>			
Timeline Marker	Time period	Event	Performance Bond
<b>2017/2018</b>	Dec. 2017 June 2018	When PMP's proposed bid was discussed with DOBOR staff prior to July 2018 auction.	<b>NOT</b> discussed that payment would be required
	July 13 2018	Around the time of the lease public auction	Payment <b>NOT</b> required
	Sept. 4 2018	At or prior to the signing of PMP's lease.	Payment <b>NOT</b> required
	Sept.19 2018	The date payment of the Bond was required (within 15 days of signing lease)	Payment <b>NOT</b> required
	Nov. 1 2018	When payment of the security fee of \$73,000 required (equal to 2 month's rent).	Payment <b>NOT</b> required
	Nov. 1 2018	Prior to PMP taking possession of the leased premises (and thereafter taking out significant loans to improve the premises).	Payment <b>NOT</b> required
<b>2019</b>	Oct .25 2019	When DOBOR's recommended approval of Jason Ho'opai's petition to assign PMP's lease to himself personally.	Payment <b>NOT</b> required
<b>2020</b>	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 <b>NOT</b> required
<b>through 2021- 23</b>	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 <b>NOT</b> required
<b>Unreasonable time to require performance bond</b>			
Timeline Marker	Time period	Event	Bond imposed/demanded
<b>2023</b>	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	<b>Bond demanded as condition to Board approval of lease transfer (\$846,000)</b>

## 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)	<b>DOBOR’s Recommendation in PMP’s Extension Request</b>
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 <b>Exhibit 5</b> - Starn O’Toole Marcus & Fisher letter)	

# EXHIBIT 11

## CHART:

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

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

<b>Substantial Improvements</b>	<b>Vendor / Contractor</b>	<b>Estimated Cost</b>	<b>Estimated Completion Date</b>
<b>GRUB AND GRADE:</b> 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	<b>\$71,204.16</b>	December 31, 2028
<b>STALL DIVIDERS:</b> 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	<b>\$5,242.00</b>	December 31, 2028
<b>GATE:</b> Replace existing front electric gate, motor and guide	Vogt Welding & Gate	<b>\$29,190</b>	December 31, 2028
<b>RESTROOM:</b> 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.	<b>\$18,238.74</b>	December 31, 2028
<b>DISPOSAL:</b> 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	<b>\$20,000</b>	December 31, 2028

<b>FENCING:</b> 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	<b>\$89,332.78</b>	December 31, 2028
<b>POWER:</b> 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.	<b>\$26,065.00</b>	December 31, 2028
<b>WATER:</b> Tap into the county water main on Kealakehe Parkway; PMP will arrange for offsite and onsite installation	Plumbing Strategies Inc. Kona	<b>\$8,587.04</b>	December 31, 2028
<b>INTERNET:</b> Install broad internet satellite services.	Starlink Satellite Internet	<b>\$705.76</b>	December 31, 2023
<b>LANDSCAPING:</b> Install low maintenance landscaping and sidewalks near office and patio area for customers.	Pacific Marine Partners, LLC, 'Ili Kūpono Gardens Nursery & Farm	<b>\$9000.00</b>	December 31, 2028
<b>GRAVEL:</b> Spread 300 tons of base course gravel throughout the boatyard to fill in potholes and low areas.	West Hawaii Concrete	<b>\$10,532.37</b>	December 31, 2028
<b>SOLAR LIGHTING:</b> Install 10 solar street lights in the rear portion of the boatyard.	Pacific Pipe Kona, West Hawaii Concrete, Werise Solar Lights.	<b>\$6,542.40</b>	December 31, 2028
<b><u>Total Estimated Cost</u></b>		<b>\$294,640.25</b>	

Tom J I  
09.22.2023

STARN · O'TOOLE · MARCUS & FISHER  
A LAW CORPORATION

September 14, 2023

VIA EMAIL: [matthew.s.dvonch@hawaii.gov](mailto:matthew.s.dvonch@hawaii.gov)  
Matthew Dvonch  
First Deputy Attorney General  
Department of the Attorney General  
425 Queen Street  
Honolulu, HI 96813

RECEIVED  
2023 SEP 15 AM 11:12  
DEPT. OF LAND  
& NATURAL RESOURCES  
STATE OF HAWAII

Re: DOBOR Lease No. LH-19-002 to Pacific Marine Partners LLC  
Situated at Honokohau Small Boat Harbor, North Kona, Island of Hawaii  
TMK: (3) 7-4-008:003 (Por).

Dear Mr. Dvonch:

We represent Jonas Ikaika Solliday (“*Ikaika*”) who has agreed to purchase his partner’s 50% interest in Lessee Pacific Marine Partners LLC (“*Pacific Marine*”) subject to Board of Land and Natural Resources (“*Board*”) approval. The approval of an assignment of an interest in a lessee to an existing co-owner is routine subject to review of the purchase price being paid to the exiting member and payment of a premium. However, as an additional condition DOBOR staff has recommended that the Board impose the performance bond (“*Bond*”) as provided for in in Paragraph 18 of the Lease, but waivable under Paragraph 29. A copy of the Lease is attached as Exhibit 1 for your convenience. If the Bond is now required as a mandatory condition it will increase the cost of this routine lease assignment from about \$80,000 to over \$900,000. The imposition of the Bond at this late date would effectively result in a denial of the assignment and termination of the Lease which would make no sense for the State, would be fundamentally unfair to Ikaika and would breach a prior written agreement between Ikaika and the State of Hawaii.

**REQUIRING THE BOND WOULD EFFECTIVELY TERMINATE THE LEASE WHICH MAKES NO SENSE FOR THE STATE AND WOULD BE INCREDIBLY UNFAIR TO IKAIKA.**

Because the monthly minimum rent is set so high, the Lessee cannot possibly obtain the Bond provided for in Paragraph 18 of the Lease. Everyone has known this from the inception of the Lease. Imposition of the Bond at this late date would amount to termination of the Lease which provides the State with one of the highest rents in the DOBOR system. This obviously makes no sense for the State and would be incredibly unfair to Ikaika. Ikaika has relied upon the fact that no Bond was required for the last 5 years. He has operated the Property in spite of the extensive damage to the Property caused by Gentry, the prior licensee. He has gone through a difficult negotiation with the State which resulted in the Settlement Agreement between him and the State. He has gone through a full arbitration with his partner and then reached an agreement to buy out

his partner based upon Ikaika prevailing in the arbitration. This buyout is conditioned upon Board approval of the assignment of his partner's interest to him. He has also improved the Property to the extent required to increase the boat owners served by the facility from approximately 275 to 360. The boat owners have come to trust and rely upon Ikaika to serve their needs. It would be incredibly unfair to deprive this hard-working, young part Hawaiian man of this State Lease and prevent him from benefitting from the land serving the community.

He is not asking for a handout; he is asking for fair treatment. Treating Ikaika fairly is also in the best interest of the State. Fortunately for both parties, Paragraph 29 of the Lease deals with situations where the existing lessee is in substantial compliance with the terms of the lease and is just as much a part of this Lease as Paragraph 18. Paragraph 29 provides in relevant part as follows:

“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) . . . ; provided, however, that the Lessor reserves the right to reactivate the bonds or reimpose the bond(s) . . . in and to their original tenor and form at any time throughout the term of this lease.”

This Lessee under Ikaika's management is not only in “substantial compliance” with the Lease but has been a stellar performer in serving the boat owners and paying the high rent to DOBOR. The Lessee has done this in spite of the many handicaps described in the letters attached as Exhibits 2 and 3. In 2018, the Lessee provided DOBOR with a cash deposit of two months rent (\$70,500) which was accepted by DOBOR and has been sufficient for the past 5 years, in effect as a substitute for the Bond. There is no good reason to terminate one of the highest rent paying leases in the DOBOR system and, pursuant to Paragraph 29, in the event there is substantial non-compliance the Bond could be reimposed.

**THE IMPOSITION OF THE BOND WAS WAIVED IN THE SETTLEMENT AGREEMENT BETWEEN THE STATE AND IKAIKA.**

On May 5, 2020, during the period Pacific Marine was under the control of Ikaika's partner, DOBOR sent a Notice of Default to Pacific Marine for (1) failure to provide financials; (2) constructing an improvement (container) without Board approval; and (3) “failing to provide a surety bond pursuant to Paragraph 18 of the Lease”.

On May 22, 2020, the Board voted to terminate the Lease based in part upon these defaults.

On July 24, 2020, DOBOR in its staff report to the Board recited all the claims Pacific Marine had against DOBOR, primarily as a result of the extensive damage caused by Gentry before it vacated the Property and the continued occupation, damage and cesspool contamination caused by Gentry's unpermitted sublessee holdover Hotspot Welding. Those claims are detailed in letters



from Duane Fisher dated August 21, 2019, and from Sunny Lee dated May 19, 2020, which are attached as Exhibits 2 and 3. The staff made the following recommendation:

“To be clear, DOBOR denies each and every one of these claims in terms of both liability and amount. . . . Even through the State denies the claims, staff and the Department of the Attorney General are recommending that the claims be settled.”

The Board approved settlement of the claims and authorized the Chair to enter into an agreement to resolve the claims.

On July 31, 2020, the State of Hawaii, entered into a Settlement Agreement (“Agreement”) with Pacific Marine and “Jonas Solliday” as parties to the Agreement. A copy of the Agreement is attached as Exhibit 4. The relevant Preambles in the Agreement read as follows:

“WHEREAS, on or about May 5, 202, the Board sent a notice of default to PMP citing three bases [sic] (1) failure to provide financial statements pursuant to Paragraph A of the Lease, (2) constructing an improvement without prior written approval of the Board, and (3) **failing to provide a surety bond pursuant to Paragraph 18 of the Lease.**”

. . . .

“WHEREAS, the State and PMP desire to fully, finally, and completely resolve, release, discharge, terminate, settle, compromise and reach **a settlement of all claims relating to disputes as to the Lease and the Premises;**

The failure to post the Bond pursuant to Paragraph 18 of the Lease was clearly one of the disputes as to the Lease that was resolved by the Settlement Agreement. Specifically in Paragraph 9 of the Settlement Agreement, it was agreed among the parties including Ikaika that . . . **“the May 5, 2020, Notice of Default and the Board’s decision to terminate the Lease are rescinded and that the State will take no further action to terminate the Lease based on these notices.”** There was no further mention of the Bond in the Agreement. Specifically, the Agreement did not require that the Bond be posted. Pacific Marine would not have agreed to the settlement had it required the Bond to be posted because it could not post the Bond and everyone knew it.

In summary, the State has already waived imposition of the Bond in writing as provided in Paragraph 29 of the Lease.

**IKAIKA HAS RELIED UPON WAIVER OF THE BOND FOR 5 YEARS AND THE STATE IS ESTOPPED FROM USING IT TO TERMINATE THE LEASE.**

Everyone has known from the inception of this Lease 5 years ago that with this high minimum monthly rent, the Lessee could not post the Bond provided for in Paragraph 18 of the Lease. DOBOR did not want to terminate one its best leases for no good reason. It was in the best interest of the State to have the Lessee continue paying this high rent for as long as possible and provide

the services to the boat owners as best it could given the damaged condition of the Property. The State has gotten this rent for the past 5 years for a Property that was never close to compliance with the bidding parameters for this Lease. When the Lessee took possession of the Property on November 1, 2018, it was fenced on only two sides, not four; it was only partially cleared; there were no longer any utilities including water; there was an illegal sub-tenant in possession whose equipment still prevents use of the only building on the Property; the gate had been torn down and was no longer operational; there was no operational restroom; the previous boat tenants had been ordered to vacate by Gentry; and there were numerous derelict boats left on the Property that were not paying rent and had to be removed at Pacific Marine's expense. So DOBOR leaving this Lessee in place was certainly in the best interest of the State.

Ikaika has also relied upon the State not requiring the Bond in doing the following:

1. Operating the Property in spite of the extensive damage caused by Gentry, including the destruction of all utilities;
2. Dealing with an illegal hold over subtenant;
3. Improving the Property in order to increase the boat owners being served from about 275 to 360;
4. Entering into the Settlement Agreement with the State;
5. Going through an arbitration and subsequent litigation with his partner;
6. Entering into an agreement to buy out his partner pursuant to the arbitration award (half of the consideration has already been paid) and
7. Incurring substantial attorneys' fees, for help with all of this and to try to negotiate an agreement with the DOBOR staff.

At this juncture the State is estopped from imposing the Bond 5 years later after accepting the high rent and other benefits of Ikaika's efforts. Pacific Marine and Ikaika would have walked away from this Lease 5 years ago if the Bond had been imposed, but instead they relied upon the fact that it would not be imposed.

## **BACKGROUND.**

The Lease was entered into on September 10, 2018, 5 years ago. Pursuant to Paragraph 18 of the Lease, any Bond was to be posted 15 days later by September 25. Because of damage to the leased Property caused by Gentry, the prior licensee, Pacific Marine was not able to occupy the Property until November 1, 2018, at which time Pacific Marine made a cash security payment to the State equal to two months rent (\$70,500). The Bond was never posted because with a minimum rent of \$35,250 per month, the amount of the Bond would be \$846,000 which everyone knew the Lessee could not obtain. The Lessee is now paying monthly rent of over \$40,000, including percentage rent, which is one of the highest rents in the entire DOBOR system, and far more than the \$7,500 a month paid by Gentry, the prior licensee.

