

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

May 10, 2024

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

GL S-4331, S-4332

Hawai'i Island

Approval of a Development Agreement for a 30-Year Extension of Lease Term, General Leases Nos. S-4331 and S-4332, James William McCully, Trustee of the James William McCully Revocable Living Trust dated September 24, 1992 and Francine Marie Morales McCully, Trustee of the Francine Marie Morales McCully Revocable Living Trust dated September 24, 1992, Lessees; Authorize the Chairperson to Approve and Execute a Lease Extension for General Leases No. S-4331 and S-4332, James William McCully, Trustee of the James William McCully Revocable Living Trust dated September 24, 1992 and Francine Marie Morales McCully, Trustee of the Francine Marie Morales McCully Revocable Living Trust dated September 24, 1992, Lessees; Waiiaka, South Hilo, Hawaii, Tax Map Keys: (3) 2-2-37:144.

APPLICANT:

James William McCully, Trustee of the James William McCully Revocable Living Trust dated September 24, 1992 and Francine Marie Morales McCully, Trustee of the Francine Marie Morales McCully Revocable Living Trust dated September 24, 1992 (“Lessees”) requested an extension of General Leases No. S-4331 and S-4332 (“General Leases”) of 30 years, commencing on April 16, 2036 and expiring on April 15, 2066 for an aggregate term (initial term plus all extensions) of 95 years.¹

LEGAL REFERENCE:

Sections 171-36(a)(6), -191 and -192, Hawaii Revised Statutes (HRS), as amended, and Act 149, Session Laws of Hawaii 2018 (Act 149).

LOCATION:

¹ Initial term of 55 years commencing on April 16, 1971 and expiring on April 15, 2026. Board previously approved a 10-year extension at its meeting of April 24, 2015, Item D-3, commencing April 16, 2026 and expiring on April 15, 2036.

GENERAL LEASE NO. S-4331: Lot 6, Hilo Industrial Development, Leilani Street Section, Waiakea, South Hilo, Hawaii, containing 22,495 square feet. TMK: (3) 2-2-37:144, as shown on the attached map, in **Exhibit A**.

GENERAL LEASE NO. S-4332: Lot 7, Hilo Industrial Development, Leilani Street Section, Waiakea, South Hilo, Hawaii, containing 23,802 Square feet. TMK: (3) 2-2-37:144, as shown on the attached map, in **Exhibit A**.

LEASE AREA:

46,297 square feet (0.971 acre), more or less (combined area of GL S-4331 and GL S-4332).

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act
DHHL 30% entitlement lands pursuant to the Hawaii State Constitution: NO

LEASE CHARACTER OF USE:

General industrial purposes.

TERM OF LEASE:

Original term of 55 years, commencing on April 16, 1971 and expiring on April 15, 2026.
Extension of 10 years commencing on April 16, 2026 and expiring on April 15, 2036.

LEASE ANNUAL RENTAL:

GENERAL LEASE NO. S-4331: Current annual rent is \$14,725.00 due in quarterly installments on the 16th day of January, April, July and October of each and every year during the term., For the ten-year extension term from April 16, 2026, up to and including April 15, 2036, the annual rent is \$23,504.00.

GENERAL LEASE NO. S-4332: Current annual rent is \$15,850.00 due in quarterly installments on the 16th day of January, April, July and October of each and every year during the term. For the ten-year extension term from April 16, 2026, up to and including April 15, 2036, the annual rent is \$24,644.00.

RENTAL REOPENINGS:

Rental reopenings in the original term for the General Leases were at the end of the 20th, 30th, 40th and 50th years of the original term. The recent extension of 10 years through April 15, 2036 requires a rental reopening by independent appraisal on April 16, 2026.

By letter dated July 7, 2022, staff apprised Lessee of the State's appraisal dated June 6, 2022 establishing the lease rent amounts for the three 10-year reopening periods to begin April 16, 2036, as follows:

GL S-4331

<u>Effective Date</u>	<u>Annual Lease Rent</u>
04/16/2036	\$28,657.00
04/16/2046	\$34,933.00
04/16/2056	\$42,583.00

GL S-4332

<u>Effective Date</u>	<u>Annual Lease Rent</u>
04/16/2036	\$30,047.00
04/16/2046	\$36,627.00
04/16/2056	\$44,648.00

Lessees have accepted the State's proposed annual lease rent.

DCCA VERIFICATION:

As trusts, Lessees is not required to register with the Department of Commerce and Consumer Affairs.

APPLICANT REQUIREMENTS:

Lessee shall be required to:

1. comply with the applicable requirements of Sections 171-36(a) and 171-192, HRS to negotiate a development agreement with department staff, and return to the Board at a later date for review and approval of the development agreement and requested lease extension in accordance with and pursuant to the Department of Attorney General current lease terms and conditions necessary to implement and conform to the requirements of Act 149, Session Laws of Hawaii 2018 (“Act 149”) and current law, including but not limited to substantive provisions relating to Lease Assignments, Sublease Rents and Ownership of Improvements, as discussed and recommended below; and
2. reimburse the Department for the cost of procuring an appraiser to review Lessee’s appraiser’s report regarding the value of the existing improvements on the property.²

² Pursuant to Section 171-192, HRS, “The applicant for a lease extension shall pay all costs and expenses incurred by the department in connection with processing, analyzing, or negotiating any lease extension request and document and of the development agreement under subsections (a) and (b).”

