

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

January 13, 2012

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

Hawaii

Consent to Sublease (Special Events Contract) under General Lease No. S-5188, Brad Radcliffe Anderson, Cord Dominis Anderson, and D.G. Anderson, Lessee, to John M. Alderson, Sublessee; Delegate Authority to Chairperson to Approve future Similar Subleases; Auhaueake, North Kona, Hawaii, Tax Map Key: (3) 7-5-09:43.

APPLICANT:

Brad Radcliffe Anderson, Cord Dominis Anderson, and D.G. Anderson, as Sublessor, to John M. Alderson, as Sublessee.

LEGAL REFERENCE:

Section 171-36(a)(6), Hawaii Revised Statutes, as amended.

LOCATION:

Portion of Government lands of Auhaueake situated at North Kona, Hawaii, identified by Tax Map Key: (3) 7-5-09:43, as shown on the attached map labeled Exhibit 1.

AREA:

Parcel Area: .338 acre (14,723 square feet), more or less.
Sublease Area: 285 square feet, more or less

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act

DHHL 30% entitlement lands pursuant to the Hawaii State Constitution: NO

LEASE CHARACTER OF USE:

Lessee shall use or allow the premises leased to be used solely for commercial purposes as may be permitted under the zoning ordinances of the County of Hawaii.

SUBLEASE CHARACTER OF USE:

Shave Ice Stand purposes.

TERM OF LEASE:

50 years, commencing on May 19, 1989 and expiring on May 18, 2039. Last rental reopening occurred on May 19, 2009; next rental reopening is scheduled for May 19, 2019.

TERM OF SUBLEASE:

Saturdays and Sundays, between 10:00 A.M. and 4:00 P.M. (weather permitting), for the calendar year 2012.

RENTAL:

\$31,150 due in semi-annual payments.

ANNUAL SUBLEASE RENTAL:

Estimated at \$3,120 (based on \$5.00 per hour for six hours each on Saturdays and Sundays).

RECOMMENDED ADJUSTMENT TO LEASE RENTAL:

A 50% share of sandwich profits to be calculated as shown in Exhibit 3 attached.

DCCA VERIFICATION:

Not applicable. Sublessor and sublessee are natural persons and not required to register with the Department of Commerce and Consumer Affairs.

REMARKS:

A notice of default (NOD) dated September 16, 2011 was issued to Brad Radcliffe Anderson, Cord Dominis Anderson, and D.G. Anderson, lessees under General Lease No. S-5188, on or about September 23, 2011 for failure to use the lease premises for commercial purposes. Lessees thereafter requested permission to enter into a form of "Special Events Contract" that would allow various users to conduct events on portions of the premises on a temporary and revocable basis. Lessees' position is that such a limited use does not amount to a sublease. However, the sublease provision under the lease is quite restrictive:

14. Subletting. The Lessee shall not rent or sublet the whole or any portion of the premises, without the prior written approval of the Board; and provided, however, that prior to this approval, the Board shall have the right to review and approve the rent to be charged to the proposed sublessee . . . , and the Board shall have the right to revise the rent of the premises based on the rental rate charged to the sublessee . . . , and provided, further, that the rent may not be revised downward.

Based on this language, staff concludes that it must present the "Special Events Contract" to the Board as a request to sublease.

Lessees are proposing to sublease approximately 285 square feet of the lease premises to John M. Alderson on an intermittent basis for the operation of a mobile shave ice cart. The cart would operate between the hours of 10:00 AM and 4:00 PM on Saturdays and Sundays. Tables, chairs and tents or awnings for shade may also be set up in the sublease area. The cart, tables, chairs, tents and awnings would all be removed from the premises when not in use. No permanent improvements will be placed in the sublease area. A copy of the proposed "Special Events Contract" is attached as Exhibit 2.¹

The Board has a number of policies in place regarding subleases and State participation in sublease rents. As an initial matter, a determination needs to be made as to whether the lease premises are improved or unimproved. In this case, there are no buildings on the premises. However, Lessees' predecessors-in-interest developed the property into a landscaped open area with walkways, stairs, railings, walls, terraces, utility corridors and a drainage feature that uses the sand volleyball court on the premises as a detention basin. These items could be considered improvements. But improvements generally enhance the value of land, and in this case the construction of a drainage system that benefits the adjoining private parcels and burdens the State land likely devalues the State land.²

1 The Special Events Contract that Lessees provided to staff had an Exhibit B attached to it, which is a copy of a check. This Exhibit B has been omitted from the copy of the contract attached as Exhibit 2.

