

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

October 13, 2023

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

BIG ISLAND

NON-ACTION ITEM: Report Relating to Rental Reopening of the Kikala-Keokea Subdivision, Kikala and Keokea, Puna, Hawaii; TMKs: (3) 1-2-07: Various

BACKGROUND

On January 3, 1983, the Pu‘u‘ō‘ō eruption began on the island of Hawaii. The eruption lasted years and devastated the town of Kalapana. In Kalapana many families that had lived on the land for generations were displaced by the eruption.

In 1991, the Hawaii State Legislature passed Act 314 (as later amended)¹ that established the Kikala-Keokea Residential Subdivision for Native Hawaiian families that had lived in Kalapana and had been displaced by the lava flows. The legislature found that residents of Kalapana “maintained a unique community promoting the Hawaiian way of life... [and] that it is in the public interest to provide for relocation assistance to the Hawaiians of Kalapana to enable them to perpetuate their way of life and traditions.”

Act 314 limited relief to those living in Kalapana that were directly displaced by the eruption. The Act states:

The department of land and natural resources is authorized to negotiate and enter into long-term lease of sixty-five years in duration, subject to renewal by mutual agreement, with persons who meet both of the following criteria:

- 1) Persons living in Kalapana who were dispossessed or displaced as a result of the volcanic eruptions on the island of Hawaii which began on January 3, 1983; and
- 2) Persons who meet the qualifications of section 13D-3(b), Hawaii Revised Statutes.²

¹ SLH 1993 Act 172 extended the DLNR’s authority to enter into leases agreements from January 1, 1994 to December 31, 1994.

² See, Rice v. Cayetano, 528 U.S. 495, 120 S.Ct. 1044 (2000) (striking down the voting restriction).

The Department of Land and Natural Resources (DLNR) was tasked with the creation and development of the Kikala-Keokea Residential Subdivision. A 100-acre parcel that is located approximately 27 miles from Hilo was selected for the subdivision. The subdivision plans called for 67 lots, a 4-acre community park, paved roads, and County water. Attached as Exhibit 1 is a map of the subdivision.

On December 16, 1994, under agenda item F-3, the Board of Land and Natural Resources (“Board”) authorized the lease of Kikala-Keokea lots. At the meeting, the Board considered a multitude of lease conditions relating to the new subdivision. A key issue the Board considered was the lease rents. The Board unilaterally set the rents below fair market value at \$132 per year for the first 25-years. Additionally, upon rental reopening, the Board ordered, “[t]he rental for any ensuing period shall be based on twenty percent (20%) of the fair market rental at the time of reopening.” However, nowhere in Act 314 did it authorize the Board to set rents at below fair market value that would otherwise be required by HRS 171-17(b).³

In 1995, by public drawing, 48 lots were successfully leased to residents of Kalapana that had been directly impacted and displaced by lava flows. However, 19 lots remained vacant and available.

In 2007, Act 73 loosened the requirements to qualify for a lease in the Kikala-Keokea Residential Subdivision. Act 73 states:

The department of land and natural resources may negotiate and enter into long-term leases of sixty-five years in duration, subject to renewal by mutual agreement, with persons who have attained the age of eighteen years, and meet the following criteria:

- 1) Residents of Kalapana who have been living in Kalapana continuously for not less than six months at the time of their application;
- 2) Previous residents of Kalapana who resided within Kalapana continuously for not less than six months; or
- 3) Descendants of those residents of Kalapana who were dispossessed or displaced as a result of the volcanic eruptions on the island of Hawaii that began on January 3, 1983.

³ HRS 171-17(b) requires directly negotiated land dispositions (e.g., leases or easements) to be established at fair market value. Further, although Act 314 authorized (but not mandated) direct negotiation, it appears the Department and Board decided to hold a drawing in accordance with HRS 171-78 for residential leases.

Act 73 allowed *family members* and *heirs of those displaced* by the Pu‘u‘ō‘ō eruption to apply for Kikala-Keokea lots. Thus, those not directly impacted by the eruption could now apply and receive lots in the Kikala-Keokea residential subdivision.