CHAPTER 343 – ENVIRONMENTAL ASSESSMENT:

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

PROPOSED IMPROVEMENTS

The Lessee’s current improvement proposal consists of the following:

Item No.	Description	Estimated Cost
1.	Ku Aloha Ola Mau Office- remove and replace flooring with new vinyl plank flooring in entire existing building (approximately 3,450 sq.ft.) (\$42,125) and paint interior as needed (\$8,125).	\$50,250
2.	Island Movers- (IM)- removal of existing asphalt, regrade and repave 8,760 sq. ft. of parking lot; clean and crack fill rest of parking lot; restripe all stalls; and repair rock wall at entry.	\$71,500
3.	IM- remove section of parking lot to help with drainage	\$24,250
4.	IM- plans, permits and installation of 17.6 KW roof mounted PV system.	\$135,000
5.	IM- plans, permits and construction of approximately 1,350 sq. ft. 2 story office space in existing building.	\$114,750
6.	IM- perimeter fencing with 2 rolling gates	\$21,500
	Total:	\$417,250

The total cost of the proposed improvements is \$417,250 and the estimates detailing them are included as **Exhibit B**.

BACKGROUND:

At a public auction of government leases, General Lease Nos, S- 4331 and S-4332 were awarded to JBL Hawaii Limited, a Hawaii Corporation on April 16, 1971.

At its meeting of December 14, 1979, the Board of Land and Natural Resources (Board) under Agenda Item F-1-e, consented to the assignment of the subject leases from JBL Hawaii Limited, to William Prichard Jenkins. Further, at its meeting of February 24, 1984, the Board under Agenda Item F-1-g, consented to the assignment of leases from William Prichard Jenkins to Pacific Consolidated Investments, A Hawaii General Partnership.

At its meeting of October 14, 1988, the Board under Agenda Item F-1-k, consented to the assignment of leases from Pacific Consolidated Investments, a Hawaii General Partnership, to George R. Madden, Jr. and Jean S. Madden, husband and wife.

Later, at its meeting of February 23, 1990, the Board under Agenda Item F-1-j, consented to the assignment of leases from George R. Madden, Jr. and Jean S. Madden, husband and wife, to Mary J. Young, unmarried.

On December 7, 1990 (Agenda Item F-1-e), the Board, at the request of Mr. Glenn S. Hara, attorney for the Maddens, rescinded its action consenting to the assignment of leases from the Maddens to Mary J. Young. In the same agenda item (F-1-e) on December 7, 1990, the Board consented to the assignment of General Lease Nos. S-4331 and S-4332 from George R. Madden, Jr. and Jean S. Madden, husband and wife, Assignors, to L & M Exchange, Ltd. a Hawaii Corporation, Intermediary Assignee, and L & M Exchange, Ltd. Assignee, and from S.T. Exchange, Inc. Intermediary Assignor, to James Wm. McCully, Trustee of the Ainako Realty Trust dated May 5, 1985 (undivided 55% interest), and James Wm. McCully and Francine M. McCully, husband and wife (undivided 45% interest), Assignees.

At its meeting of January 25, 1991, the Board under Agenda Item F-1-c, consented to a sublease executed on August 18, 1988, between George R. Madden, Jr. and Jean S. Madden, husband and wife, and Pacific Consolidated Investments, a Hawaii General Partnership, Sublessors, and Loveland Industries, Inc., a Colorado Corporation, dba UAP Hawaii, Sublessee.

At its meeting of March 12, 1993, the Board under Agenda Item F-1-c, as amended, approved an Addendum to Sublease which reduced the area of the sublease to Loveland Industries, Inc.

At its meeting of August 25, 1995, the Board, under Agenda Item F-1-d, approved, as amended, a second Addendum to Sublease to Puna Plantation Hawaii, Ltd., dba KTA Superstores, a Hawaii Corporation.

At its meeting of September 18, 1996, the Board, under Agenda Item D-8 approved the assignment of lease from James Wm. McCully, Trustee of the Ainako Realty Trust dated May 5, 1985 (undivided 55% interest), and James Wm. McCully and Francine M. McCully husband and wife (undivided 45% interest), Assignors, to James William McCully, Trustee of the James William McCully Revocable Living Trust and Francine Marie Morales

McCully, Trustee of the Francine Marie Morales McCully Revocable Living Trust, Assignee.

A consent to mortgage was approved by the Chairperson on May 18, 2004 in the amount of \$700,000. The purpose of the mortgage was to refinance an existing mortgage on the property.

As indicated above, the original term of this lease was for 55 years, commencing on April 16, 1971 and expiring on April 15, 2026. At its meeting of April 24, 2015, the Board approved a ten-year extension, commencing April 16, 2026 and expiring on April 15, 2036 to allow the Lessees to enable the re-financing of the existing mortgage as required by the lender First Hawaiian Bank, and to perform improvements on the property. Lessees obtained a consent to mortgage from the Board executed on April 15, 2016. Lessees completed the improvements to the property.

Lessees have requested an extension of General Leases No. S-4331 and S-4332 of 30 years each, commencing on April 16, 2036 and expiring on April 15, 2066.