Matthew Dvonch  
DOBOR Lease No. LH-19-002 to Pacific Marine Partners LLC  
September 14, 2023  
Page 5

For all of these reasons, continued waiver of the Bond is appropriate and fair.

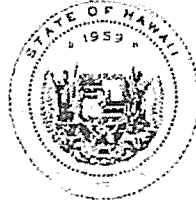
Sincerely,

*/s/ A. Bernard Bays*

A. BERNARD BAYS

cc: Dawn Chang  
Chair  
Riley Smith  
Big Island Representative  
Ivan Lui-Kwan  
Matthew Dvonch; [matthew.s.dvonch@hawaii.gov](mailto:matthew.s.dvonch@hawaii.gov)

DANNY IGE  
GOVERNOR OF HAWAII



SUZANNE B. L. USE  
DIRECTOR  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
COMMISSIONER OF WATER RESOURCES  
ROBERT K. MANU'UA  
DIRECTOR  
JERRY L. PEARSON, PE.  
DIRECTOR  
EDWARD R. UNDERWOOD  
ADMINISTRATOR  
OFFICE OF BOATING MANAGEMENT

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
DIVISION OF BOATING AND OCEAN RECREATION  
4 SAND ISLAND ACCESS ROAD  
HONOLULU, HAWAII 96819

BOR-PM-038.19

September 12, 2018

*Certified Mail*  
7015 3010 0001 6023 6614

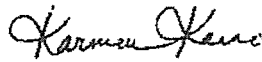
Pacific Marine Partners LLC  
c/o Jason Ho'opai  
317 Kapulei Street  
Honolulu, HI 96813

Dear Mr. Hoopai,

**Boating Lease No. LH-19-002**

Enclosed is a fully executed copy of the subject Boating Lease for your files. If there are any questions, please call our Property Management Office at (808) 587-2683.

Best Regards,

  
Karmen Kanno  
PM Office Assistant

Enclosures:  
Executed Copy of Lease No. LH-19-002

Exhibit "1"

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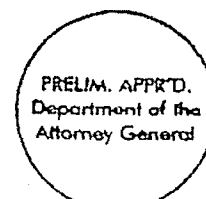
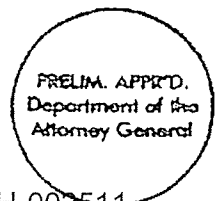


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STATE OF HAWAII

DEPARTMENT OF LAND AND NATURAL RESOURCES

BOATING LEASE NO. LH-19-002

THIS LEASE, made this 10th day of September, 2018, by and between the STATE OF HAWAII, hereinafter referred to as the "Lessor," by its Board of Land and Natural Resources, called the "Board," and PACIFIC MARINE PARTNERS LLC, a Hawaii limited liability company, whose address is 317 Kapulei Street, Honolulu, Hawaii 96813, hereinafter referred to as the "Lessee."

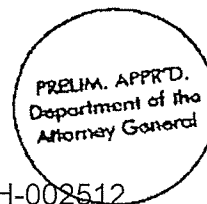
WITNESSETH:

The Lessor, pursuant to Sections 171-35 and 200-2.5, Hawaii Revised Statutes, for and in consideration of the rent to be paid and of the terms, covenants and conditions herein contained, all on the part of the Lessee to be kept, observed and performed, does lease unto the Lessee, and the Lessee does lease from the Lessor the premises situate at Kealakehe, North Kona, Island of Hawaii, Hawaii, and identified as "Honokohau Small Boat Harbor, Lease Parcel," containing an area of 9.000 acres, SUBJECT, HOWEVER, to a portion of Perpetual Non-Exclusive Road Easement, more particularly described in Exhibit "A" and as shown on the map marked Exhibit "B," attached hereto and made parts hereof.

TO HAVE AND TO HOLD the leased premises unto the Lessee for the term of TEN (10) years, commencing on the 1st day of November, 2018, up to and including the 31st day of October, 2028, unless sooner terminated as hereinafter provided, the Lessor reserving and the Lessee yielding and paying to the Lessor at the Office of the Department of Land and Natural Resources, Honolulu, Oahu, State of Hawaii, an annual rental, as provided hereinbelow, as follows:

The monthly rent shall be base rent in the amount of THIRTY FIVE THOUSAND TWO HUNDRED FIFTY AND NO/100 DOLLARS (\$35,250.00) payable in advance, without notice or demand, on the first (1<sup>st</sup>) day of each and every month during the term or an amount based on percentage of monthly gross receipts, as hereinafter provided, whichever is greater.

A. To the extent percentage rent exceeds base rent,



the excess shall be payable on the fifteenth (15<sup>th</sup>) day of the month following gross receipts. For example, percentage rent (if any) payable based on February gross receipts shall be due and payable by March 15. Percentage rent shall be calculated and paid on a monthly basis as a percentage of gross receipts from all sources within the leased premises, including parking and including any and all State of Hawaii excise tax that lessee may collect. Percentage annual rent shall be fifty per cent (50%), as established by Lessee's winning bid at public auction. Gross receipts includes gross receipts of any sublessee if and when a sublease is approved by the Board pursuant to paragraph 14 of this lease.

i. Each payment of percentage rent shall be accompanied by a written statement certified as correct by Lessee, or a person duly authorized by Lessee, showing in accurate detail the amount of gross receipts, by category, for the payment period.

ii. The Lessee shall submit, no later than sixty (60) days after the close of each and every of the Lessee's fiscal years reviewed financial statements prepared according to generally accepted accounting principles, which financial statements shall include a breakdown of gross receipts by month and by category. The financial statements shall provide sufficient detail to allow the Lessor to determine and verify the Lessee's monthly receipts for each month of the Lessee's fiscal years. This fiscal year review is solely for the benefit and information of Lessor. Calculation and payment of percentage rent is based solely on monthly gross receipts and shall not be adjusted upon annual review except in the event of underpayment or overpayment of rent for any prior month.

iii. The Lessee shall at all times keep and maintain accurate records of all business transactions and sales made in and from the premises. The Lessor shall have the right at all reasonable times during business hours, through the Lessor's duly authorized agent, attorney, or accountant, to inspect and make copies of the Lessee's records, accounts, and books in any way bearing on such sales (including copies of tax or information returns furnished to any governmental authority), at the premises or at any other office of the Lessee at which such books, records, and accounts may be kept, and to inspect the records, accounts and books in any way bearing on sales of any other person or firm selling goods or services in or from any part of the premises.

iv. If an audit discloses that the Lessee has



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

v. If an audit discloses that the Lessee has overpaid the percentage rent due for any month, the Lessor shall notify the Lessee in writing of such overpayment. Overpaid amounts shall be credited to and set off against rental amounts next due and payable following the date that such overpayment is discovered or revealed. If the lease is in the final month, and if an audit discloses that the Lessee has overpaid the percentage rent due in its final month, the Lessor shall refund Lessee's overpayments, to the Lessee, when verified by Lessor.

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

RESERVING UNTO THE LESSOR THE FOLLOWING:

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

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

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

THE LESSEE COVENANTS AND AGREES WITH THE LESSOR AS FOLLOWS:

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

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

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

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

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

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

7. Compliance with laws. The Lessee shall comply with all of the requirements of all municipal, state, and federal authorities and observe all municipal, state and federal laws applicable to the premises, now in force or which may be in force.

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

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

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

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

12. Character of use. The Lessee shall use or allow the premises leased to be used solely for the operation of a boat/trailer storage facility and vehicle parking purposes. Residential use shall not be allowed on the premises.

The Lessee is prohibited from any illegal activity, or to perform any act which may result in the creation or commission of a nuisance on said premises or the lease to be caused or produced upon the premises, or emanate there from, any unusual offensive sounds, or any noxious fumes, smoke, gases, vapor or odors.

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."

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

15. Release and indemnity. The Lessee shall release, indemnify, defend, and hold the Lessor harmless from and against any claim or demand for loss, liability, or damage, including claims for bodily injury, wrongful death, or property damage, arising out of or resulting from: 1) any act or omission on the

part of Lessee relating to Lessee's use, occupancy, maintenance, or enjoyment of the premises; 2) any failure on the part of the Lessee to maintain the premises and sidewalks, roadways and parking areas adjacent thereto in Lessee's use and control, and including any accident, fire or nuisance, growing out of or caused by any failure on the part of the Lessee to maintain the premises in a safe condition; and 3) from and against all actions, suits, damages, and claims by whomsoever brought or made by reason of the Lessee's non-observance or non-performance of any of the terms, covenants, and conditions of this lease or the rules, regulations, ordinances, and laws of the federal, state, municipal or county governments.

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

17. Liability insurance. The Lessee shall procure and maintain, at its cost and expense and acceptable to the Lessor, in full force and effect throughout the term of this lease, general liability insurance, or its equivalent, with an insurance company or companies licensed or authorized to do business in the State of Hawaii with an AM Best rating of not less than "A- VIII" or other comparable and equivalent industry rating, in an amount of at least \$1,000,000.00 for each occurrence and \$2,000,000.00 aggregate, and with coverage terms acceptable to the Chairperson of the Board. The policy or policies of insurance shall name the State of Hawaii as an additional insured. A copy of the policy or other documentation required by the Lessor shall be filed with the State of Hawaii, Department of Land and Natural Resources. The insurance shall cover the entire premises, including all buildings, improvements, and grounds and all roadways or sidewalks on or adjacent to the premises in the use or control of the Lessee.

The Lessee, prior to entry and use of the premises or within fifteen (15) days from the effective date of this lease, whichever is sooner, shall furnish the Lessor with a policy(s) or other documentation required by the Lessor showing the policy(s) to be initially in force, keep the policy(s) or other

documentation required by the Lessor on deposit during the entire lease term, and furnish a like policy(s) or other documentation required by the Lessor upon each renewal of the policy(s). This insurance shall not be cancelled, limited in scope of coverage, or nonrenewed until after thirty (30) days written notice has been given to the Lessor. The Lessor may at any time require the Lessee to provide Lessor with copies of the insurance policy(s) that are or were in effect during the lease period or other documentation required by the Lessor.

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

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

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

18. Bond, performance. The Lessee shall, at its own cost and expense, within fifteen (15) days from the effective date of this lease, procure and deposit with the Lessor and thereafter keep in full force and effect during the term of this lease a good and sufficient surety bond, conditioned upon the full and faithful observance and performance by Lessee of all the terms, conditions, and covenants of this lease, in an amount equal to two times the annual rental then payable. This bond shall provide that in case of a breach or default of any of the lease terms, covenants, conditions, and agreements, the full amount of the bond shall be paid to the Lessor as liquidated and

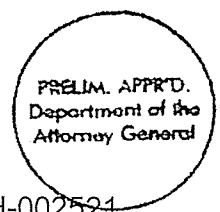
ascertained damages and not as a penalty.

19. Lessor's lien. The Lessor shall have a lien on all the buildings and improvements placed on the premises by the Lessee, on all property kept or used on the premises, whether the same is exempt from execution or not and on the rents of all improvements and buildings located on the premises for all Lessor's costs, attorney's fees, rent reserved, for all taxes and assessments paid by the Lessor on behalf of the Lessee, and for the payment of all money provided in this lease to be paid by the Lessee, and this lien shall continue until the amounts due are paid.

20. Mortgage. Except as provided in this lease, the Lessee shall not mortgage, hypothecate, or pledge the premises, any portion, or any interest in this lease without the prior written approval of the Chairperson and any mortgage, hypothecation, or pledge without the approval shall be null and void.

Upon due application and with the written consent of the Chairperson, the Lessee may mortgage this lease, or any interest, or create a security interest in the leasehold of the public land. If the mortgage or security interest is to a recognized lending institution in either the State of Hawaii or elsewhere in the United States, the consent may extend to foreclosure and sale of Lessee's interest at the foreclosure to any purchaser, including the mortgagee, without regard to whether or not the purchaser is qualified to lease, own, or otherwise acquire and hold the land or any interest. The interest of the mortgagee or holder shall be freely assignable. The term "holder" shall include an insurer or guarantor of the obligation or condition of the mortgage, including the Department of Housing and Urban Development through the Federal Housing Administration, the Federal National Mortgage Association, the Veterans Administration, the Small Business Administration, Farmers Home Administration, or any other Federal agency and their respective successors and assigns or any lending institution authorized to do business in the State of Hawaii or elsewhere in the United States; provided, that the consent to mortgage to a non-governmental holder shall not confer any greater rights or powers in the holder than those which would be required by any of these Federal agencies.