On April 11, 2008, under agenda item D-3, the Board authorized a drawing to award the remaining 19 Kikala-Keokea lots. The Board again considered the lease terms as well as the rents. The Board set the initial rents at \$480 per year in accordance with its minimum rent policy. However, the Board remained silent on the reopening rents. The second set of leases states, upon reopening, “The rental for any ensuing period shall be the fair market rental at the time of reopening.”

In December 2021, Appraiser Ted Yamamura valued all 67 Kikala-Keokea Residential Subdivision lots for the January 1, 2022 rental reopening. In his appraisal, Mr. Yamamura applied the Board approved lease terms of reduced rent to the first set of leases (48) but not the second set of leases (19). The appraised values greatly varied for the subdivision. The rents ranged from \$617 to \$770 annually for the first set of leases to \$3,084 to \$3,238 annually for the second set of leases. Attached as Exhibit 2 is a table of the rents.

In January 2022, then Board Chairperson, Suzanne Case (Chair Case) conducted community outreach. Chair Case met with Joy San Buenaventura, the area’s Senator. After the community outreach, ultimately, the rents were approved by Chair Case.

Notices of the new rents were sent to all 67 Kikala-Keokea lessees. The notices permitted the lessees to approve or reject the new rents. If the lessee rejected the new rents, pursuant to §171-17(d), Hawaii Revised Statutes (“HRS”) they were required to appoint their own certified appraiser. Four (4) rent rejections were received; however, none of the rejections were valid as none listed a certified appraiser.

Additional notices were sent to lessees who rejected the rent, and additional time was provided to all lessee to contest the new rents. Despite the additional notices and numerous deadline extensions, all rents were accepted or deemed accepted as no valid rent rejections were received. Accordingly, the rents were set as appraised.

Recently, the Office of Hawaiian Affairs contacted DLNR with concerns about the disparate rents.

DISCUSSION

Rent Reopening Process:

To set lease reopening rents, DLNR is required to follow the Hawaii Revised Statutes. HRS §171-17(d) requires all lease reopening rents to be set at the “fair market rental at the time of reopening” as determined by a qualified department employee or a disinterest appraiser. To determine the fair market rent for the Kikala-Keokea rental reopening, DLNR hired an impartial appraiser, Ted Yamamura. Mr. Yamamura has over 40 years of appraisal experience and is a State of Hawaii Certified General Appraiser. Mr. Yamamura used the sales comparison approach and reviewed sales of similar comparable properties. After review, Mr. Yamamura concluded the rents ranged from \$617 to \$770 annually for the first set of leases to \$3,084 to \$3,238 annually for the second set of leases.

Additionally, for rent reopenings, DLNR is required to follow the terms of the Lease. The first set of leases states, “The rental for any ensuing period shall be based on twenty percent (20%) of the fair market rental at the time of reopening.” The second set of leases does not have a reduced rent provision. The second set of leases states, “The rental for any ensuing period shall be the fair market rental at the time of reopening.” Thus, DLNR’s Appraiser, Mr. Yamamura applied the lease provisions in determining the rental rates, resulting in neighboring properties having disparate rents. Notwithstanding the disparate rents, DLNR followed the statutory rent reopening procedure, and the appraiser properly applied the terms of the leases.

Legislative History:

DLNR examined the enabling legislation to answer the question as to whether the leases should be amended to charge similar rents. The enabling legislation for the Kikala-Keokea subdivision is Act 314 (SLH 1991) for the first set of 48 leases and Act 73 (SLH 2007) for the second set of 19 leases. Act 314 states,

The purpose of this Act is to award long-term leases on state lands to those residents of Kalapana who are of Hawaiian ancestry and who were dispossessed or displaced from their homes as a result of the recent volcanic eruptions on the island of Hawaii.

The department of land and natural resources is authorized to negotiate and enter into long-term lease of sixty-five years in duration, subject to renewal by mutual agreement, with persons who meet both of the following criteria:

- 1) Persons living in Kalapana who were dispossessed or displaced as a result of the volcanic eruptions on the island of Hawaii which began on January 3, 1983; and
- 2) Persons who meet the qualifications of section 13D-3(b), Hawaii Revised Statutes.

Act 73 states,

The purpose of this Act is to authorize the department of land and natural resources, subject to specific criteria and priority requirements, to award leases for the remaining nineteen lots at Kikala-Keokea.