LEASE EXTENSION:

With the Lessees' current lease set to expire on April 15, 2036, Lessees are requesting an additional 30-year extension pursuant to Act 149, Session Laws of Hawaii 2018 (Act 149) in order to amortize the cost of additional improvements to the property. Act 149 allows up to a 40-year extension of leases located in the Hilo Community Economic District (HCED) based on "substantial improvements" to the lease premises:

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

The subject lease is located within the HCED as defined in Act 149. Lessees' proposed improvements include replacing the flooring of office building as well as upgrade of the existing parking lot and its drainage, and installation of a 17.6 KW roof mounted photovoltaic system, perimeter fencing and construction of an additional 1,350 square foot interior office space inside the existing building, along with other renovations to the premises at an estimated cost of \$417,250. The cost proposal stipulated the improvements to be completed within twelve (12) months of notice to proceed.³ An appraisal evaluation

³ Staff has confirmed that the property is connected to the county sewer system and there are no large capacity cesspool concerns with the property. Once the requested lease extension is granted, Lessees will seek a consent to mortgage from the Board or Chairperson, as appropriate, in order to finance improvements to the property for this extension request. The Lessees have prequalified for a loan from First Hawaiian Bank of up to \$1 million (re-fi of existing \$375,000 term loan, \$200,000 line of credit used to complete renovations and additional new money request for estimated renovations).. As a condition of the loan, the

performed by a certified appraiser has determined that the economic life of the proposed improvements will exceed the twenty-five-plus (25+) year period necessary to amortize the refurbishments. The appraiser, contracted by the Lessees, determined the market value of the current improvements to be \$1,230,000.00. Lessees’ proposed expenditure of \$417,250 represents 33.9% of the value of the existing improvements (\$1,230,000.00), and Lessees are only seeking a 30-year extension of the lease. Accordingly, Lessees’ proposed expenditure appears to justify the requested 30-year extension under Act 149.

Land Division procured the services of an appraiser to review and assess the appraisal submitted by the Lessee (“Appraisal Report”) relating to the value of the existing improvements expressly referenced in Act 149 in order to ensure the Lessees’ appraisal report and valuation is consistent with Uniform Standards of Professional Appraisal Practice (USPAP) and consistent with industry standards. The aforesaid Land Division appraisal review report concluded that the Lessees’ appraisal was compliant with USPAP and that the report’s conclusions appear to be generally supported and credible.

Act 149 stipulates that prior to entering into a development agreement, the lessee shall submit to the Board the plans and specifications for the total development being proposed. The Board shall review the plans and specifications and determine: 1) Whether the development proposed is of sufficient worth and value to justify the extension; 2) The estimated time to complete the improvements and expected date of completion; 3) The minimum revised annual rent based on the fair market value of the lands to be developed, as determined by an appraiser for the Board, and the percentage rent where gross receipts exceed a specified amount.

The Lessees have submitted plans and specifications for the total development and a proposed development agreement outlining the terms and conditions required in compliance with Act 149 and Section 171-192(a), HRS, as amended, and the Lessees have accepted the minimum revised annual rent based on the fair market value of the lands as determined by the Board's appraiser as follows:

GL S-4331

<u>Effective Date</u>	<u>Annual Lease Rent</u>
04/16/2036	\$28,657.00
04/16/2046	\$34,933.00
04/16/2056	\$42,583.00

GL S-4332

<u>Effective Date</u>	<u>Annual Lease Rent</u>
04/16/2036	\$30,047.00

bank is requesting the Lessees obtain an extension of the current lease including the known fixed rent for remaining term of 30 years and amortization period of 25-years.

04/16/2046	\$36,627.00
04/16/2056	\$44,648.00

Paragraph 10 of the Lease, states:

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

As part of its due diligence and review process, staff notes that the Internal Revenue Service (IRS) has provided criteria to determine what would qualify as a capital improvement, which is an improvement that adds to the value of a property, extends its useful life, or adjusts it to new uses. The property is improved whenever it experiences a betterment, adaption or restoration. An expenditure is for betterment if it facilitates a material condition or defect in the property that existed before it was acquired or when it was produced - it makes no difference whether or not you were cognizant of the defect when you received the unit of property; results in a material addition to the property - for instance, physically broadens, grows, or extends it, or results in a material increase in the property's capacity, productivity, power, or quality.

An expenditure is for a restoration if it returns a property that has plunged into disrepair to its ordinarily efficient operating condition; rebuilds the property to a like-new condition after the end of its useful economic life; replaces a significant part or important structural component of the property; replaces a piece of a property for which the owner has taken a loss, or repairs damage to a property for which the owner has taken a basis adjustment for a casualty loss.⁴ Generally, repairs are one-time expenditures to keep the property as currently existing in a usable and operating condition.⁵

⁴ Information can be found at this link: <https://www.irs.gov/businesses/small-businesses-self-employed/tangible-property-final-regulations#Whatisthefactsandcircumstancesanalysis>.

⁵ The United States Supreme Court has recognized the highly factual nature of determining whether expenditures are for capital improvements or for ordinary repairs. See Welch v. Helvering, 290 U.S. 111, 114 (1933) (“[T]he decisive distinctions [between capital and ordinary expenditures] are those of degree and not of kind”); Deputy v. du Pont, 308 U.S. 488, 496 (1940) (observing that each case “turns on its special facts”). Because of the factual nature of the issue, the courts have articulated a number of ways to distinguish between deductible repairs and non-deductible capital improvements. For example:

Illinois Merchants Trust Co. v. Commissioner, 4 B.T.A. 103, 106 (1926), the court explained that repair and maintenance expenses are incurred for the purpose of keeping property in an ordinarily efficient operating condition over its probable useful life for the uses for which the property was acquired. Capital expenditures, in contrast, are for replacements, alterations, improvements, or additions that appreciably prolong the life of the property, materially increase its value, or make it adaptable to a different use.