21. Breach. Time is of the essence in this agreement. If the Lessee shall fail to pay the rent, or any part thereof, at the times and in the manner provided in this lease and this failure shall continue for a period of more than thirty (30) days





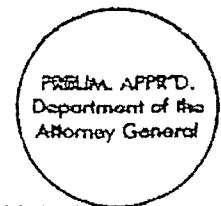
after delivery by the Lessor of a written notice of breach or default and demand for cure, by personal service, registered mail or certified mail to the Lessee and to each holder of record having a security interest in the premises, or if the Lessee shall become bankrupt, or shall abandon the premises,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

22. Right of holder of record of a security interest.

In the event the Lessor seeks to forfeit the privilege, interest, or estate created by this lease, each recorded holder of a security interest may, at its option, cure or remedy the default or breach of rent payment within thirty (30) days or any other default or breach within sixty (60) days, from the date of receipt of the Lessor's notice, or within an additional period allowed by Lessor for good cause, and add the cost to the mortgage debt and the lien of the mortgage. Upon failure of the holder to exercise its option, the Lessor may: (a) pay to the holder from any moneys at its disposal, including the special land and development fund, the amount of the mortgage debt, together with interest and penalties, and secure an assignment of the debt and mortgage from the holder or if ownership of the privilege, interest, or estate shall have vested in the holder by way of foreclosure, or action in lieu thereof, the Lessor shall be entitled to the conveyance of the privilege, interest, or estate upon payment to the holder of the amount of the mortgage debt, including interest and penalties, and all reasonable expenses incurred by the holder in connection with the foreclosure and preservation of its security interest, less appropriate credits, including income received from the

privilege, interest, or estate subsequent to the foreclosure; or (b) if the property cannot be reasonably reassigned without loss to the State, then terminate the outstanding privilege, interest, or estate without prejudice to any other right or remedy for arrears of rent or for any preceding or other breach or default and use its best efforts to redispense of the affected land to a qualified and responsible person free and clear of the mortgage and the debt secured; provided that a reasonable delay by the Lessor in instituting or prosecuting its rights or remedies shall not operate as a waiver of these rights or to deprive it of a remedy when it may still otherwise hope to resolve the problems created by the breach or default. The proceeds of any redispense shall be applied, first, to reimburse the Lessor for costs and expenses in connection with the redispense; second, to discharge in full any unpaid purchase price or other indebtedness owing the Lessor in connection with the privilege, interest, or estate terminated; third, to the mortgagee to the extent of the value received by the State upon redispense which exceeds the fair market lease value of the land as previously determined by the State's appraiser; and fourth, to the owner of the privilege, interest, or estate.

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



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

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

26. Acceptance of rent not a waiver. The acceptance of rent by the Lessor shall not be deemed a waiver of any breach by the Lessee of any term, covenant, or condition of this lease, nor of the Lessor's right of re-entry for breach of covenant, nor of the Lessor's right to declare and enforce a forfeiture for any breach, and the failure of the Lessor to insist upon strict performance of any term, covenant, or condition, or to exercise any option conferred, in any one or more instances, shall not be construed as a waiver or relinquishment of any term, covenant, condition, or option.

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

28. Justification of sureties. Any bonds required by this lease shall be supported by the obligation of a corporate surety organized for the purpose of being a surety and qualified to do business in the State of Hawaii, or by not less than two personal sureties, corporate or individual, for which justifications shall be filed as provided in Section 78-20, Hawaii Revised Statutes; provided, however, the Lessee may furnish a bond in like amount, conditioned as aforesaid, executed by it alone as obligor, if, in lieu of any surety or sureties, it

shall also furnish and at all times thereafter keep and maintain on deposit with the Lessor security in certified checks, certificates of deposit (payable on demand or after a period the Lessor may stipulate), bonds, stocks or other negotiable securities properly endorsed, or execute and deliver to the Lessor a deed or deeds of trust of real property, all of a character which is satisfactory to Lessor and valued in the aggregate at not less than the principal amount of the bond. It is agreed that the value of any securities which may be accepted and at any time thereafter held by the Lessor shall be determined by the Lessor, and that the Lessee may, with the approval of the Lessor, exchange other securities or money for any of the deposited securities if in the judgment of the Lessor the substitute securities or money shall be at least equal in value to those withdrawn. It is further agreed that substitution of sureties or the substitution of a deposit of security for the obligation of a surety or sureties may be made by the Lessee, but only upon the written consent of the Lessor and that until this consent is granted, which shall be discretionary with the Lessor, no surety shall be released or relieved from any obligation.

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.

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.

31. Surrender. The Lessee shall, at the end of the term or other sooner termination of this lease, peaceably deliver unto the Lessor possession of the premises in a clean and orderly condition, together with all improvements existing or constructed thereon or Lessee shall remove such improvements, at the option of the Lessor. Furthermore, upon the expiration, termination, or

revocation of this lease, should the Lessee fail to remove any and all of Lessee's personal property from the premises, after notice thereof, the Lessor may remove any and all personal property from the premises and either deem the property abandoned and dispose of the property or place the property in storage at the cost and expense of Lessee, and the Lessee does agree to pay all costs and expenses for disposal, removal, or storage of the personal property. This provision shall survive the termination of the lease.

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

33. Hazardous materials. Lessee shall not cause or permit the escape, disposal or release of any hazardous materials except as permitted by law. Lessee shall not allow the storage or use of such materials in any manner not sanctioned by law or by the highest standards prevailing in the industry for the storage and use of such materials, nor allow to be brought onto the premises any such materials except to use in the ordinary course of Lessee's business, and then only after written notice is given to Lessor of the identity of such materials and upon Lessor's consent which consent may be withheld at Lessor's sole and absolute discretion. If any lender or governmental agency shall ever require testing to ascertain whether or not there has been any release of hazardous materials by Lessee, then the Lessee shall be responsible for the reasonable costs thereof. In addition, Lessee shall execute affidavits, representations and the like from time to time at Lessor's request concerning Lessee's best knowledge and belief regarding the presence of hazardous materials on the premises placed or released by Lessee.

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

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

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

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

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

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

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

39. Historic preservation. In the event any historic properties or burial sites, as defined in section 6E-2, Hawaii Revised Statutes, are found on the premises, the Lessee and the Lessee's agents, employees and representatives shall immediately stop all land utilization or work or both and contact the Historic Preservation Office in compliance with chapter 6E, Hawaii Revised Statutes.

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

SPECIAL CONDITIONS

41. Improvements. If the Lessee constructs improvements upon the premises, the Lessee shall construct such improvements in accordance with plans and specifications submitted by the Lessee to and approved in writing by the Chairperson and in full compliance with all applicable laws, ordinances, rules and regulations.

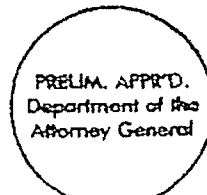
The construction, installation, or provision of lockers, as well as other secure areas for the storage of tools, equipment and supplies incidental to the operation of the boat/trailer storage facility, and any construction of structures incidental to the operation of a boat/trailer storage facility, shall require the Chairperson's prior written approval.

Planting and maintenance of landscaping as well as any building improvements, shall require the Chairperson's prior written approval.

All plans and the design of all improvements in any newly expanded area within the premises shall require the written approval of the Chairperson prior to construction. Any additional improvements to be made within the premises shall require the Chairperson's prior written approval.

42. Bond, improvement. If the Lessee constructs improvements, the Lessee, upon submittal and written approval of the construction plan(s) shall within sixty (60) days procure and deposit with the Lessor a surety bond(s), acceptable to the Chairperson, in the amount equal to the costs of improvements, which bond(s) shall name the State as obligee, conditioned upon the faithful observance and performance of the improvements, the completion of the improvements free from all liens and claims, and that the Lessee shall release, indemnify, defend, and hold the State harmless from all liens, suits, actions or damages arising out of, caused from or attributable to the work performed pursuant to the improvements.

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



replacement cost of the facilities, and shall pay the premiums at the time and place required under the policy.

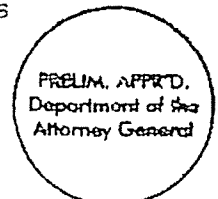
In the event of total or partial loss, any proceeds derived from the policy(s) shall be used by the Lessee for rebuilding, repairing, or otherwise reinstating the same buildings in a good and substantial manner according to plans and specifications approved in writing by the Board; provided, however, that with the approval of the Lessor, the Lessee may instead surrender this lease and pay the balance owing on any mortgage. Upon surrender of the lease, the Lessee shall then receive that portion of the insurance proceeds which the unexpired term of this lease, at the time of the loss or damage, bears to the whole of the term, with the Lessor to be paid the balance of the proceeds.

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

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

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

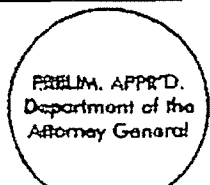
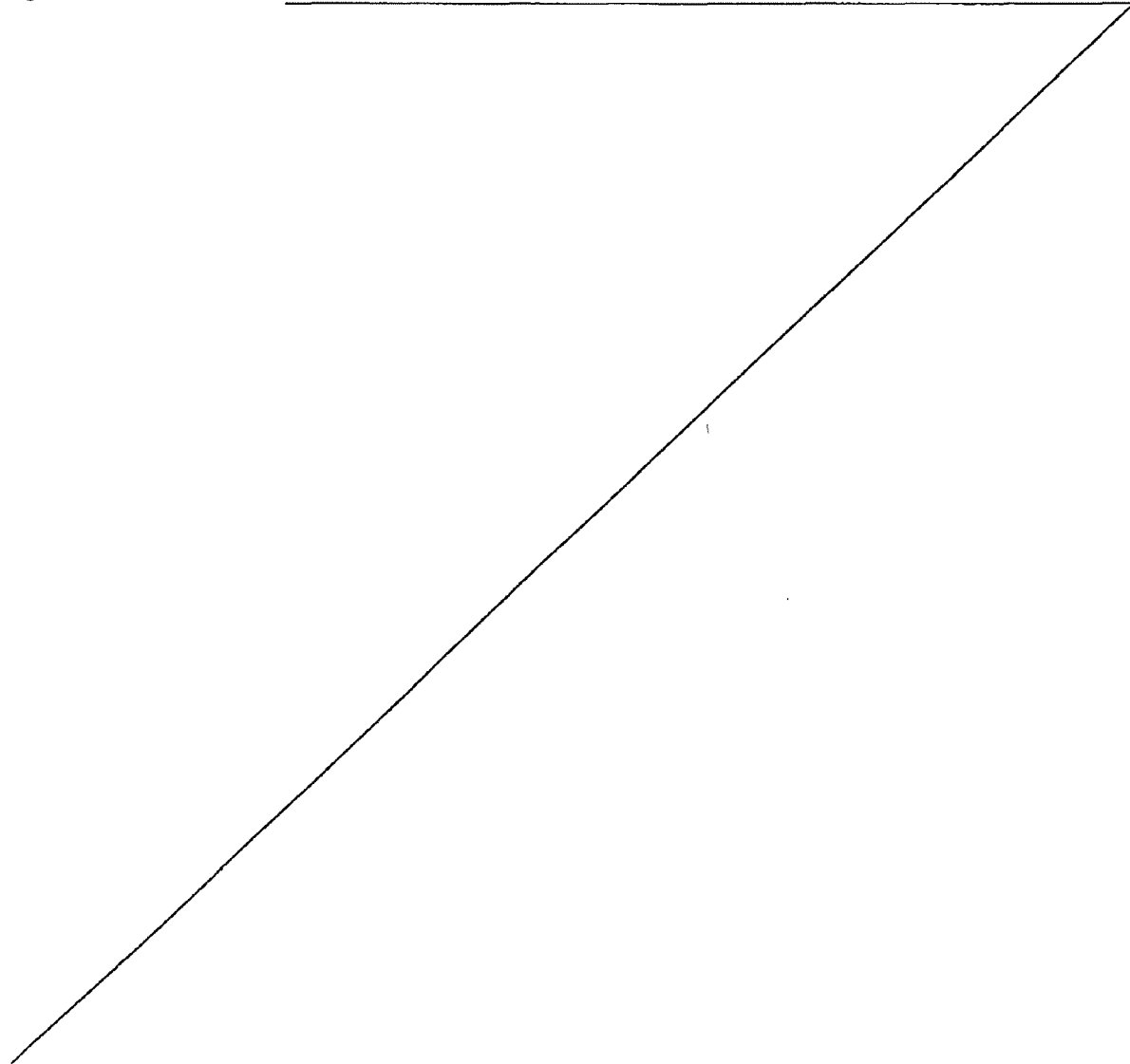
45. Phase I environmental site assessment. Prior to termination or revocation of the subject lease or the assignment of the leasehold, Lessee shall conduct a Phase I environmental site assessment and conduct a complete abatement and disposal, if necessary, satisfactory to the standards required by the Federal Environmental Protection Agency, the Department of Health, and the Department of Land and Natural Resources. Failure to comply with the provisions of this paragraph shall not extend the term of this lease or automatically prevent termination or revocation of the lease. The Board, at its sole option, may refuse to approve termination, revocation, or assignment unless this





evaluation and abatement provision has been performed. In addition or in the alternative, the Board may, at its sole option if Lessee does not do so, arrange for performance of the provisions of this paragraph, all costs and expenses of such performance to be charged to and paid by Lessee.

46. Lessee's subdivision approval requirements. The Lessee acknowledges that the leased premises, is not a legally subdivided separate individual lot. Lessee shall obtain Board approval prior to applying for a subdivision. All costs associated with preparation of the subdivision process, including but not limited to the survey, map and associated fees and costs, shall be the sole responsibility of the Lessee and shall be paid by the Lessee.



Definitions.

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

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

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

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

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

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

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

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

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

STATE OF HAWAII

Approved by the Board of Land and Natural Resources at its meeting held on August 11, 2017.