The department of land and natural resources may negotiate and enter into long-term leases of sixty-five years in duration, subject to renewal by mutual agreement, with persons who have attained the age of eighteen years, and meet the following criteria:

- 1) Residents of Kalapana who have been living in Kalapana continuously for not less than six months at the time of their application;
- 2) Previous residents of Kalapana who resided within Kalapana continuously for not less than six months; or
- 3) Descendants of those residents of Kalapana who were dispossessed or displaced as a result of the volcanic eruptions on the island of Hawaii that began on January 3, 1983.

Neither Act provides for reduced lease rents or expressly gives the Board authority to establish lease rents below fair market value. Absent such express authorization, the Board must follow the HRS §171-17, which states rents must be set at fair market value as determined by appraisal. Acts 314 & 73 are attached as Exhibits 3 and 4, respectively.

Public Drawing Leases and Amendments:

On April 11, 2008, under agenda item D-3, the Board authorized a public drawing to award the remaining 19 Kikala-Keokea lots pursuant to Act 73. DLNR consulted the Department of the Attorney General to determine whether the Board may amend the second set of 19 Kikala-Keokea leases to make the rent provisions consistent with the first set of leases. The leases were issued by public drawing, not direct negotiation. As such, amending the second set of leases to match the first set is not possible.⁴

⁴ In *Kahua Ranch*, the Hawaii Supreme Court found that amending an auction lease would be inconsistent with the terms of the notice published. Accordingly, the Court found amendments of an auction lease are “illegal and unenforceable.” The Kikala-Keokea leases are drawing leases. Auction leases and drawing leases share similar notice requirements, requiring publication of

Comments:

Since DLNR's letters setting the rents were sent, staff notes no lessees have submitted written notices contesting the rents. Furthermore, many of the Kikala-Keokea tenants are in arrears on lease rents and, therefore, are in default for non-compliance under the terms of their leases.

CONCLUSION

Based on the foregoing, while staff is aware of the community concerns and is sensitive to the disparate rents, staff recommends no further action be taken.

Respectfully Submitted,

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Andrew Tellio
Appraisal and Real Estate Specialist

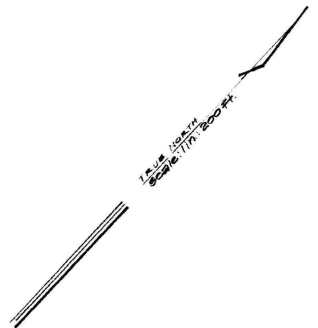
APPROVED FOR SUBMITTAL:



^{RT}

Dawn N. S. Chang, Chairperson

notice and making the lease forms available to the public prior to the event. See, HRS §171-16. Applying the *Kahua Ranch* analysis, providing the Kikala-Keokea residents a different lease than what was presented at the original public drawing would be illegal and unenforceable.



Yellow Lots = 20% of FMR rent provision
Green Lots = Full fair market rent



PLAT 07

Exhibit 1

Owners, lessees, & vendees name recorded on this tax map print may not be current. Please refer to computer and history sheets for current owners.