Based on the foregoing and upon review of Lessees' improvement plan, staff believes that the proposed expenditures exceed simple repairs and qualify as substantial improvements under Act 149.

Staff notes that GL S-4331 and S-4332 state:

24. Surrender. That the Lessee shall and will at the expiration or sooner termination of this lease, peaceably and quietly surrender and deliver possession of the demised premises to the Lessor, together with all buildings and improvements of whatever name or nature, now on or hereafter erected or placed upon the same, in good order and condition, reasonable wear and tear excepted.

GL S-4331 and GL S-4332 expire on April 15, 2036. If the Board denies the extension request, ownership of the improvements will revert to the Department, including the costs to secure, repair and maintain the improvements. Furthermore, if the lease extension is not granted, there is no incentive for the Lessees to maintain the improvement in an optimal condition at the end of the lease term.

Based on the foregoing, staff recommends that the Board approve the proposed development agreement, a copy of which is attached hereto as **Exhibit C** and authorize the Chairperson to execute the development agreement as well as the lease extension document. The development agreement and the lease extension document will incorporate the following specific current lease terms and conditions for the 30-year extension in order to implement Act 149 and conform the terms of the extension period to current law. Below is a summary of the three substantive provisions that need to be updated in this lease originally issued in 1971:

- Lease Assignments. The current lease form includes an assignment of lease premium analysis that allows the State to share in the consideration paid for an assignment of a lease under some circumstances. This term is consistent with Section 171-36, HRS. GL S-4331 and GL S-4332 are silent on this provision, and the lease extension period should include this standard assignment of lease premium term.
- Sublease Rents. The current lease form includes language allowing the State to adjust the lease rent based on the sublease rent charged to the sublessee, which is

Estate of Walling v. Commissioner, 373 F.2d 190, 192-193 (3rd Cir. 1967), the court explained that the relevant distinction between capital improvements and repairs is whether the expenditures are to “put” or “keep” property in efficient operating condition.

Plainfield-Union Water Co. v. Commissioner, 39 T.C. 333, 338 (1962), the court stated that if the expenditure merely restores the property to the state it was in before the situation prompting the expenditure arose and does not make the property more valuable, more useful, or longer-lived, then such an expenditure is usually considered a deductible repair. In contrast, a capital expenditure is generally considered to be a more permanent increment in the longevity, utility, or worth of the property.

also consistent with Section 171-36, HRS. GL S-4331 and GL S-4332 contain sublease rent participation clauses, but they are different from the provision currently used for new leases. The lease extension documents should include the updated standard sublease rent participation language.

- **Ownership of Improvements.** The current lease form includes a provision on ownership of improvements at lease expiration giving the State the option of assuming ownership or requiring the lessee to remove them at lessee's expense. State leases have incorporated this provision since about the mid-1960s. GL S-4331 and GL S-4332 simply provide that at the expiration of the lease, lessee delivers possession of the demised premises to the lessor, together with all buildings and improvements in good order, reasonable wear and tear excepted, leaving open the question whether the State is responsible for removing improvements that have outlived their useful lives. The lease extension document and the development agreement should include the current standard terms clarifying the State's options relating to ownership of improvements.

At this time, staff is recommending that these updated lease terms and other current standard lease terms and conditions be limited to the 30-year extension period that the Board, at its discretion, may approve under Act 149. Incorporating these substantive terms for the extension period is consistent with the legislative intent of Chapter 171, HRS, which allows the State to be paid its fair share of ancillary income arising from the tenant's leasehold interest.

The cost proposal stipulated the improvements to be completed within twelve (12) months of notice to proceed. However, staff is recommending twenty-four (24) months for Lessee to complete the improvements required under the development agreement. Staff is recommending additional time for Lessees to complete the improvements required under the development agreement in order to provide Lessees' the opportunity to address any labor or supply chain issues that may arise over the construction period without defaulting on the development agreement. Additionally, the twenty-four month period is consistent the time period granted to other lessees seeking extensions to complete their improvements

Upon the Board's approval of the terms and conditions of the development agreement as set forth above, staff is recommending that the Chairperson be authorized to approve and execute the development agreement once it is finalized and thereafter to execute the lease extension document.

There are no outstanding rental reopening issues. The Lessee is current with rent, insurance, and performance bond. No agency comments were solicited on the request because it involves a lease extension, not a new disposition.

RECOMMENDATION:

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

1. Declare that, after considering the potential effects of the proposed disposition as provided by Chapter 343, HRS, and Sections 11-200.1-15 and -16, HAR, the lease extension is expected to have minimal or no significant effect on the environment and is therefore exempt from the preparation of an environmental assessment as a de minimis activity.
2. Determine that: 1) the development proposed is of sufficient worth and value to justify the extension of the lease; 2) the estimated time to complete the improvements is approximately 24 months from the date the development agreement is signed; and 3) the minimum revised annual rent for the extension based on the fair market value of the lands to be developed shall be as follows:

GL S-4331

<u>Effective Date</u>	<u>Annual Lease Rent</u>
04/16/2036	\$28,657.00
04/16/2046	\$34,933.00
04/16/2056	\$42,583.00

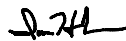
GL S-4332

<u>Effective Date</u>	<u>Annual Lease Rent</u>
04/16/2036	\$30,047.00
04/16/2046	\$36,627.00
04/16/2056	\$44,648.00