By *Suzanne D. Case*  
SUZANNE D. CASE  
Chairperson  
Board of Land and  
Natural Resources

APPROVED AS TO FORM:

LESSOR

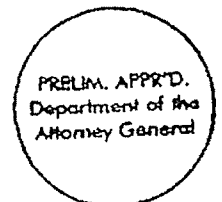
*Cindy Y. Young*  
CINDY Y. YOUNG  
Deputy Attorney General

Dated: Aug 2, 2017

PACIFIC MARINE PARTNERS LLC, a  
Hawaii limited liability company

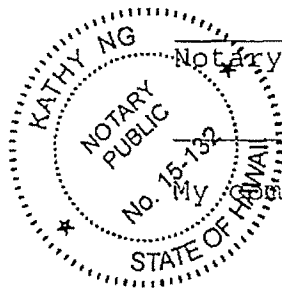
By *Jason Hoopani*  
Its Member

LESSEE



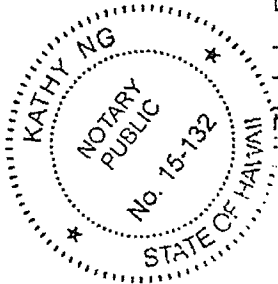
STATE OF HAWAII )  
 ) SS.  
CITY AND COUNTY OF HONOLULU )

On this 4 day of September, 2018,  
before me personally appeared Jason Trovati,  
to me personally known, who, being by me duly sworn or affirmed,  
did say that such person executed the foregoing instrument as the  
free act and deed of such person, and if applicable in the  
capacity shown, having been duly authorized to execute such  
instrument in such capacity.

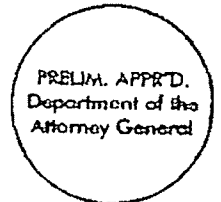


Kathy Ng  
Notary Public, State of Hawaii

My Commission expires: 4-5-2019



Doc. Date: 9-4-18 # Pages: 40  
Notary Name: Kathy Ng Foster  
Doc. Description: State of Hawaii  
Dept. of Land and Natural Resources  
Boating lease No. LH-19-002  
Kathy Ng 9-4-18  
Notary Signature Date  
NOTARY CERTIFICATION





STATE OF HAWAII  
SURVEY DIVISION  
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES  
HONOLULU

C.S.F. No. 25,658

March 19, 2018

HONOKOHAU SMALL BOAT HARBOR

LEASE PARCEL

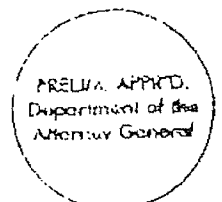
Kealakehe, North Kona, Island of Hawaii, Hawaii

Being a portion of the Government Land of Kealakehe.

Being also a portion of Part 1 of Honokohau Small Boat Harbor,  
Governor's Executive Order 4334.

Beginning at the northeast corner of this parcel of land, the  
coordinates of said point of beginning referred to Government Survey Triangulation  
Station "KEAHUOLU" being 8023.44 feet North and 2157.74 feet East, thence running  
by azimuths measured clockwise from True South:-

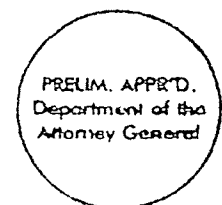
1. 333° 44' 20" 551.62 feet along the remainder of Part 1 of  
Honokohau Small Boat Harbor,  
Governor's Executive Order 4334;
2. 80° 24' 20" 424.38 feet along the remainder of Part 1 of  
Honokohau Small Boat Harbor,  
Governor's Executive Order 4334;
3. 72° 59' 20" 219.00 feet along the remainder of Part 1 of  
Honokohau Small Boat Harbor,  
Governor's Executive Order 4334;
4. 138° 19' 20" 108.00 feet along the remainder of Part 1 of  
Honokohau Small Boat Harbor,  
Governor's Executive Order 4334;



C.S.F. No. 25.658

March 19, 2018

5. Thence along the remainder of Part 1 of Honokohau Small Boat Harbor, Governor's Executive Order 4334, on a curve to the left with a radius of 545.00 feet, the chord azimuth and distance being:  
     126° 29' 20"                      499.08 feet;
6.   194° 57' 20"                      86.70 feet along the remainder of Part 1 of Honokohau Small Boat Harbor, Governor's Executive Order 4334;
7.   260° 12' 20"                      346.50 feet along the remainder of Part 1 of Honokohau Small Boat Harbor, Governor's Executive Order 4334;
8.   256° 12' 20"                      337.00 feet along the remainder of Part 1 of Honokohau Small Boat Harbor, Governor's Executive Order 4334;
9.   260° 05'                            168.26 feet along the remainder of Part 1 of Honokohau Small Boat Harbor, Governor's Executive Order 4334 to the point of beginning and containing an AREA OF 9.000 ACRES.



C.S.F. No. 25,658

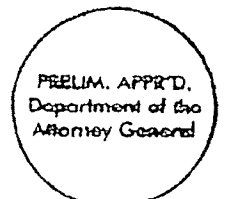
March 19, 2018

SUBJECT, HOWEVER, to a portion of Perpetual Non-Exclusive Road Easement as shown on plan attached hereto and made a part hereof.

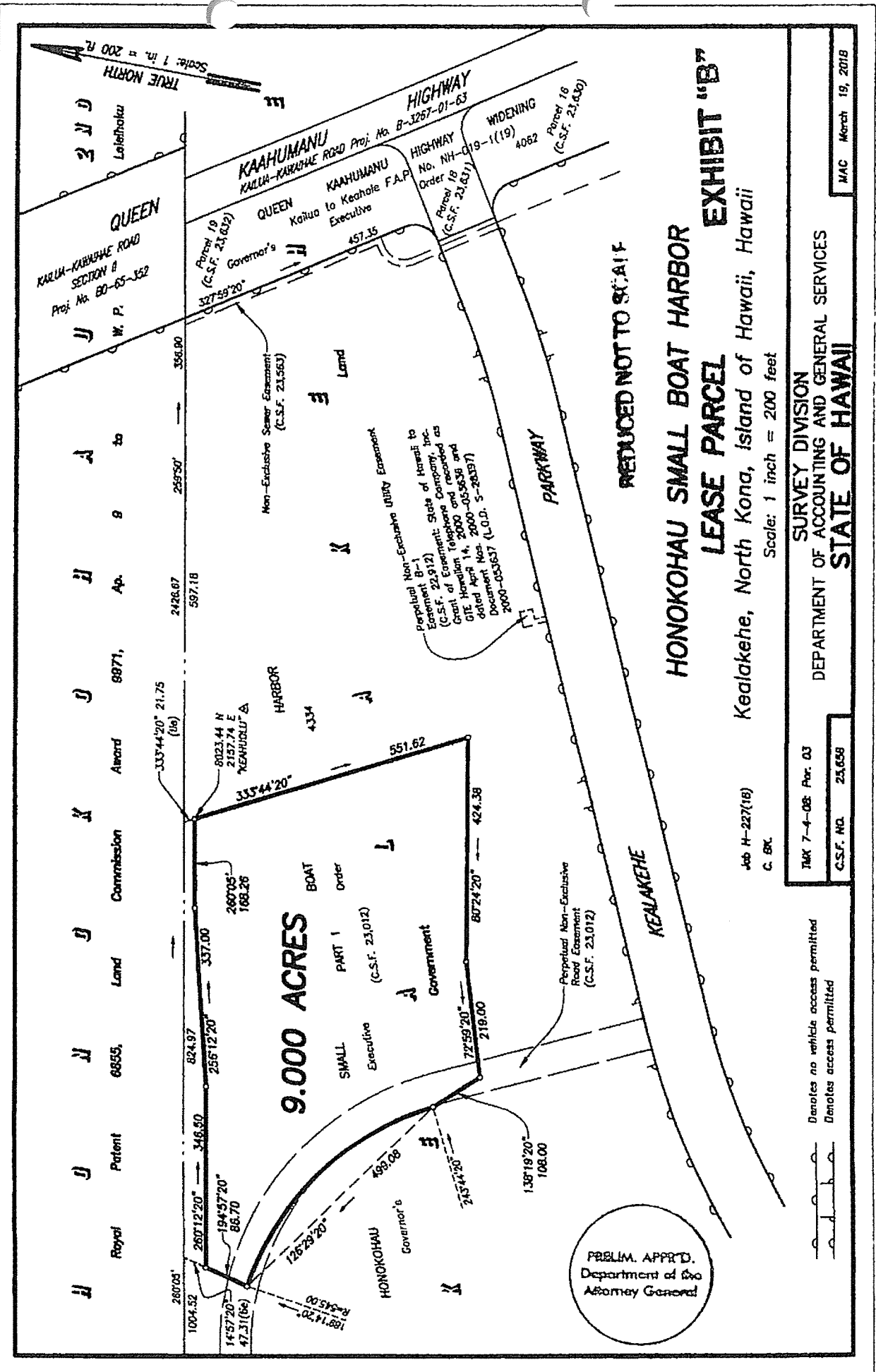
SURVEY DIVISION  
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES  
STATE OF HAWAII

By: *Gerald Z. Yonashiro*  
Gerald Z. Yonashiro  
Land Surveyor rk

Compiled from map and desc.  
furn. by Wes Thomas Associates.  
Said map and desc. have been  
examined and checked as to form  
and mathematical correctness but  
not on the ground by the Survey  
Division.



JH-002537



REDUCED NOT TO SCALE

**HONOKOHAU SMALL BOAT HARBOR  
LEASE PARCEL  
EXHIBIT "B"**

Kealahou, North Kona, Island of Hawaii, Hawaii  
Scale: 1 inch = 200 feet

Job H-227(18)  
C. BK.

SURVEY DIVISION  
DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES  
STATE OF HAWAII

TAK 7-4-08: Par. 03  
C.S.F. NO. 25,658

MAC March 19, 2018

Denotes no vehicle access permitted  
Denotes access permitted

PRELIM. APPR'D.  
Department of the  
Attorney General



ASSIGNMENT OF LEASE EVALUATION POLICY

1. Enabling Statute.

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

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

2. Qualifying Leases.

This policy shall be applicable to the subject lease.

3. Prior Approval.

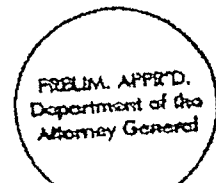
Prior to giving its consent to an assignment, DLNR must receive (i) the name, legal composition and address of any proposed assignee, (ii) a complete copy of the purchase agreement and the proposed assignment agreement, including the total consideration to be paid by the assignee for the assignment whether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

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

4. Qualifications of Assignee.

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

EXHIBIT "C"



5. Consideration to be Paid.

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

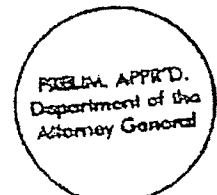
6. Payment of Premium.

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

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

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

Depreciation of improvements and trade fixtures will be determined on a straight line basis. Depreciation of improvements or renovations will be determined in the same



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

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

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

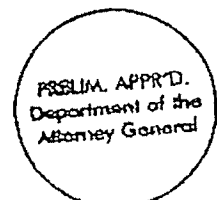
Schedule D attached provides a typical example of the evaluation calculations using Schedule A to calculate the replacement cost for improvements or renovations and depreciation, Schedule B to calculate the cost and depreciation for trade fixtures, and Schedule C to obtain the premium percentage.

7. Non-qualifying Deductions.

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

8. Subsequent Assignments.

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



Using Schedule E, the consideration the assignor paid less included inventory and any premiums will be used to obtain the adjusted depreciated cost of improvements and trade fixtures. Also, the Base Year is redefined to be the date the assignor received the Consent of the Board to occupy the premises. The holding period (redefined Base Year to assignment date), or actual occupancy of the assignor, is used in place of the "expired term" when calculating depreciation. Depreciation will be calculated by dividing the holding period by the whole term of the lease (The whole term will remain unchanged).

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

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

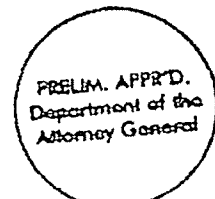
The excess of subtracting the adjusted depreciated consideration the assignor paid and the adjusted depreciated cost of additional improvements, if any, from the consideration the assignor received will be used against the appropriate premium percentage to determine the amount payable to the state.

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

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

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

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



SCHEDULE A.      Adjusted Depreciated Cost of Improvements or Renovations

1.    Adjusted Cost of Improvements or Renovations.

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

2.    Depreciation

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

3.    Depreciated Cost of Improvements or Renovations

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

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

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

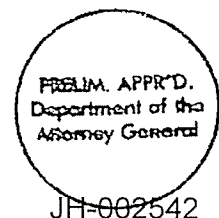
$$\text{Actual Cost} \times \frac{\text{CCI (most recent)}}{\text{CCI (base year)}}$$

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

2.    Depreciation

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

3.    Adjusted Depreciated Cost of Improvements or Renovations



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

SCHEDULE B. Adjusted Depreciated Cost of Trade Fixtures

1. Adjusted Cost of Trade Fixture.

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

2. Depreciation.

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

3. Depreciated Cost of Trade Fixtures.

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

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

Refrigerator

<u>Example</u>	Actual cost:	\$1,510
	CPI (most recent):	118.1
	CPI (base year):	104.6
1. Adjusted Cost of Trade Fixture	Expired term:	57 mos.
	Whole term:	96 mos.
	(Anticipated life)	

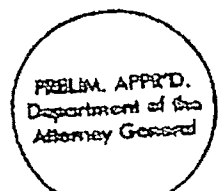
$$\text{Actual Cost} \times \frac{\text{CPI (most recent)}}{\text{CPI (base year)}}$$

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

2. Depreciation

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

3. Adjusted Depreciated Cost of Trade Fixture



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

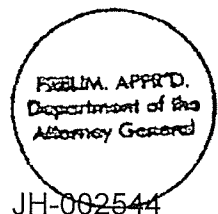
SCHEDULE C. Premium Percentages

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

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

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

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



SCHEDULE D. Assignment of Lease Calculations

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

Example

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

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

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

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



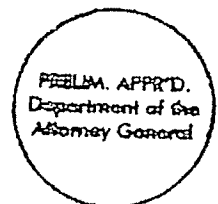
SCHEDULE E. Subsequent Assignment of Lease Calculations

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

Example

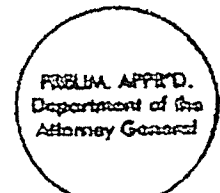
An assignor is assigning a lease 107 months after receiving the consent of the Board. Occupancy or the holding period is defined to be 107 months. The consideration received is \$1,000,000.