FOR PROPERTY ASSESSMENT PURPOSES - SUBJECT TO CHANGE

SUMMARY OF LOT VALUES AND ANNUAL RENT

KIKALA-KEOKEA RESIDENTIAL SUBDIVISION

Kalapana Section					Kapoho Section				
Lot No.	Tax Map Key	Parcel Size In SF	Estimated Land Value	CONCLUDED ANNUAL RENT	Lot No.	Tax Map Key	Parcel Size In SF	Estimated Land Value	CONCLUDED ANNUAL RENT
1	1-2-43-1	43,560	\$77,101	\$617	43	1-2-43-43	43,996	\$77,873	\$623
2	1-2-43-2	43,560	\$77,101	\$3,084	44	1-2-43-44	43,560	\$77,101	\$617
3	1-2-43-3	44,431	\$78,643	\$629	45	1-2-43-45	43,560	\$77,101	\$617
4	1-2-43-4	60,548	\$96,271	\$770	46	1-2-43-46	43,560	\$77,101	\$617
5	1-2-43-5	45,738	\$80,956	\$648	47	1-2-43-47	43,560	\$77,101	\$617
6	1-2-43-6	43,560	\$77,101	\$617	48	1-2-43-48	43,560	\$77,101	\$617
7	1-2-43-7	43,560	\$77,101	\$3,084	49	1-2-43-49	43,560	\$77,101	\$617
8	1-2-43-8	43,560	\$77,101	\$617	50	1-2-43-50	43,996	\$77,873	\$623
9	1-2-43-9	43,560	\$77,101	\$3,084	51	1-2-43-51	55,321	\$91,280	\$730
10	1-2-43-10	43,560	\$77,101	\$617	52	1-2-43-52	47,045	\$81,388	\$651
11	1-2-43-11	43,560	\$77,101	\$617	53	1-2-43-53	43,560	\$77,101	\$617
12	1-2-43-12	43,560	\$77,101	\$617	54	1-2-43-54	43,996	\$77,873	\$623
13	1-2-43-13	46,174	\$79,881	\$639	55	1-2-43-55	43,996	\$77,873	\$623
14	1-2-43-14	43,560	\$77,101	\$617	56	1-2-43-56	43,560	\$77,101	\$617
15	1-2-43-15	43,560	\$77,101	\$617	57	1-2-43-57	43,560	\$77,101	\$3,084
16	1-2-43-16	43,560	\$77,101	\$3,084	58	1-2-43-58	43,560	\$77,101	\$3,084
17	1-2-43-17	43,560	\$77,101	\$617	59	1-2-43-59	43,560	\$77,101	\$617
18	1-2-43-18	43,560	\$77,101	\$617	60	1-2-43-60	43,996	\$77,873	\$623
19	1-2-43-19	43,560	\$77,101	\$3,084	61	1-2-43-61	43,560	\$77,101	\$3,084
20	1-2-43-20	43,996	\$77,873	\$623	62	1-2-43-62	44,867	\$79,415	\$3,177
21	1-2-43-21	43,560	\$77,101	\$3,084	63	1-2-43-63	46,609	\$80,634	\$645
22	1-2-43-22	43,560	\$77,101	\$617	64	1-2-43-64	45,738	\$80,956	\$3,238
23	1-2-43-23	43,560	\$77,101	\$617	65	1-2-43-65	44,867	\$79,415	\$635
24	1-2-43-24	43,560	\$77,101	\$3,084	66	1-2-43-66	43,560	\$77,101	\$3,084
25	1-2-43-25	43,560	\$77,101	\$617	67	1-2-43-67	43,996	\$77,873	\$3,115
26	1-2-43-26	43,560	\$77,101	\$3,084					
27	1-2-43-27	43,560	\$77,101	\$3,084					
28	1-2-43-28	43,996	\$77,873	\$3,115					
29	1-2-43-29	43,560	\$77,101	\$617					
30	1-2-43-30	43,560	\$77,101	\$617					
31	1-2-43-31	46,174	\$79,881	\$639					
32	1-2-43-32	46,174	\$79,881	\$639					
33	1-2-43-33	46,174	\$79,881	\$639					
34	1-2-43-34	46,609	\$80,634	\$645					
35	1-2-43-35	47,045	\$81,388	\$651					
36	1-2-43-36	45,738	\$79,127	\$633					
37	1-2-43-37	45,738	\$79,127	\$633					
38	1-2-43-38	46,609	\$80,634	\$645					
39	1-2-43-39	46,609	\$80,634	\$645					
40	1-2-43-40	46,174	\$79,881	\$639					
41	1-2-43-41	46,174	\$79,881	\$639					
42	1-2-43-42	46,174	\$79,881	\$3,195					

Initial Leases at 20% of Fair Market Rent (FMR)
Follow Up Leases at FMR

Exhibit 2

A Bill for an Act Relating to Persons Dispossessed or Displaced by Volcanic Eruptions.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The legislature finds that a special trust obligation to native Hawaiians is evidenced by Sections 4 and 7 of Article XII of the Constitution of the State of Hawaii and that by virtue of these provisions, the State has an affirmative obligation to reaffirm and protect the cultural rights, including fishing and subsistence rights of native Hawaiians and their descendents.

The legislature further finds that pursuant to Public Law 86-3, Admissions Act of 1959, the State assumed title to certain ceded lands adjacent to the Kalapana Extension in the Kikala-Keokea area. Section 5(f) of the Admissions Act of 1959 provides that these lands may be utilized for the betterment of conditions of native Hawaiians.