3. Authorize the Chairperson to approve and execute a development agreement with Lessees James William McCully, Trustee of the James William McCully Revocable Living Trust dated September 24, 1992 and Francine Marie Morales McCully, Trustee of the Francine Marie Morales McCully Revocable Living Trust dated September 24, 1992, for a 30-year extension of General Leases No. S-4331 and S-4332, covering the State-owned parcels identified by Tax Map Keys: (3) 2-2-37:144, pursuant to Act 149, Session Laws of Hawaii 2018, under the terms and conditions cited above, which by this reference are incorporated herein, and further subject to the following terms and conditions:
 - A. Incorporation of the current standard terms and conditions, regarding, and including but not limited to lease assignment, sublease rent participation, and ownership of improvements used by the Department of the Attorney General with respect to leasing of public lands;
 - B. Review and approval by the Department of the Attorney General; and
 - C. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

4. Approve a 30-year extension of lease term of General Leases Nos.S-4331 and S-4332, James William McCully, Trustee of the James William McCully Revocable Living Trust dated September 24, 1992 and Francine Marie Morales McCully, Trustee of the Francine Marie Morales McCully Revocable Living Trust dated September 24, 1992, covering the State-owned parcels identified by Tax Map Keys: (3) 2-2-37:144, pursuant to Act 149, Session Laws of Hawaii 2018, under the terms and conditions cited above, which by this reference are incorporated herein, and further subject to the following terms and conditions:
 - A. Incorporation of the current standard terms and conditions, regarding, and including but not limited to lease assignment, sublease rent participation, and ownership of improvements used by the Department of the Attorney General with respect to leasing of public lands.
 - B. Review and approval by the Department of the Attorney General; and
 - C. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

Respectfully Submitted,



FOR Gordon C. Heit
 District Land Agent

APPROVED FOR SUBMITTAL:



Dawn N.S. Chang, Chairperson

RT

Public Land Trust Information System



April 25, 2024

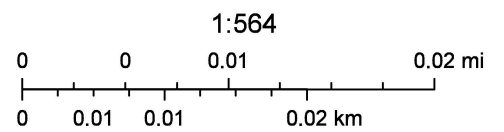


EXHIBIT A

Esri, HERE, Garmin, iPC, Resource Mapping Hawaii



Takamine Construction, Inc.

PROPOSAL

DATE: APRIL 23, 2024

TO: JAMES WILLIAM MCCULLY. And as Trustee
FRANCINE MARIE MORALES-MCCULLY, Trustee
GL-4331/ GL-4332

PROJECT NAME: IMPROVEMENTS TO PROPERTY

TMK #: (3) 2-2-037:144

PROJECT LOCATION: 900 LEILANI STREET
HILO, HI 96720

We propose to furnish all material and perform all labor necessary to complete the following:

IMPROVEMENTS TO PROPERTY LOCATED AT 900 LEILANI STREET

CONDITIONS

1. This is a proposal based on site visit and drawings provided by lessee.
2. Any revisions or additions will require re-pricing by Takamine Construction, Inc.
3. Improvements to be completed within 12 months of notice to proceed.

SCOPE OF WORK :

Ku Aloha Ola Mau Office

1. Remove and replace flooring in entire building. Approximately 3,450 square feet. New vinyl plank flooring to be installed.
2. Paint interior as needed.

Island Movers

1. Remove 8,760 square feet of existing asphalt in the parking lot, regrade and repave with 2 ½" thick #4 asphalt mix. Clean the rest of the parking lot, crack fill, apply 2 coats of SealMaster liquid Road Sealer and restripe all stalls. Repair eroded corner of rock wall at entry.
2. Remove section of parking lot near drywell approximately 810 square feet down 24" and install 2 ½" drain rock to help with drainage.
3. Plans, permits and installation 17.6 KW roof mounted PV system with battery.

EXHIBIT B



Takamine Construction, Inc.

4. Plans, permits and construction of approximately 1,350 square foot, 2 story office space inside existing building.
5. Perimeter fencing with 2 rolling gates.

SCHEDULE OF VALUES

Ku Aloha Ola Mau Office

- | | |
|----------------------|--------|
| 1. Flooring | 42,125 |
| 2. Interior painting | 8,125 |

Island Movers

- | | |
|---|---------|
| 1. Parking lot improvements | 71,500 |
| 2. Drainage improvements | 24,250 |
| 3. Photovoltaic system with battery | 135,000 |
| 4. New interior office space 2 story 1,350 sf | 114,750 |
| 5. Perimeter Fence with 2 rolling gates | 21,500 |

We propose to furnish material and labor, complete in accordance with the above specifications, for the sum of: Four hundred eighteen thousand two hundred fifty and 00/100 Dollars \$418,250

Payment to be made as follows: Progress payments

Contractor's Signature: _____

Craig S. Takamine

Acceptance of Proposal: The above price, specifications and conditions are satisfactory and are hereby accepted. You are authorized to do the work as specified. Payment will be made as outlined above.

Owner's Signature: _____

Date: _____

DEVELOPMENT AGREEMENT

FOR

**James William McCully, Trustee of the James William McCully Revocable
Living Trust dated September 24, 1992 and Francine Marie Morales
McCully, Trustee of the Francine Marie Morales McCully Revocable Living
Trust dated September 24, 1992**

* * *

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

State of Hawaii

EXHIBIT C

DEVELOPMENT AGREEMENT

THIS DEVELOPMENT AGREEMENT (the “**Agreement**”) is made and dated effective as of this _____ day of _____, 2024 (“**Effective Date**”), by and between the **STATE OF HAWAII**, by its Chairperson of the Board of Land and Natural Resources (“**Chairperson**”) by the authority granted by the Board of Land and Natural Resources (“**Board**”) at its meeting held on May 10, 2024, under agenda Item D-___, for the Department of Land and Natural Resources, Land Division, whose principal place of business and post office address is 1151 Punchbowl Street, Room 220, Honolulu, Hawaii 96813 (“**State**”), and **James William McCully, Trustee of the James William McCully Revocable Living Trust dated September 24, 1992** and **Francine Marie Morales McCully, Trustee of the Francine Marie Morales McCully Revocable Living Trust dated September 24, 1992**, whose business address is _____ (“**Lessee**”).