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



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

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



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

Pacific Guardian Center, Makai Tower • 733 Bishop Street, Suite 1900 • Honolulu, Hawaii 96813  
2103100 Telephone: (808) 537-6100 • Fax: (808) 537-5434 • Web: www.starnlaw.com

EX 2

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.<sup>1</sup> 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.

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<sup>1</sup> 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 Estimate<sup>2</sup>**

<b>Item</b>	<b>Basis for Damages</b>	<b>Total</b>
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
<b>TOTAL</b>		<b>\$415,505</b>

**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.

<sup>2</sup> 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.<sup>3</sup>

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.

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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.

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<sup>3</sup> 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.

Mr. William J. Wynhoff  
Dept. of the Attorney General  
August 21, 2019  
Page 8 of 8

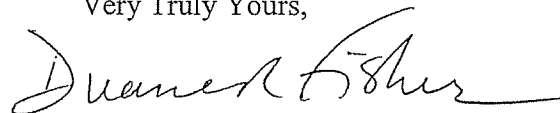
Pacific Marine requests that BLNR approve the environmental remediation claims identified in the Environmental Issues Letter and agree to reimburse Pacific Marine for the costs to complete the environmental remediation. Pacific Marine has consistently asserted that it will not be liable for pre-existing 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.



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OUR REFERENCE NO.:  
069882-1

February 20, 2019

## VIA E-MAIL

William J. Wynhoff  
Department of the Attorney General  
Land Transportation Division  
425 Queen St.  
Honolulu, HI 96813

Re: Environmental Remediation of Honokau Harbor, Kailua-Kona, Hawai'i  
TMK No. (3) 7-4-008:003 (Portion)

Dear Bill:

This letter follows up on our discussions regarding environmental issues at the Pacific Marine Partners, LLC d/b/a Honokohau Marine Storage ("Pacific Marine") site at Honokau Harbor, 74-429 Kealakehe Parkway, Kailua-Kona, Hawaii, located on a 9-acre portion of the parcel designated by TMK No. (3) 7-4-008:003 (the "Property"). We have been retained by Pacific Marine for the purpose of coordinating the work pertaining to the Property by environmental consultants separately hired by Pacific Marine to (1) conduct a Phase I environmental site investigation, (2) prepare aerial photographic documentation of the condition of the Property and (3) prepare a cost estimate for remediating "recognized environmental conditions" ("RECs") identified in the Phase I report. In addition, we have briefly analyzed the certain environmental laws implicated by each REC.

## I. Background

Pacific Marine currently leases the Property from the State of Hawai'i, Board of Land and Natural Resources ("BLNR") pursuant to Boating Lease No. LH-19-002 ("Lease") for the operation of a boat/trailer storage facility and vehicle parking purposes. Among other things, the Lease requires Pacific Marine to comply with all applicable federal, state, and county environmental impact regulations (collectively, "Environmental Laws").

It is our understanding that at the time Pacific Marine and the BLNR entered into the Lease, the parties were generally aware that the Property contained numerous preexisting environmental / contamination / hazardous materials / environmental conditions (collectively "Preexisting Conditions") that needed to be addressed in order to bring the Property into

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EXHIBIT B

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 .

- Apparent abandoned or derelict vessels and trailers, some with highly weathered exteriors that have resulted in releases of paints, metals, and other debris to the ground surface.
- An adjacent property to the west with numerous commercial businesses and activities, septic systems, and above ground and underground fuel storage tanks.

In connection with the foregoing observations, ESI considers the following issues to be RECs:

- The undocumented waste water system at the Hot Spot fabrication shop;
- Uncontrolled dumping;
- Collection of otherwise *de minimis* release of oil, paint, or other hazardous substances, solid wastes; and
- Abandoned or derelict vessels.

In addition, the accumulation of contamination on the surface soil due to historical use of the Property for, *inter alia*, storage, repair, and alteration of vessels since around 1983 is considered a REC.

#### Applicable Environmental Laws

The RECs identified in the Report trigger certain statutory and regulatory regimes, including, but not limited to, the following:

- A. Undocumented waste water system at the Hot Spot fabrication shop
  1. Hawai'i Clean Water Act (HRS Chapter 342D) - Individual Wastewater Systems

The permit requirements for individual wastewater systems ("IWS") are set forth in HAR Chapter 11-62, which was promulgated pursuant to the Department of Health's authority under, *inter alia*, Chapter 342D to regulate discharges of water pollution. HAR Chapter 11-62 requires the owner to apply for a permit, and defines an "owner" as the person who has legal title to the individual wastewater system, or a duly authorized representative of that owner.<sup>1</sup> HAR Chapter 11-62 also prohibits any "person" from using any IWS, including a cesspool or septic system, without written authorization from the director of the Hawaii Department of Health ("DOH").<sup>2</sup>

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<sup>1</sup> HAR § 11-62-03. Note that under the terms of Lease ownership of all improvements located on the land prior to or on the commencement date of the lease is reserved to the Lessor.

<sup>2</sup> HAR 11-62.31.1(f).

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.<sup>3</sup>

## 2. Federal Safe Drinking Water Act

The Federal Safe Drinking Water Act ("SDWA")<sup>4</sup> 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.<sup>5</sup>

LCCs include cesspools at commercial business facilities that have the capacity to serve more than 19 people a day<sup>6</sup>. 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.<sup>7</sup> These fines are in addition to the requirement for compliance (i.e., the cost of closure of the LCC).<sup>8</sup>

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 Law<sup>9</sup> (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

<sup>3</sup> HRS § 342D-30.

<sup>4</sup> See 42 U.S.C.A. §§ 300f to 300j.

<sup>5</sup> See 40 CFR § 144.88.

<sup>6</sup> 40 CFR § 144.81(2).

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

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

<sup>9</sup> 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,<sup>10</sup> operation of an unpermitted solid waste management system,<sup>11</sup> and / or improper disposal of solid waste.<sup>12</sup>

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

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<sup>10</sup> "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.

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

<sup>12</sup> "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")<sup>13</sup> was enacted to restore and maintain the integrity of the waters of the United States.<sup>14</sup> 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,<sup>15</sup> 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.<sup>16</sup>

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."<sup>17</sup> 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:<sup>18</sup>

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,

<sup>13</sup> 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.

<sup>14</sup> See 33 U.S.C. § 1251.

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

<sup>16</sup> 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").

<sup>17</sup> 40 CFR § 122.26.

<sup>18</sup> [https://www.osha.gov/pls/imis/sic\\_manual.display?id=921&tab=description](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"<sup>19</sup> 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 to \$25,000/day.<sup>20</sup>

**III. Cost Estimate for Remediation**

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

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<sup>19</sup> 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).

<sup>20</sup> 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 <sup>21</sup>
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.<sup>22</sup>

B. Other Environmental Conditions

The following are estimates for the cost<sup>23</sup> 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

<sup>21</sup> Abandoned or derelict vessel cost estimates provided by PENCO.

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

<sup>23</sup> 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
<b>Totals</b>	<b>\$1,104,000</b>	<b>\$4,059,000</b>	<b>\$2,591,500</b>

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 B

1003 Bishop Street, Suite 2300

Honolulu, HI 96813

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*A Law Corporation*

**Bronster Fujichaku Robbins**

ATTORNEYS AT LAW

May 19, 2020

**Via E-Mail: [bill.j.wynhoff@hawaii.gov]**

Bill J. Wynhoff, Esq.  
Department of Attorney General  
465 S. King Street, Suite 300  
Honolulu, HI 96813

Re: Honokohau Small Boat Harbor  
LH-19-002  
Pacific Marine Partners LLC  
Notice of Default Dated April 14, 2020

Dear Bill:

This responds to the Notice of Default dated April 14, 2020 and in furtherance of the discussions that Board of Land and Natural Resources ("BLNR") has had with Pacific Marine Partners LLC ("PMP") regarding Boating Lease No. LH-19-002 ("Lease") related the Honokohau Small Boat Harbor, including the August 21, 2019 and February 20, 2019 letters from PMP's former counsel. This letter is subject to Hawaii Rules of Evidence Rule 408.

As a preliminary matter, PMP must inform BLNR that the economic conditions related to PMP's operations at the Honokohau Small Boat Harbor have been drastically affected by the Covid-19 pandemic. In a typical month, PMP receives approximately \$42,000 in income from its tenants. However, in March and April, PMP collected a total of \$24,019. Many of PMP's customers have been closed for business since the issuance of the Governor's emergency proclamations. Accordingly, with this background, PMP hopes that BLNR can appreciate the economic conditions along with the issues at the start of PMP's possession of the Lease have made it significantly difficult for PMP to become current on its obligations under Lease.

EX 3  
**EXHIBIT B**

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After PMP took possession of the Premises on November 1, 2018, PMP discovered significant issues with the Premises, as more fully set forth below and previously detailed in letters from PMP's former counsel<sup>1</sup>. These issues impacted PMP from the on-set of the Lease and as result PMP has incurred and will incur substantial costs to restore the Premises to allow PMP full use and enjoyment of the Premises.

Additionally, after PMP took possession of the Premises, it discovered that there are significant environmental issues present on the Premises which need to be address. PMP is willing to undertake the remediation of these pre-existing environmental issues in exchange for agreement by BLNR to reimburse or otherwise compensate PMP.

PMP is still optimistic that with the assistance of BLNR that PMP will be able to fulfill its obligations under the Lease and continue to make the relationship a positive win-win for both parties. Accordingly, PMP requests that BLNR approve: (1) rate abatement in the maximum amount permitted by law and (2) credit for environmental remediations which PMP is willing to undertake.

## **I. Relevant Background**

As you are aware, PMP is the current leasee of the Honokohau Small Boat Harbor located in North Kona, identified by Tax Map Key No. (3) 7-4-008-003 (portion) ("Premises") pursuant to the Lease, which is dated September 10, 2018.

On or about June 1, 2018, a Notice of Public Auction ("Notice") for the lease of the Honokohau Small Boat Harbor was published in the Star Advertiser. The Notice described the Premises as "containing approximately 392,040 square feet of unimproved graded-gravel land, fenced with chain link fencing".

PMP was not allowed to conduct a proper due diligence inspection of the Premises prior to submitting its bid on the Lease pursuant to the Notice of Public Auction. Instead, PMP could only observe the condition of the Premises from outside of the perimeter chain-link fence. It is PMP's understanding that

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<sup>1</sup> August 21, 2019 letter from Dwayne Fisher and February 20, 2019 letter from Ian Sandison, which are incorporated by reference.

DLNR had the right under the prior lease with Gentry Kona Marine (“GKM”) to allow for inspection by prospective bidders as PMP but that DLNR did not exercise that option.

Further, PMP requested that it be allowed to conduct a Phase 1 environmental study of the Premises prior to submission of its Bid. However, DLNR did not allow PMP to do so until after execution of the Lease. After execution of the Lease, PMP, with the consent of DLNR, conducted a Phase 1 study. The Phase 1 study identified numerous pre-existing conditions that need to be remediated. See February 20, 2019 letter from Ian Sandison.

## **II. Request for Rent Abatement Under HRS § 171-6(7)**

PMP respectfully requests that BLNR authorize rent abatement pursuant to HRS § 171-6(7) for one year of lease payment, or \$387,000 for substantial improvements that PMP has and will have to do restore the Premises to the advertised and usable condition to afford PMP full use and enjoyment of the Premises.

The basis of PMP’s request, as previously set forth, and summarized below is due to the Premises not being delivered to PMP in the condition that was advertised in the Notice and the damage that was apparently done by the prior leasee which have impacted PMP’s ability to operate the Premises as intended under the Lease.

It is worth mentioning that PMP has, in the hopes of reaching an amicable resolution, acted in good faith and undertaken many actions to further goodwill between the parties.

(1) Property Damage: As set forth in the August 21, 2019 letter from Mr. Duane Fisher, the total amount that PMP is seeking for Property damage is **\$214,225<sup>2</sup>**.

It appears that GKM caused significant damage to the Premises before vacating, including disconnecting utility services, damaging utility lines and taking out the motorized security gate. Additionally, it was discovered that significant portions of the perimeter fencing were missing. In sum, the

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<sup>2</sup>The totals are based on actual costs and estimated costs from bids and proposals.

Premises was materially different than what PMP had observed prior to submitting its Bid.

The majority of this Property Damage amount is related to the perimeter fencing. As set forth in the Notice, PMP expected that there would be perimeter fencing around the entire Premises. A perimeter fence is a must for small boat harbor such as the Honokohau Small Boat Harbor because it is a necessary security measure and vital to retaining customers to prevent thieves and vandals from accessing customers boats and vessels.