There is a further finding that legislative action to relieve the hardships and stress of Hawaiians displaced by volcanic eruptions was provided to the residents of the Milolii-Hoopuloa area after an eruption and lava flow of Mauna Loa. Act 62, Session Laws of Hawaii 1982 and Act 83, Session Laws of Hawaii 1984 address a nearly identical need in language after which this Act is patterned.

The legislature also finds that in 1938 the United States Congress enacted Public Law 680, the Kalapana Extension Act, which authorized the addition of Kalapana lands to the Hawaii National Park. The law further provided that native Hawaiian residents of the area were to be provided with leases for home sites and that fishing was to be permitted only by native Hawaiian residents of the area or adjacent villages, and by visitors under their guidance.

The legislature also finds that through the years the Hawaiian residents of Kalapana on the island of Hawaii have maintained a unique community promoting the Hawaiian way of life. However, the continuation of their way of life has been threatened as a result of the volcanic eruptions which began on January 3, 1983. The eruptions have caused severe disruptions to the Hawaiian residents of Kalapana and have destroyed one of the last Hawaiian settlements on the island of Hawaii. The legislature agrees that the only remedy is an after-the-fact humanitarian act to help replace what has been lost by these residents. The legislature further finds that it is in the public interest to provide for relocation assistance to the Hawaiians of Kalapana to enable them to perpetuate their way of life and traditions.

The legislature further finds that to assist the Kalapana residents to continue as a unique Hawaiian community requires them to be as close as possible to Kalapana. An ideal site for the displaced Kalapana residents to maintain their Kalapana heritage is the Kikala-Keokea homestead area which is adjacent to and mauka of Kalapana-Kapoho beach road and identified as TMK 1-2-07, parcels 2 and 30 (two contiguous parcels totaling 1,012 acres). Up to 150 acres at the site may be used to provide leases under this Act. The site will allow them to develop the land in a manner that will enable them to continue their traditional way of life in raising small animals, planting sustenance crops, growing herbal medicines, and gathering additional food resources from the nearby ocean and uplands.

The purpose of this Act is to award long-term leases on state lands to those residents of Kalapana who are of Hawaiian ancestry and who were dispossessed or displaced from their homes as a result of the recent volcanic eruptions on the island of Hawaii.

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SECTION 2. The department of land and natural resources is authorized to negotiate and enter into long-term leases of sixty-five years in duration, subject to renewal by mutual agreement, with persons who meet both the following criteria:

- (1) Persons living in Kalapana who were dispossessed or displaced as a result of the volcanic eruptions on the island of Hawaii which began on January 3, 1983; and
- (2) Persons who meet the qualifications of section 13D-3(b), Hawaii Revised Statutes.

SECTION 3. The lands eligible for long-term residential lease negotiations under this Act are limited to those lands situated at Kikala-Keokea homestead area, which is adjacent to and mauka of Kalapana-Kapoho beach road and identified as TMK 1-2-07, parcels 2 and 30. No more than 150 acres of the homestead area shall be used for the purposes of this Act. The size of any lot leased under this Act shall be at least one acre.

SECTION 4. The department of land and natural resources or its designated agency is authorized to subdivide and provide for the creation of residential subdivision in Kikala-Keokea homestead area for persons who receive long-term leases under the provisions of this Act, which shall be exempt from all statutes, ordinances, charter provisions, and rules of any governmental agency relating to zoning and construction standards for subdivisions, the development and improvement of land, and the construction of units thereon; provided that the department of land and natural resources finds the project is consistent with the purpose and intent of this Act and meets minimum requirements of health and safety.

SECTION 5. Notwithstanding any other law to the contrary, including chapter 171, Hawaii Revised Statutes, the department of land and natural resources is authorized to negotiate and enter into lease arrangements in accordance with the provisions and limitations of this Act; provided that the authority granted by this Act shall expire:

- (1) When leases have been negotiated and recorded in the bureau of conveyances for all parcels meeting the criteria in this Act; or
- (2) On January 1, 1994; whichever occurs first.

SECTION 6. This Act shall take effect upon its approval.

(Approved June 26, 1991.)