RECITALS:

The State owns in fee simple that certain parcels of land, a portion of government lands, situated at Waiakea, South Hilo, Hawaii, shown on **Exhibit A** attached hereto, incorporated herein and made a part hereof. The parcels consist of approximately 46,297 square feet (0.971 acres) (for both GL S-4331 and GL S-4332) and is identified by Tax Map Keys: (3) 2-2-37:144 (“**Subject Property**”).

- A. The parcels are currently leased to Lessee under General Lease No. S-4331 and S-4332 for an original term of fifty-five (55) years from April 16, 1971 to April 15, 2026, with an extension of 10 years commencing on April 16, 2026 and expiring on April 15, 2036 (Land Board meeting April 24, 2015, Item D-3) (“**Lease**”).
- B. Act 149 Session Laws of Hawaii 2018 ("**Act 149**"), codified at Sections 171-191 and 171-192, Hawaii Revised Statutes ("**HRS**"), as amended, created the Hilo community economic district which includes the Subject Property. The purpose for creating the district was to allow the State to “facilitate efficient and effective improvement, and economic opportunity, in the area for lessees who commit to making substantial improvements to the existing improvements or constructing new substantial improvements.”
- C. Act 149 authorizes the Board to extend the term of leases for public lands within the Hilo community economic district for lessees who commit to substantial improvements to the existing improvements or to new substantial improvements so long as the length of the extension granted does not extend the original lease term by more than forty (40) years, and/or to extend the terms of such leases to the extent needed to qualify the lessee for loans or to amortize the cost of substantial improvements to the premises paid for by the lessee without institutional financing.
- D. Act 149 defines "substantial improvements" to mean “any renovation, rehabilitation, reconstruction, or construction of existing improvements, including minimum requirements for off-site and on-site improvements, the cost of which

equals or exceeds thirty per cent of the market value of the existing improvements, that the lessee or the lessee and developer install, construct, and complete by the date of completion of the total development.”

- E. An Appraisal Report prepared for the Lessee determined the market value of the leasehold improvements on the Subject Property to be \$1,230,000.00 as of October 26, 2019. Thirty percent of this amount is \$369,000.00.
- F. Lessee applied for a 30-year extension, which is the maximum allowed under Act 149 in light of the 10-year extension the Board already approved, and Lessee is planning to make substantial improvements to the Subject Property in an amount exceeding the minimum required to be eligible for a lease extension under Act 149, as the total cost of Lessee’s substantial improvements will be approximately \$417,250.
- H. Lessee’s plans and specifications for its substantial improvements to the Subject Property were presented to the Board at its meeting of May 10, 2024, under agenda Item D-__, together with the State staff recommendation that the Board approve a 30-year extension of the Lease to amortize the cost of the substantial improvements. The Board reviewed the plans and specifications and statutory requirements for a lease extension Act 149 and approved the extension of the Lease.
- I. This Agreement sets forth the terms and conditions that Lessee must satisfy and successfully perform in order for the requested extension of the Lease to be issued, and for Lessee to retain the benefit of the requested extension of the term of the Lease for the Subject Property pursuant to Act 149.

AGREEMENT:

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

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

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

3. Development Plan.

A. Pursuant to Act 149, prior to entering into this Agreement, Lessee prepared and submitted to the Board the plans and specifications of its proposed development plan for the substantial improvements to the Subject Property dated April 23, 2024, a copy of which is attached hereto as **Exhibit B** incorporated herein and made a part hereof (such plans and specifications are collectively referred to as the **“Development Plan”**). All such plans and specifications of the Development Plan shall meet the requirements of and be in full compliance with this Agreement and all applicable municipal, county, state and federal regulations, rules, codes and ordinances. The Board reviewed the Development Plan at its meeting held on May 10, 2024, under agenda Item D-___, and determined that:

(i) The Development Plan proposed in this Agreement is of sufficient worth and value to justify the extension of the term of the Lease to April 15, 2066;

(ii) The estimated period of time to complete the Development Plan shall be twenty-four (24) months from the Effective Date of this Agreement, which is reasonable; and

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

B. The Board granted final approval of the Development Plan and this Agreement at its meeting held on May 10, 2024, Item D-___.

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

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

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

5. Construction Period. Lessee shall have twenty-four (24) months from the Effective Date to complete the substantial upgrades to the existing improvements on the Subject Property in accordance with the approved Development Plan (“**Construction Period**”).