The remainder of the Property Damage claim relates to PMP's creative solutions to resolve the unusable conditions of the Premises upon turnover should be commended and reimbursed by way of rent abatement. As noted above, the Premises had no electricity at takeover and so PMP bought a generator for interim use and then installed a solar power system. PMP had to hire security while a new security gate was installed.

(2) Derelict vessels. Most of the approximately 24 derelict vessels that were left in the Premises by the former leasee have been removed. However, PMP was unable to rent out those spaces occupied by the derelict vessels and accordingly, PMP estimates the damage at **\$66,280**.

(3) Solid Wastes. Again, due to the condition that the former leasee left the Premises, including mountains of solid wastes (metal, equipment, debris), PMP was unable to lease out approximately 9 boat stalls. BLNR has cleared most of the solid waste. Accordingly, PMP estimates the damage at **\$20,280**.

(4) Hotspots. At the time of PMP's possession of the Premises, it was discovered that the former leasee had improperly sublet a portion of the Premises to Hotspots Welding and Fabrication LLC. Initially, Hotspots refused to vacate the Premises. As a result, PMP incurred significant attorneys' fees dealing with Hotspots. PMP was also damaged by not being able to use the approximately 7,000 square feet of space that Hotspots was occupying.

However, due to efforts by PMP, in approximately December of 2019, Hotspots vacated the Premises. However, Hotspots also left the Premises full of debris and waste, which PMP has incurred costs to clear out. Unfortunately, due to its efforts to remove Hotspots, PMP has been named in a lawsuit by one of the former members of Hotspots. The lawsuit is ongoing and PMP is incurring attorneys' fees and costs in defending against the baseless lawsuit.



PMP is therefore requesting damages in the amount of **\$88,500**, which includes not being able to use the space in the Premises occupied by Hotspots for over a year, cleanup of Hotspots' space, and attorneys' fees it has incurred in its effort to remove Hotspots.

(5) No Grading. As previously pointed out, the Notice described the Premises as being "graded-gravel land". Some significant portions of the Premises is not graded and PMP has estimated the cost of grading and leveling the land at approximately **\$58,720**.

The total cost related to restoring the Premises to the advertised condition to allow PMP full use and enjoyment of the Premises as under the Lease is estimated at **\$448,005**. Accordingly, PMP requests that BLNR approve rent abatement under HRS § 171-6(7) for one full year or **\$423,000**.

PMP proposes that the rent abatement be applied as follows: (1) applied towards the outstanding lease payment, which PMP understands to be approximately \$148,000, and (2) the remaining amount prorated over the next twelve months to reduce the monthly lease payment owed to BLNR.

### **III. Environmental Remediation**

The total estimated costs for investigation and remediation of the remaining pre-existing conditions on the Premises ranges between \$474,000 and \$1,864,000 related but not limited to: Hotspots' septic tank/cesspool (closure and installation of new septic system), Hotspots' hazardous waste disposal, Premise-wide investigation, perimeter berms investigation and cleanup, and Premise-wide soil investigation. As previously set forth, PMP has consistently asserted that it will not be liable for pre-existing environmental conditions and that PMP will not bear the costs of remediation of such conditions.

PMP is willing to discuss creative approaches to resolving the remediation of the pre-existing conditions, including receiving Lease rent credit from BLNR in exchange for PMP agreeing to remediate some or all of the pre-existing environmental conditions.

William J. Wynhoff  
May 19, 2020  
Page 6

#### **IV. Conclusion**

PMP appreciates the opportunity to continue the dialogue to resolve these outstanding issues and further the relationship with BLNR at the Honokohau Small Boat Harbor. For the above stated reasons, and as previously discussed and presented, PMP requests (1) rent abatement for one year's rent under the Lease pursuant to HRS § 171-6(7) and (2) reimburse PMP for environmental remediation. We are available at your earliest convenience to hopefully bring this matter to a close.

Very truly yours,

*/s/ Sunny S. Lee*

Sunny S. Lee  
Matthew Terry

SETTLEMENT AGREEMENT

This Settlement Agreement (“Agreement”), effective July 31, 2020, is made and entered into by and between the STATE OF HAWAI‘I (including its divisions, departments, officials, agents, employees, and insurers) (“State”), and PACIFIC MARINE PARTNERS LLC, a Hawai‘i limited liability company (“PMP”) and INTERNATIONAL AND PACIFIC ENTERPRISES, LLC, JONAS SOLLIDAY, and JASON HOOPAI (collectively “Releasing Parties”). PMP and the State are referred to herein as the “Parties.”

RECITALS

Whereas, on September 10, 2018, the State, as Lessor, through its Board of Land and Natural Resources, entered into Boating Lease No. LH-19-002 with PMP as Lessee, for the lease of 9.00 acres of State-owned land (the “Premises”) at Kealakehe, North Kona, Island of Hawai‘i (the “Lease”); and

WHEREAS, there was and is a dispute between the Parties as to the condition of the Premises and the Parties’ respective rights and duties with respect to the condition of the Premises; and

WHEREAS, PMP obtained a Phase I Environmental Site Assessment of the Premises prepared by Environmental Science International and dated February 20, 2019 (“Phase I Report”) that identified certain recognized environmental conditions; and

WHEREAS, the recognized environmental conditions described by ESI in the Phase I Report included (1) the “apparently undocumented waste water system at the Hot Spot fabrication shop”; (2) the “uncontrolled dumping of waste 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 Premises; (3) “a collection of otherwise de minimis release of oil, paint, or other hazardous substances, solid wastes and abandoned or derelict vessels”; and

WHEREAS, additional disputes include, but are not limited to, the infrastructure that was or should have been delivered with the Premises, the number and nature of vessels on the Premises at the time PMP took possession and which of those vessels were paying rent, occupancy of a portion of the property by Hotspots Welding and Fabrication Limited Liability Company (“Hot Spots”) and any materials or structures left on the Premises by Hot Spots, and utilities provided to or accessible by the Premises; and

WHEREAS, the next payment due on the Lease is due and payable on August 1, 2020; and

WHEREAS, on or about April 14, 2020, the Board of Land and Natural Resources (“Board”) sent a notice of default to PMP for failing to pay rent due under the Lease (“April 14, 2020 Notice of Default”); and

WHEREAS, on or about May 5, 2020, the Board sent a notice of default to PMP citing three bases (1) failure to provide financial statements pursuant to Paragraph A.ii of the Lease, (2) constructing an improvement without prior written approval of the Board, and (3) failing to provide a surety bond pursuant to Paragraph 18 of the Lease (“May 5, 2020 Notice of Default”); and

WHEREAS on May 22, 2020, the Board voted to terminate the Lease based on the April 14, 2020 Notice of Default; and

WHEREAS, on June 1, 2020, PMP filed a Petition for Contested Case Hearing related to the May 22, 2020 decision by the Board to terminate the Lease; and

WHEREAS, after May 22, 2020, PMP made substantial payments with respect to the Lease; and

WHEREAS the outstanding balance of rent under the Lease is \$58,641.66 as of the date hereof; and

WHEREAS, the State and PMP desire to fully, finally, and completely resolve, release, discharge, terminate, settle, compromise, and reach a settlement of all claims relating to disputes as to the Lease and the Premises;

NOW, THEREFORE, in mutual consideration of the terms, covenants, and conditions of this Agreement, the Parties hereby agree as follows:

I. PROMISES AND COVENANTS

1. Settlement Amount. The State agrees to pay to PMP the sum of FOUR HUNDRED TWENTY-THREE THOUSAND DOLLARS AND ZERO CENTS (\$423,000) in full satisfaction of all claims asserted by PMP in connection with the Lease and the Premises (“Settlement Amount”) except as otherwise specifically stated herein. Payment of this Settlement Amount will be made only as set forth in Paragraphs 2 and 3 below.

2. Payment of Settlement Amount – Immediate Credit. PMP shall immediately upon execution of this Agreement receive a rent credit in the amount of \$58,641.66 which is the outstanding rent under the Lease as of the date hereof.

3. Payment of Settlement Amount – Future Credits Starting on August 1, 2020, PMP will make a monthly rent payment of \$17,000 plus any and all additional amounts as may be due by way of percentage rent. This amount is referred to herein as “Monthly Settlement Rent Payable.” The difference between the Monthly Settlement Rent Payable and the amount otherwise owed under the Lease is \$18,250 per month. This difference shall be credited against the Settlement Amount as and upon payment of the Monthly Settlement Rent Payable. PMP will continue to make payments in the amount of the Monthly Settlement Rent Payable on the first calendar day of each month until the balance of the Settlement Amount is exhausted. PMP will continue to comply with all terms of the Lease, except as set forth herein.

After the Settlement Amount is paid or credited as specified herein, PMP shall resume making full monthly payments pursuant to the terms of the Lease.

4. No Direct Payment of Settlement Amount. Rent credits as described above are and shall be the only way that the State makes payment of the Settlement Amount. Under no circumstances shall the State make or be required to make any cash payment of the Settlement Amount. In particular but without limitation, if PMP fails to make any or all of the payments in the amount of the Monthly Settlement Rent Payable, then the State will not be liable for the State's payment of Settlement Amount that month. If the lease is terminated for any reason before the State makes payment in full of the Settlement Amount, the State shall not be liable for any remaining unpaid portion of the Settlement Amount.

5. Lease Shall Remain in Force and Effect. The Parties agree that the Lease shall remain in full force and effect, but for the Parties' compromise as set forth in this Agreement. This Agreement is a compromise of disputed claims and the Parties agree it is not a reformation or modification of the Lease.

6. Wastewater System. The State shall be solely responsible for the closure of the undocumented waste water system at the Hot Spot fabrication shop. The State will work cooperatively with PMP to minimize impact on PMP's operations during the closure of the undocumented waste water system. The State shall return the area surrounding the undocumented waste water system back to similar or like condition before closure. The State will not be liable for any damage or loss to existing structures that may be required in order to accomplish closure. Installation of any new or replacement systems shall be PMP's sole responsibility and cost and will comply with all Lease requirements and all relevant laws, rules and regulations.

7. Waste Removal. The Parties agree that all “waste or waste-like materials” and all “solid wastes and abandoned or derelict vessels” described in the Phase I Report were removed from the Premises as of the date of this Agreement. Any additional or different waste or waste-like materials are PMP’s responsibility.

8. Environmental Issues. As set forth in the Phase I Report, the then- existing conditions of the Premises that were identified included: (a) removal and disposal of those derelict vessels at the time of the Lease, (b) undocumented Hot Spots septic tank/cesspool, (c) the possible need to obtain a NPDES Permit and/or Water Pollution Control Plan, (d) remediation of any impacted soil throughout the Premises, (e) disposal of solid wastes at the Hot Spots fabrication shop, and (f) investigation and possible remediation of the perimeter berms. The Parties agree that the State has removed all but one of the derelict vessels and some of the solid waste on the Premises at the beginning of the Lease. The Parties specifically agree and understand that the State is not going to do any other investigation, removal, or remediation of any kind on the Premises other than as set forth in paragraph 6 above. The Phase I Report is the baseline. Anything beyond the Phase I Report is PMP’s responsibility.

9. Notices of Default. The Parties agree that the April 12, 2020 Notice of Default and the May 5, 2020 Notice of Default and the Board’s decision to terminate the Lease are rescinded and that the State will take no further action to terminate the Lease based on these notices. Specifically, the State agrees that as of the date of this Agreement that it has received all financial statements as required by Paragraph A.ii of the Lease. Further, the State agrees that the current mobile container which has been used to facilitate PMP’s operations is not a violation of the Lease. The State reserves the right to pursue any future defaults.

10. Contested Case. PMP's and Jonah Solliday's petitions for Contested Case Hearing have been denied. PMP and Mr. Solliday will take no further action as to those petitions.

11. Release. In exchange for the good and valuable consideration described herein, PMP and Releasing Parties do hereby fully and finally release, acquit, and forever discharge the State (including its divisions, departments, officials, agents, employees, and insurers) from and against any and all claims regarding the Premises whether described above or not, and whether known or not, as of the date of this Agreement ("Released Claims"). This release survives the termination of the Lease for any reason.

12. Covenant Not to Sue. PMP and Releasing Parties agree that they will forever refrain and forbear from commencing or instituting any lawsuit or other proceeding or making any claim against the State based upon the Released Claims. This covenant does not cover or affect claims as may arise from failure to perform the obligations contained in this Agreement. This agreement in no way affects PMP's obligations to comply with applicable laws or comply with the Lease other than as specifically stated herein. This covenant survives the termination of the Lease for any reason.

## II. OTHER

1. No Representations. PMP and Releasing Parties admit that no statement of fact or opinion has been made by the State or by anyone acting on behalf of State to induce execution of this Agreement, other than as expressly set forth in this Agreement, and that this Agreement is executed freely by PMP and Releasing Parties upon advice of counsel.

2. Captions or Headings. In this Agreement, the captions or headings of paragraphs are inserted for convenience, reference, and identification purposes only, and shall not control, define, limit, or affect any provisions of this Agreement.