ACT 73

S.B. NO. 840

A Bill for an Act Relating to Kikala-Keokea.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The legislature finds that the destruction of Kalapana by lava flow displaced a tightly knit community with a truly Hawaiian lifestyle. In 1938, the United States Congress enacted, the Kalapana Extension Act (16 U.S.C. 396a),

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providing that native Hawaiian residents of the area were to be provided with leases for homesites and that fishing was to be permitted only by native Hawaiian residents of the area or adjacent villages, and by visitors under their guidance.

The continuation of the unique way of life of the Hawaiian residents of Kalapana was disrupted by volcanic eruptions and lava flows that began on January 3, 1983, destroying one of the last Hawaiian settlements on the island of Hawaii.

The legislature recognized this tragedy by enacting Act 314, Session Laws of Hawaii 1991, as amended (Act 314), authorizing the department of land and natural resources to negotiate long-term leases with qualified, displaced Kalapana families to maintain their heritage in the Kikala-Keokea homestead area adjacent to Kalapana-Kapoho beach road. The site allows the Kalapana families to develop the land in a manner that will enable them to continue their traditional way of life by raising small animals, planting sustenance crops, growing herbal medicines and gathering additional food resources from the nearby ocean and uplands.

Act 314 also stipulated that the department of land and natural resources or its designated agency subdivide and create a residential subdivision in the Kikala-Keokea homestead area that will be exempt from all statutes, ordinances, charter provisions, and rules of any governmental agency relating to zoning and construction standards for subdivisions, the development and improvement of land, and the construction of units thereon; provided that it meets the minimum requirements of health and safety.

Prior to the expiration of Act 314, the department of land and natural resources entered into lease arrangements with forty-eight families who met the eligibility criteria set forth under the Act. However, there are nineteen remaining lots which were not leased prior to the expiration of Act 314.

The purpose of this Act is to authorize the department of land and natural resources, subject to specific criteria and priority requirements, to award leases for the remaining nineteen lots at Kikala-Keokea.

SECTION 2. The department of land and natural resources may negotiate and enter into long-term leases of sixty-five years in duration, subject to renewal by mutual agreement, with persons who have attained the age of eighteen years, and meet the following criteria:

- (1) Residents of Kalapana who have been living in Kalapana continuously for not less than six months at the time of their application;
- (2) Previous residents of Kalapana who resided within Kalapana continuously for not less than six months; or
- (3) Descendants of those residents of Kalapana who were dispossessed or displaced as a result of the volcanic eruptions on the island of Hawaii that began on January 3, 1983.

SECTION 3. In awarding a lease to a person meeting the eligibility requirements of section 2 of this Act, the department of land and natural resources shall give priority to the following:

- (1) Persons who were previously awarded a lease under Act 314, Session Laws of Hawaii 1991, but did not execute a lease;
- (2) Persons who were dispossessed or displaced as a result of the volcanic eruptions on the island of Hawaii that began on January 3, 1983, who do not have any other residential property interest;
- (3) Persons who have no immediate family members who have executed a lease under this Act or under Act 314, Session Laws of Hawaii 1991;
- (4) Persons who have not executed a lease under this Act or under Act 314, Session Laws of Hawaii 1991; and

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- (5) Heirs of a person who was eligible for a lease under section 2 of Act 314, Session Laws of Hawaii 1991.

For the purpose of this Act:

“Heirs” includes persons, including a surviving spouse or reciprocal beneficiary, who are entitled under the statutes of intestate succession to the property of a decedent.

“Immediate family members” includes grandparents, parents, siblings, spouse, reciprocal beneficiaries, children, and legal guardians.

SECTION 4. The lands eligible for long-term residential lease negotiation under this Act are limited to those lands described in section 3 of Act 314, Session Laws of Hawaii 1991, for which a lease was not executed prior to the expiration of Act 314, Session Laws of Hawaii 1991.

SECTION 5. Notwithstanding any other law to the contrary, including chapter 171, Hawaii Revised Statutes, the department of land and natural resources may negotiate and enter into lease agreements in accordance with the provisions and limitations of this Act; provided that the authority to initially execute a lease agreement granted by this Act shall expire:

- (1) When all nineteen leases have been negotiated and recorded in the bureau of conveyances for all parcels meeting the criteria in this Act; or
- (2) One year after the effective date of this Act; whichever comes first.

SECTION 6. This Act shall take effect upon its approval.

(Approved May 16, 2007.)