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

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

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

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

7. Bonds. Lessee shall not commence construction of the improvements until Lessee has filed with the State sufficient bonds conditioned upon the full and faithful performance of all the terms and conditions of this Agreement, including a completion bond for the full, faithful and timely completion of this Agreement, free from all liens and claims, including the completion of the substantial improvements described in this Agreement, and a labor and materialmen’s bond in the amount of \$417,250, in such form and upon such terms and

conditions as may be approved by the State. The Lessee shall, at its own cost and expense, within fifteen (15) days from the Effective Date of this Agreement, procure and deposit with the State and thereafter keep in full force and effect during the term of this Agreement, such bonds acceptable to the State in the amount of \$417,250 as aforesaid, which bonds shall name the State as obligee, conditioned upon the full and faithful observance and performance by Lessee of all the terms, conditions and covenants of this Agreement, including, but not limited to, the completion of the substantial improvements requirement in accordance with the approved Development Plan at the Subject Property on or before the date of completion, free from all liens and claims, pursuant to the approved Development Plan. Lessee shall indemnify, defend, and hold the State harmless from all liens, suits, actions or damages arising out of, caused from or attributable to the work performed pursuant to the substantial improvements requirement in accordance with the approved Development Plan at the Subject Property incorporated herein this Agreement. These bonds shall provide that in case of a breach or default of any of the terms of this Agreement, covenants, conditions and agreements of such bonds, the full amounts payable pursuant to the terms and conditions of such bonds shall be paid to the State as liquidated and ascertained damages and not as a penalty.

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

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

9. Justification of Sureties. Any bonds required by this Agreement shall be supported by the obligation of a corporate surety organized for the purpose of being a surety and qualified to do business in the State of Hawaii, or by not less than two (2) personal sureties, corporate or individual, for which justifications shall be filed as provided in Section 78-20, HRS; provided, however, the Lessee may furnish a bond in like amount, conditioned as aforesaid, executed by it alone as obligor, if, in lieu of any surety or sureties, it shall also furnish and at all

times thereafter keep and maintain on deposit with the State security in certified checks, certificates of deposit (payable on demand or after a period the State may stipulate), bonds, stocks or other negotiable securities properly endorsed, or execute and deliver to the State a deed or deeds of trust of real property, all of a character which is satisfactory to State and valued in the aggregate at not less than the principal amount of the bond. It is agreed that the value of any securities which may be accepted and at any time thereafter held by the State shall be determined by the State, and that the Lessee may, with the approval of the State, exchange other securities or money for any of the deposited securities if in the judgment of the State the substitute securities or money shall be at least equal in value to those withdrawn. It is further agreed that substitution of sureties or the substitution of a deposit of security for the obligation of a surety or sureties may be made by the Lessee, but only upon the written consent of the State and that until this consent is granted, which shall be discretionary with the State, no surety shall be released or relieved from any obligation, except for any bonds terminated by Lessee after the Completion Date pursuant to the terms of Paragraph 8 hereinabove.

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

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

In addition, the State recognizes that from time to time the approved Development Plan may require changes or modifications initiated by Lessee. Lessee may make any such changes or modifications to said approved Development Plan with the prior written consent of the State, which consent shall not be unreasonably withheld, provided that such changes or modifications: (a) do not materially alter or change the Development Plan as approved by the

State; (b) do not reduce the rents and all other charges to be paid by Lessee under the Lease or Extended Lease; (c) do not provide for uses that are not permitted by applicable laws or ordinances; or (d) do not adversely affect or delay the Construction Period for more than one hundred and eighty (180) days.

12. Agreement to Issue Extension of Term of Lease. Upon execution of this Agreement, the State will request the Department of the Attorney General to prepare the Extended Lease document. Pursuant to Act 149, the Extended Lease document (heretofore and hereinafter sometimes also simply referred to as the “Extended Lease”) shall reflect an extension term of thirty (30) years and shall contain the Department’s and the Department of the Attorney General’s most current lease terms and conditions for leasing of public lands to for-profit entities, including but not limited to Lease Assignment, Sublease Rent Participation, and Ownership of Improvements. The Extended Lease document will cover the aggregate extended term between April 16, 2036 through April 15, 2066, and will provide that in the event that the Lessee fails to successfully perform, timely satisfy or fully comply with any of the terms and conditions of this Agreement and/or approved Development Plan, the Extended Lease term will be rescinded and the Lease, together with its current termination date of April 16, 2036, will be reinstated. The State and Lessee will promptly sign the Extended Lease document when the form thereof is approved by the Department of the Attorney General.

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

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

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

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

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

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

(iv) If the Lessee is not in compliance with Sections 171-191 and -192, HRS.

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

Upon any early termination by the State under this Agreement, this Agreement shall terminate on the date as provided for in the State's written notice and shall become null and void except as to any provisions which expressly survive termination in this Agreement. The Extended Lease shall be rescinded and Lessee shall not be entitled to an extension of the term of the Lease for the Subject Property pursuant to Act 149. Upon the effective date of termination and without waiving any other remedies to which it may be entitled, the State shall be entitled to: (1) prosecute any claim against Lessee for fees, costs or other payments or charges that accrued prior to the effective date of termination, including the interest thereon; and (2) assert any claim that it may have against Lessee for any damages, costs, or expenses, suffered or incurred by the State, which obligations shall survive termination of this Agreement, the Lease and/or Extended Lease.

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

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

be. The foregoing covenants of Lessee shall survive expiration or any early termination of this Agreement.

16. Expenses to be Paid by Lessee. Pursuant to Act 149, Lessee shall pay all costs and expenses incurred by the State in connection with the processing, analyzing and negotiating of any request for a lease term extension and document, and this Agreement.

17. Observance of Laws, Ordinances and Regulations. Each party hereto, and their respective officers, agents, assigns, employees, consultants and/or contractors, or persons acting for or on its behalf, shall at all times observe and comply with all applicable laws, ordinances, rules and regulations of the federal, state, county and municipal governments, now in force or which may be in force.