3. Binding on Successors. This Agreement, including the obligations and releases herein contained, shall be binding upon and inure to the benefit of each of the Parties hereto and any successors-in-interest

4. Authority to Execute and Warranties. By signing this Agreement, PMP and Releasing Parties and the State each represents and warrants that they have the authority to execute and bind themselves to the Agreement. PMP warrants that it is the owners of the respective Released Claims, and that it has not assigned, sold, transferred, mortgaged, conveyed, hypothecated, or otherwise disposed of the Released Claims or any of them to anyone.

5. Hawai'i Law. This Agreement is entered into in the State of Hawai'i, and shall be construed and interpreted according to its laws.

6. Amendment. This Agreement shall not be amended except by a written instrument executed and approved by PMP and by the State.

7. Entire Agreement. Except as set forth in the Lease, the Parties have not made any agreement or promise to do or omit to do any act or thing not mentioned in this Agreement. This Agreement contains the entire agreement between and among the Parties with regard to the matters set forth herein. There are no other understandings or agreements, verbal or otherwise, in relation hereto, between the Parties. It is mutually understood that each party fully participated in the drafting of this document and that in no case, including in the case of an ambiguity, should the terms of this Agreement be construed against the drafter because of its status as the drafter.

PACIFIC MARINE PARTNERS LLC

By 

Its: Managing Member.

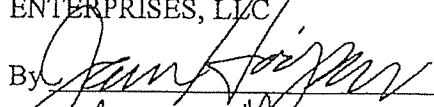
Jason Hoopa

STATE OF HAWAI'I

By \_\_\_\_\_

SUZANNE D. CASE  
Chairperson, Board of Land  
and Natural Resources

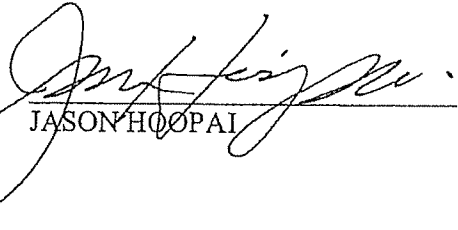
INTERNATIONAL AND PACIFIC  
ENTERPRISES, LLC

By   
Its: Managing Member  
Jason Hoopai

- and -

By \_\_\_\_\_  
CLARE E. CONNORS  
Attorney General of Hawai'i

\_\_\_\_\_  
JONAS SOLLIDAY

  
JASON HOOPAI

Approved as to form:

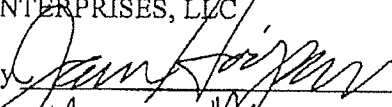
\_\_\_\_\_  
William J. Wynhoff  
Deputy Attorney General

Approved by the Board of Land and  
Natural Resources at its meeting of  
July 24, 2020

INTERNATIONAL AND PACIFIC  
ENTERPRISES, LLC

By

Its

  
Managing Member  
Jason Hoopai

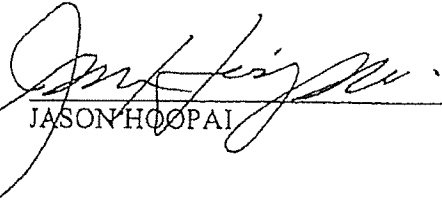
- and -

By


CLARE E. CONNORS

Attorney General of Hawai'i

JONAS SOLLIDAY

  
JASON HOOPAI

Approved as to form:

  
William J. Wynhoff  
Deputy Attorney General

Approved by the Board of Land and  
Natural Resources at its meeting of  
July 24, 2020

3. Binding on Successors. This Agreement, including the obligations and releases herein contained, shall be binding upon and inure to the benefit of each of the Parties hereto and any successors-in-interest

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PACIFIC MARINE PARTNERS LLC

By *Jason Hoopa*

Its: *Managing Member.*

*Jason Hoopa*

STATE OF HAWAI'I

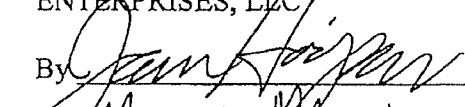
By *Suzanne D. Case*

SUZANNE D. CASE

Chairperson, Board of Land  
and Natural Resources

INTERNATIONAL AND PACIFIC  
ENTERPRISES, LLC

- and -


By 

By \_\_\_\_\_

Its: Managing Member

CLARE E. CONNORS  
Attorney General of Hawai'i

Jason Hoopai

  
JONAS SOLLIDAY - Owner and Managing Member of Pacific Marine Partners, LLC

  
JASON HOOPAI

Approved as to form:

\_\_\_\_\_  
William J. Wynhoff  
Deputy Attorney General

Approved by the Board of Land and  
Natural Resources at its meeting of  
July 24, 2020

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PACIFIC MARINE PARTNERS LLC

By 

Its: Managing Member:

Jason Hoopa

STATE OF HAWAI'I

By \_\_\_\_\_  
SUZANNE D. CASE  
Chairperson, Board of Land  
and Natural Resources

# STARN · O'TOOLE · MARCUS & FISHER

A L A W C O R P O R A T I O N

September 20, 2023

**VIA EMAIL** [dlnr@hawaii.gov](mailto:dlnr@hawaii.gov) and  
[blnr.testimony@hawaii.gov](mailto:blnr.testimony@hawaii.gov)  
Chairperson Dawn N.S. Chang  
Department of Land and Natural Resources  
Kalanimoku Building  
1151 Punchbowl St.  
Honolulu, HI 96813

Aloha Chair Chang,

We are in receipt of DOBOR's September 17, 2023 posted recommendation to the Board regarding Agenda item J-1 (Consent to Assignment of Boating Lease No. LH-19-002 to Jonas Ikaika Solliday) scheduled for the upcoming September 22<sup>nd</sup> Board meeting.

**Additional Requirement of \$845,000 Performance Bond:**

In its recommendation DOBOR continues to include an additional monetary requirement to the routine statutory and lease required conditions for a lease assignment: a performance bond equal to two years minimum rent or a similarly impossible to obtain "irrevocable line of credit". This requirement would add \$845,000 to the monetary requirements for approval of the lease assignment. As previously discussed in my testimony (attached hereto), the matter of the performance bond was settled in the 2020 Settlement Agreement between the Board and Pacific Marine Partners. Inclusion of this additional monetary requirement in violation of the Settlement Agreement is tantamount to a denial of the assignment and cancellation of the Pacific Marine lease.

It is my understanding from DOBOR staff that the Department is not in position to make a determination regarding waiver of the performance bond, but rather that this is the kuleana of the Board. We therefore ask the Board to comply with its 2020 Settlement Agreement and the bond waiver provision in Section 29 of the Lease to waive the bond.

**Lease Extension:**

In its most recent recommendation, DOBOR also inexplicably removes its previous recommendation for a 10-year extension of Pacific Marine's Lease as a part of the assignment. We previously understood and continue to ask that the only remaining issue to be discussed is the setting of a reasonable deadline for the completion of improvements under the extension. Pacific Marine has agreed with DOBOR to limit the Lease extension to 10 years versus the 20 years requested and to increase the leasehold imposed to \$300,000 as DOBOR requested.

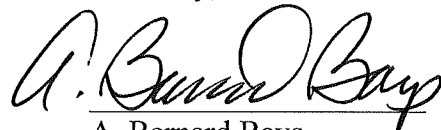
**Fair and Consistent Treatment:**

We are simply asking of the Board to make Pacific Marine's proposed lease terms reasonable, consistent, and fair – namely that the Board waive the performance bond as provided in the Settlement Agreement and Section 29 of the Lease because the Lessee is in substantial compliance.

**Pacific Marine's Request:**

1. That the performance bond be waived, subject to being reimposed in the event of any future substantial non-compliance and,
2. that at least a ten-year extension be granted for the \$300,000 of improvements with a reasonable deadline for completion of the improvements at October 31, 2028, which is the end date of the current lease.

Sincerely,

  
A. Bernard Bays



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, Situated 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](mailto: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.<sup>1</sup>

<sup>1</sup> 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.<sup>2</sup>

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.<sup>3</sup> 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.

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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**.

<sup>2</sup> 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**.

<sup>3</sup> 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;<sup>4</sup>
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.<sup>5</sup> Based on her commitment to fair and consistent treatment of DOBOR lessees, the continued waiver of the performance bond is reasonable and appropriate.

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<sup>4</sup> 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).

<sup>5</sup> 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.<sup>6</sup>

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.<sup>7</sup>

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.<sup>8</sup> Moreover, the Board has on other occasions, for PMP and for other DLNR lessees, waived the payment of a performance bond.<sup>9</sup>

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

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<sup>6</sup> A chart labeled “DOBOR’s Disparate Treatment - Ho‘opai versus Solliday Petitions” (of PMP members’ Petitions for Lease Assignment) is attached as **Exhibit 6**.

<sup>7</sup> A chart comparing the value of GKM’s adjacent DOBOR harbor lease with that of PMP is attached as **Exhibit 7**.

<sup>8</sup> 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”.

<sup>9</sup> 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.

<sup>10</sup> 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)<sup>11</sup> 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.

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– 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**.

<sup>11</sup> 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.<sup>12</sup>

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.<sup>13</sup>

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

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

<sup>13</sup> 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.<sup>14</sup>

#### **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

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<sup>14</sup> 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 (9<sup>th</sup> 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 *defacto* 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 DNLN’s relations to the adjacent DLNR lessee at Honokōhau, Gentries Kona Marina, GKM, Inc. (“*GKM*”), DNLN 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: \_\_\_\_\_



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:

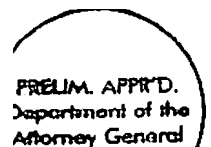
- (1) Modify or eliminate any of the restrictions specified in subsection (a);
- (2) Extend or modify the fixed rental period of the lease; provided that the aggregate of the initial term and any extension granted shall not exceed sixty-five years; or
- (3) Extend the term of the lease, to the extent 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]

August 21, 2019

**VIA U.S. MAIL AND ELECTRONIC MAIL**

Mr. William J. Wynhoff  
Dept. of the Attorney General  
Kekuaanoa 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

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.<sup>1</sup> 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.

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<sup>1</sup> 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 Estimate<sup>2</sup>**

<b>Item</b>	<b>Basis for Damages</b>	<b>Total</b>
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
<b>TOTAL</b>		<b>\$415,505</b>

**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.

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<sup>2</sup> 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.<sup>3</sup>

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.

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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.

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<sup>3</sup> 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.

Mr. William J. Wynhoff  
Dept. of the Attorney General  
August 21, 2019  
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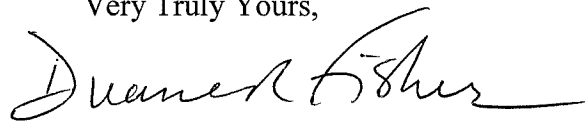
Pacific Marine requests that BLNR approve the environmental remediation claims identified in the Environmental Issues Letter and agree to reimburse Pacific Marine for the costs to complete the environmental remediation. Pacific Marine has consistently asserted that it will not be liable for pre-existing 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.



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OUR REFERENCE NO.:  
069882-1

February 20, 2019

## VIA E-MAIL

William J. Wynhoff  
Department of the Attorney General  
Land Transportation Division  
425 Queen St.  
Honolulu, HI 96813

Re: Environmental Remediation of Honokāu Harbor, Kailua-Kona, Hawai'i  
TMK No. (3) 7-4-008:003 (Portion)

Dear Bill:

This letter follows up on our discussions regarding environmental issues at the Pacific Marine Partners, LLC d/b/a Honokohau Marine Storage ("**Pacific Marine**") site at Honokau Harbor, 74-429 Kealakehe Parkway, Kailua-Kona, Hawaii, located on a 9-acre portion of the parcel designated by TMK No. (3) 7-4-008:003 (the "**Property**"). We have been retained by Pacific Marine for the purpose of coordinating the work pertaining to the Property by environmental consultants separately hired by Pacific Marine to (1) conduct a Phase I environmental site investigation, (2) prepare aerial photographic documentation of the condition of the Property and (3) prepare a cost estimate for remediating "recognized environmental conditions" ("**RECs**") identified in the Phase I report. In addition, we have briefly analyzed the certain environmental laws implicated by each REC.

## **I. Background**

Pacific Marine currently leases the Property from the State of Hawai'i, Board of Land and Natural Resources ("**BLNR**") pursuant to Boating Lease No. LH-19-002 ("**Lease**") for the operation of a boat/trailer storage facility and vehicle parking purposes. Among other things, the Lease requires Pacific Marine to comply with all applicable federal, state, and county environmental impact regulations (collectively, "**Environmental Laws**").

It is our understanding that at the time Pacific Marine and the BLNR entered into the Lease, the parties were generally aware that the Property contained numerous preexisting environmental / contamination / hazardous materials / environmental conditions (collectively "**Preexisting Conditions**") that needed to be addressed in order to bring the Property into

HONOLULU

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EXHIBIT B

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 .

- Apparent abandoned or derelict vessels and trailers, some with highly weathered exteriors that have resulted in releases of paints, metals, and other debris to the ground surface.
- An adjacent property to the west with numerous commercial businesses and activities, septic systems, and above ground and underground fuel storage tanks.

In connection with the foregoing observations, ESI considers the following issues to be RECs:

- The undocumented waste water system at the Hot Spot fabrication shop;
- Uncontrolled dumping;
- Collection of otherwise *de minimis* release of oil, paint, or other hazardous substances, solid wastes; and
- Abandoned or derelict vessels.

In addition, the accumulation of contamination on the surface soil due to historical use of the Property for, *inter alia*, storage, repair, and alteration of vessels since around 1983 is considered a REC.

### **Applicable Environmental Laws**

The RECs identified in the Report trigger certain statutory and regulatory regimes, including, but not limited to, the following:

- A. Undocumented waste water system at the Hot Spot fabrication shop
1. Hawai'i Clean Water Act (HRS Chapter 342D) - Individual Wastewater Systems

The permit requirements for individual wastewater systems (“IWS”) are set forth in HAR Chapter 11-62, which was promulgated pursuant to the Department of Health's authority under, *inter alia*, Chapter 342D to regulate discharges of water pollution. HAR Chapter 11-62 requires the owner to apply for a permit, and defines an “owner” as the person who has legal title to the individual wastewater system, or a duly authorized representative of that owner.<sup>1</sup> HAR Chapter 11-62 also prohibits any “person” from using any IWS, including a cesspool or septic system, without written authorization from the director of the Hawaii Department of Health (“DOH”).<sup>2</sup>

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<sup>1</sup> HAR § 11-62-03. Note that under the terms of Lease ownership of all improvements located on the land prior to or on the commencement date of the lease is reserved to the Lessor.

<sup>2</sup> HAR 11-62.31.1(f).

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.<sup>3</sup>

## 2. Federal Safe Drinking Water Act

The Federal Safe Drinking Water Act ("SDWA")<sup>4</sup> 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.<sup>5</sup>

LCCs include cesspools at commercial business facilities that have the capacity to serve more than 19 people a day<sup>6</sup>. 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.<sup>7</sup> These fines are in addition to the requirement for compliance (i.e., the cost of closure of the LCC).<sup>8</sup>

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 Law<sup>9</sup> (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

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<sup>3</sup> HRS § 342D-30.

<sup>4</sup> See 42 U.S.C.A. §§ 300f to 300j.

<sup>5</sup> See 40 CFR § 144.88.

<sup>6</sup> 40 CFR § 144.81(2).

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

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

<sup>9</sup> 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,<sup>10</sup> operation of an unpermitted solid waste management system,<sup>11</sup> and / or improper disposal of solid waste.<sup>12</sup>

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

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<sup>10</sup> "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.

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

<sup>12</sup> "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")<sup>13</sup> was enacted to restore and maintain the integrity of the waters of the United States.<sup>14</sup> 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,<sup>15</sup> 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.<sup>16</sup>

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."<sup>17</sup> 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:<sup>18</sup>

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,

<sup>13</sup> 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.

<sup>14</sup> See 33 U.S.C. § 1251.

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

<sup>16</sup> 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").

<sup>17</sup> 40 CFR § 122.26.

<sup>18</sup> [https://www.osha.gov/pls/imis/sic\\_manual.display?id=921&tab=description](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"<sup>19</sup> 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.<sup>20</sup>

**III. Cost Estimate for Remediation**

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

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<sup>19</sup> 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).

<sup>20</sup> 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.

	<b>Estimated Cost<sup>21</sup></b>
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.<sup>22</sup>

B. Other Environmental Conditions

The following are estimates for the cost<sup>23</sup> to investigate and remediate the other ECs identified in the Report.

	<b>Low Range</b>	<b>High Range</b>	<b>Average</b>
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

<sup>21</sup> Abandoned or derelict vessel cost estimates provided by PENCO.

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

<sup>23</sup> 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
<b>Totals</b>	<b>\$1,104,000</b>	<b>\$4,059,000</b>	<b>\$2,591,500</b>

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	<b>1 week</b>
June 22, 2022	Solliday submitted Petition for Lease Assignment to DOBOR	Aug. 18, 2023	DOBOR issued recommendation to the Board	<b>62 weeks</b>

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

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

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

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

# EXHIBIT 7

## CHART:

“Value Comparison of GKM and  
PMP Harbor Leases”

# VALUE COMPARISON OF GKM AND PMP HARBOR LEASES

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



# EXHIBIT 8

## CHART:

“Unfair Imposition of Performance Bond in  
2023”

## UNFAIR IMPOSITION OF PERFORMANCE BOND IN 2023

<b>Times when reasonable to impose/require substantial performance bond</b>			
Timeline Marker	Time period	Event	Performance Bond
<b>2017/2018</b>	Dec. 2017 June 2018	When PMP's proposed bid was discussed with DOBOR staff prior to July 2018 auction.	<b>NOT</b> discussed that payment would be required
	July 13 2018	Around the time of the lease public auction	Payment <b>NOT</b> required
	Sept. 4 2018	At or prior to the signing of PMP's lease.	Payment <b>NOT</b> required
	Sept.19 2018	The date payment of the Bond was required (within 15 days of signing lease)	Payment <b>NOT</b> required
	Nov. 1 2018	When payment of the security fee of \$73,000 required (equal to 2 month's rent).	Payment <b>NOT</b> required
	Nov. 1 2018	Prior to PMP taking possession of the leased premises (and thereafter taking out significant loans to improve the premises).	Payment <b>NOT</b> required
<b>2019</b>	Oct .25 2019	When DOBOR's recommended approval of Jason Ho'opai's petition to assign PMP's lease to himself personally.	Payment <b>NOT</b> required
<b>2020</b>	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 <b>NOT</b> required
<b>through 2021- 23</b>	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 <b>NOT</b> required
<b>Unreasonable time to require performance bond</b>			
Timeline Marker	Time period	Event	Bond imposed/demanded
<b>2023</b>	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	<b>Bond demanded as condition to Board approval of lease transfer (\$846,000)</b>

## 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)**

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

# EXHIBIT 11

CHART:

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

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

<b>Substantial Improvements</b>	<b>Vendor / Contractor</b>	<b>Estimated Cost</b>	<b>Estimated Completion Date</b>
<b>GRUB AND GRADE:</b> 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	<b>\$71,204.16</b>	December 31, 2028
<b>STALL DIVIDERS:</b> 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	<b>\$5,242.00</b>	December 31, 2028
<b>GATE:</b> Replace existing front electric gate, motor and guide	Vogt Welding & Gate	<b>\$29,190</b>	December 31, 2028
<b>RESTROOM:</b> 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.	<b>\$18,238.74</b>	December 31, 2028
<b>DISPOSAL:</b> 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	<b>\$20,000</b>	December 31, 2028



<b>FENCING:</b> 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	<b>\$89,332.78</b>	December 31, 2028
<b>POWER:</b> 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.	<b>\$26,065.00</b>	December 31, 2028
<b>WATER:</b> Tap into the county water main on Kealakehe Parkway; PMP will arrange for offsite and onsite installation	Plumbing Strategies Inc. Kona	<b>\$8,587.04</b>	December 31, 2028
<b>INTERNET:</b> Install broad internet satellite services.	Starlink Satellite Internet	<b>\$705.76</b>	December 31, 2023
<b>LANDSCAPING:</b> Install low maintenance landscaping and sidewalks near office and patio area for customers.	Pacific Marine Partners, LLC, 'Ili Kūpono Gardens Nursery & Farm	<b>\$9000.00</b>	December 31, 2028
<b>GRAVEL:</b> Spread 300 tons of base course gravel throughout the boatyard to fill in potholes and low areas.	West Hawaii Concrete	<b>\$10,532.37</b>	December 31, 2028
<b>SOLAR LIGHTING:</b> Install 10 solar street lights in the rear portion of the boatyard.	Pacific Pipe Kona, West Hawaii Concrete, Werise Solar Lights.	<b>\$6,542.40</b>	December 31, 2028
<b><u>Total Estimated Cost</u></b>		<b>\$294,640.25</b>	

Subject: Testimony for the BLNR meeting to be held September 22, 2023

RE: J- Informational Briefing on DOBOR's Non-Profit Rent Policy for 501(c)(1) and 501(c)(3) Organizations.

Submitted by: Kate Thompson, a founding member of Kama'aina Boaters.

**Dear Dawn Chang, Chair for the Board of Land and Natural Resources and Board Members:**

**We appreciate the Board Members efforts to increase Public Involvement for both Informational Briefings and opportunities for the public to make written and verbal testimony on topics such as Revocable Permits, and Long term Leases.** Board Members are often presented with submittals that are expected to be voted on that day. Board members might consider 'postponing' their discussion and decision making until certain information, or relevant stakeholders are present, or at a minimum, presented written testimony.

On July 14th, 2023 Board members may have benefited from having more information in the J-4 item regarding the Lahaina Harbor Maui Propark company revocable permit was affected by Covid-19 in 2020. Board members asked if the Propark company had been invited to the July 14th meeting to the BLNR meeting. The answer from DOBOR administrators was , "Yes, I think they were invited." Yet, no such documented communication was presented by DOBOR to the BLNR members. The board could have 'postponed' and required the Company's statement, or presence of a company representative at the Board meeting (physically, or on zoom) before making a Board decision. Earlier in the year, a decision was made about Surf Schools request to increase permits, and half-day permits, yet there was no presenter at the meeting, in person or on zoom, therefore the Board made a decision based solely on DOBOR recommendations. Non-Profit and 'low profit' surf and sailing schools are often run by volunteers and might need written invitations, or social media announcements, from DOBOR to learn about the BLNR meetings and participate.

**How was today's informational session advertised?**

Board Members, please ask DOBOR administrators how they informed (or didn't inform) the public about today's informational session about the use of State owned public lands by Non-profit groups. Would members of the public need to research BLNR agendas on a regular basis to learn about this presentation?

This informational session today, being presented by DOBOR Administrators to Members of the Board of Land and Natural Resources, could have been made public with the 'DOBOR Alert' system.

DOBOR Email alerts are sent to people who sign up to get email updates. These updates include emergency notices and also more routine communication such as boat auctions, reduced office hours due to computer outages, or holiday scheduling.

The people who sign up for DOBOR Alerts are mostly boaters and people who use State lands for outrigger canoe paddling and other water sports. The public would probably like to listen to this presentation but probably not going to be listening to today's presentation, on zoom or in person, because they do not know about the presentation. There has been no targeted advertising for it and it is difficult for the public to monitor every meeting of the Board, City Council and Legislative session regarding DLNR or DOBOR topics.

Can the video of today's presentation be posted on the DOBOR website? The Outrigger Canoe teams with canoes on State owned beach land and Youth Sailing programs throughout the State will be interested in viewing this presentation by DOBOR staff.

### **Can a Non-Profit group collect money as long as it is re-invested?**

Board Members, please ask DOBOR administrators if a non-profit group could run a parking lot. In 2008, for the *Ala Wai Small Boat Harbor*, a State funded third party mediation group managed the negotiations in which the 549 free Public Parking stalls were reduced by 249 stalls leaving 'no less free 300' parking stalls for free public use.

The income from the 'lost' 249 parking stalls was to 'cover' the maintenance expenses of the remaining 300 stalls in terms of parking and signage plus lighting, paving, and bathroom maintenance. It was also to cover the cost of water for surfer showers which runs about \$5,000.00 a month. Now DOBOR generates substantial income from the 249 parking stalls, parking places that were given to DOBOR by the Public, via a professional Mediation process, established in Public meetings and then during a formal

negotiation in 2008. These 249 parking stalls are the bulk of the current Paid parking stalls (329) that bring in \$100,000.00 a month.

If even 1/3 of the current paid parking income of about \$35,000.00 a month was allotted to free recreational parking for 'Utilities', there would still be plenty of money for the maintenance of the 300 recreational stalls.

Some people think the surfers and boaters should get the 249 parking stalls back, lost in the 2008 negotiation, due to the 'lack of good will' by DOBOR to do as they said they would in 2008 with the generated money. The income from the 249 parking stalls that was converted from free to paid, was also supposed to maintain the restrooms, provide security and pay for the water, lights, parking signage and paving. Also promised was much needed harbor maintenance such as trash pick-up.

This job might be best done by non-profit groups such as Surfrider Foundation, Surfing Education Association (Save Our Surf), or a Coalition of Ocean Access based Non-profits. Barring that maybe the Office of Hawaiian Affairs, or City and County Parks.

**The 'Comfort Station' restrooms on the 600-700 row at the AWSBH, and the use of non-profit funding for maintenance and improvements of restrooms.**

DOBOR policy is to lock the bathrooms at 4:00 pm on Monday-Tuesday-Wednesday-Thursday. This is just about the time of day when the bathrooms are most needed for recreational use by the public who are getting off of work and school.

During the weekends (Fri-Sat-Sun) this bathroom is open all weekend long, which is good, but sometimes leads to houseless persons sleeping in the bathrooms at night. Most 'well-run' public beach parks around the United States have a 'Sunrise to Sundown' policy, maximizing access to the beach and public bathrooms.

There are people who could lock (and unlock) the doors fairly easily each day. It could be a paid boater or trusted volunteer person. Hilton could also provide this service, since they have security guards who drive on Golf Carts in the area. Per the negotiated contract between DNLR and the Hilton for use of the Duke Kahanamoku Lagoon, the Hilton was to supply a PUBLIC bathroom. Therefore, locking and unlocking the Public bathroom near the recreational parking area would be an easy task for the Hilton staff.

There have been issues with the *He'eia Kea Boat Harbor* bathroom including funding and contract issues, mis-management, plus sewage pollution. The accessibility of

bathrooms (toilets) is a significant aspect of ocean facing public lands and usability of the area by the public.

<https://www.hawaiinewsnow.com/2023/04/28/flabbergasted-state-agency-charges-with-protecting-hawaiis-resources-faces-600000-fine-pollution/>