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

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

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

If to the State:	Board and Department of Land and Natural Resources 1151 Punchbowl Street, Room 220 Honolulu, Hawaii 96813 Attention: Chairperson Fax No.: (808) 587-0390
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And a copy to:	Department of the Attorney General Attention: Land/Transportation Division Kekuanaoa Building 465 South King Street, Suite 300
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Honolulu, Hawaii 96813
Fax No.: (808) 587-2999

If to Lessee:

Living Trust

James William McCully, *Trustee*
of the Francine Marie Morales McCully Revocable

Hilo, Hawaii 967__

Living Trust

Francine Marie Morales McCully, *Trustee*
of the Francine Marie Morales McCully Revocable

Hilo, Hawaii 967__

And a copy to: _____

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

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

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

agree to execute such other documents and instruments as may be reasonably requested by the other party and as may be necessary to effectuate the terms and conditions of this Agreement.

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

25. Ratification. To the extent of any conflict or inconsistency between the terms of this Agreement and the terms of the Lease, the terms of this Agreement shall govern and control to the extent only where there is any conflict or inconsistency with regard to the terms and conditions that Lessee must satisfy and successfully perform in order for it to be issued an extension of the term of the Lease by the State for the Subject Property pursuant to Act 149.

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

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

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

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

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

reasonably necessary to assign to the State, all such development rights, permits, approvals, plans, specifications, etc.

31. DLNR. Notwithstanding anything herein to the contrary, it is specifically understood and agreed by the parties that: (a) the “State” as used herein means the Department of Land and Natural Resources, State of Hawaii, and the “Chairperson” as used herein means the Chairperson of the Board of Land and Natural Resources; (b) whenever action is taken, or required to be taken by the “State” under this Agreement (e.g., approve, disapprove, consent or otherwise), it shall be deemed to be an act of only the Board of Land and Natural Resources, and shall not be construed to be the act of any other department or agency of the State of Hawaii. Lessee acknowledges and accepts the responsibility for obtaining all entitlements and governmental approvals from the other applicable governing boards, agencies and departments of the State, County and Federal Government.

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

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

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

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

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

Exhibit A: Map of Subject Property

Exhibit B: Lessee’s Development Plan dated April 23, 2024.

[THE NEXT PAGE IS THE SIGNATURE PAGE.]

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

Approved and Executed by the Chairperson pursuant to authority granted by the Board of Land and Natural Resources at its meeting held on May 10, 2024

STATE OF HAWAII

By _____
DAWN N. S. CHANG
Chairperson of the Board of Land and

Natural Resources

APPROVED AS TO FORM:

Name: _____

Deputy Attorney General

Dated: _____

**James William McCully, Trustee of
the James William McCully Revocable
Living Trust dated September 24, 1992**

Lessee

STATE OF HAWAII)
) SS.
COUNTY OF _____)

On this _____ day of _____, 20____, before me personally appeared _____ to me personally known, who, being by me duly sworn, did say that he/she is the successor trustee of **James William McCully, Trustee of the James William McCully Revocable Living Trust dated September 24, 1992** and acknowledged said instrument to be the free act and deed of said trust.

Notary Public, State of Hawaii

My commission expires: _____

**Francine Marie Morales McCully,
Trustee of the Francine Marie Morales
McCully Revocable Living Trust dated
September 24, 1992**

Lessee

STATE OF HAWAII)
) SS.
COUNTY OF _____)

On this _____ day of _____, 20____, before me personally appeared _____ to me personally known, who, being by me duly sworn, did say that he/she is the successor trustee of **Francine Marie Morales McCully, Trustee of the Francine Marie Morales McCully Revocable Living Trust dated September 24, 1992** and acknowledged said instrument to be the free act and deed of said trust.

Notary Public, State of Hawaii

My commission expires: _____

EXHIBIT A

EXHIBIT B

LESSEE'S DEVELOPMENT PLAN DATED APRIL 23, 2024

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

Item	Estimated Cost
1. Ku Aloha Ola Mau Office Remove and replace flooring in entire building. Approximately 3,450 square feet. New vinyl plank flooring to be installed.	\$42,125 (See Exhibit 1)
2. Ku Aloha Ola Mau Office Paint interior as needed.	\$8,125 (See Exhibit 1)
3. Island Movers Remove 8,760 square feet of existing asphalt in the parking lot, regrade and repave with 2 ½" thick #4 asphalt mix. Clean the rest of the parking lot, crack fill, apply 2 coats of SealMaster liquid Road Sealer and restripe all stalls. Repair eroded corner of rock wall at entry.	\$71,500 (See Exhibit 1)
4. Island Movers Remove section of parking lot near drywell approximately 810 square feet down 24 inches and install 2 ½ inch drain rock to help with drainage.	\$24,250 (See Exhibit 1)
5. Island Movers Plans, permits and installation 17.6 KW roof mounted PV system.	\$135,000 (See Exhibit 1)
6. Island Movers Plans, permits and construction of approximately 1,350 square foot, 2 story office space inside existing building.	\$114,750 (See Exhibit 1)
7. Island Movers Perimeter fencing with 2 rolling gates.	\$21,500 (See Exhibit 1)

Total:	\$417,250

The total estimated cost for the Project is \$417,250, which is 33.9% of the market value of the existing improvements (based on Lessee's appraisal) and exceeds the 30% threshold required under HRS Section 171-192.

EXHIBIT 1