2 An independent appraisal would be needed to compare the value of the land in its raw state to

Accordingly, staff has applied the sublease policy for subleases of unimproved lands to Lessees' request. Attached as Exhibit 3 is a sample sublease sandwich calculation based on the assumption that the proposed sublessee would operate every weekend of the year. In that case, the annual sublease rent would be \$3,120, and the State would receive \$1,258 as additional rent due per year. But the actual additional rent cannot be determined at the present time because of the temporary, revocable nature of the sublease and the possibility that the sublessee may not operate on days of inclement weather. Accordingly, staff is including a recommendation below that the Lessees submit a sublease rent report to Land Division within 60 days of the end of each lease year setting forth the amount of sublease rents collected for the year and calculating the amount due to the State based on the formula set forth in Exhibit 3. Lessees shall additionally pay to the department its share of the sublease rent within 60 days of the end of the lease year.³

Lessee is current on its rent, liability insurance, and performance bond. Since the Lessees acquired the lease on August 31, 2010, the following NODs have issued:

- October 6, 2010 – Various violations relating to construction of temporary shade cloth fence on premises
- December 3, 2010 – Failure to post required liability insurance
- September 3, 2011 – Failure to use premises for commercial purposes

The October 6 and December 3, 2010 NODs have been cured, but Lessees remain in default of the commercial purpose requirement of the lease.⁴

There are no outstanding rental reopening issues.

No agency or community comments were solicited, however staff will provide a copy of the submittal to the County of Hawaii Planning Department once the matter is confirmed on the agenda. The lease premises are located in the Special Management Area and possibly within the shoreline setback area. Staff understands that the County has expressed concerns about any activities on the premises that are inconsistent with the passive park use approved under Special Management Area (SMA) Use Permit No. 277,

its value as it presently exists (burdened with the drainage feature). The appraisal report that was prepared for the last rental reopening in 2009 did not factor in the burden of the drainage feature or utility lines. The report states in part that a "[r]eview of the Tax Map and Legal Description indicate that there are no easement or restrictions affecting the property except the ground lease. . . . The land is improved with a sand volleyball court with adjacent landscaping including palm trees, shrubs and grass. There are also bleachers and land terracing."

³ The lease year ends on May 18 of each year.

⁴ In a companion submittal before the Board at the present meeting, Lessees are requesting an additional 90-day extension to cure the September 3, 2011 NOD.

as amended. Accordingly, staff is including a recommendation below that Lessees secure all necessary government approvals before allowing the sublessee to conduct operations.

Finally, Lessees anticipate subleasing portions of the lease premises to other users on an intermittent basis using the same form of contract. Staff is including a recommendation below that the Board delegate to the Chairperson the authority to review and approve/disapprove such subleases under the same conditions set forth in this submittal.

RECOMMENDATION:

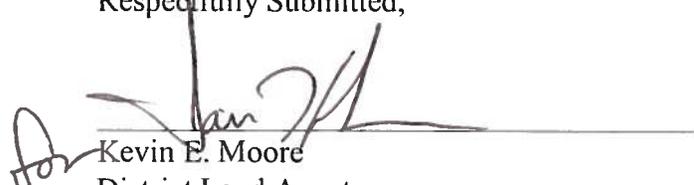
That the Board:

- A. Consent to the sublease under General Lease No. S-5188 between Brad Radcliffe Anderson, Cord Dominis Anderson, and D.G. Anderson, as sublessor, and John M. Alderson, as sublessee, subject to any applicable conditions cited above which are by this reference incorporated herein and further subject to the following terms and conditions:
 1. The standard terms and conditions of the most current consent to sublease form, as may be amended from time to time;
 2. Lessees shall submit a sublease rent report to Land Division within 60 days of the end of each lease year setting forth the amount of sublease rents collected for the year and calculating the amount due to the State based on the formula set forth in Exhibit B. Lessees shall additionally pay to the department its share of the sublease rents within 60 days of the end of the lease year. The lease year ends on May 18 of each year;
 3. Lessees shall secure all applicable government approvals, including, without limitation, any County of Hawaii Planning Department approvals, prior to allowing the sublessee to operate on the premises;

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

- B. Delegate to the Chairperson the authority to approve/disapprove future subleases of the lease premises, subject to any applicable conditions cited above which are by this reference incorporated herein.

Respectfully Submitted,


Kevin E. Moore
District Land Agent

APPROVED FOR SUBMITTAL:


William J. Aila, Jr., Chairperson

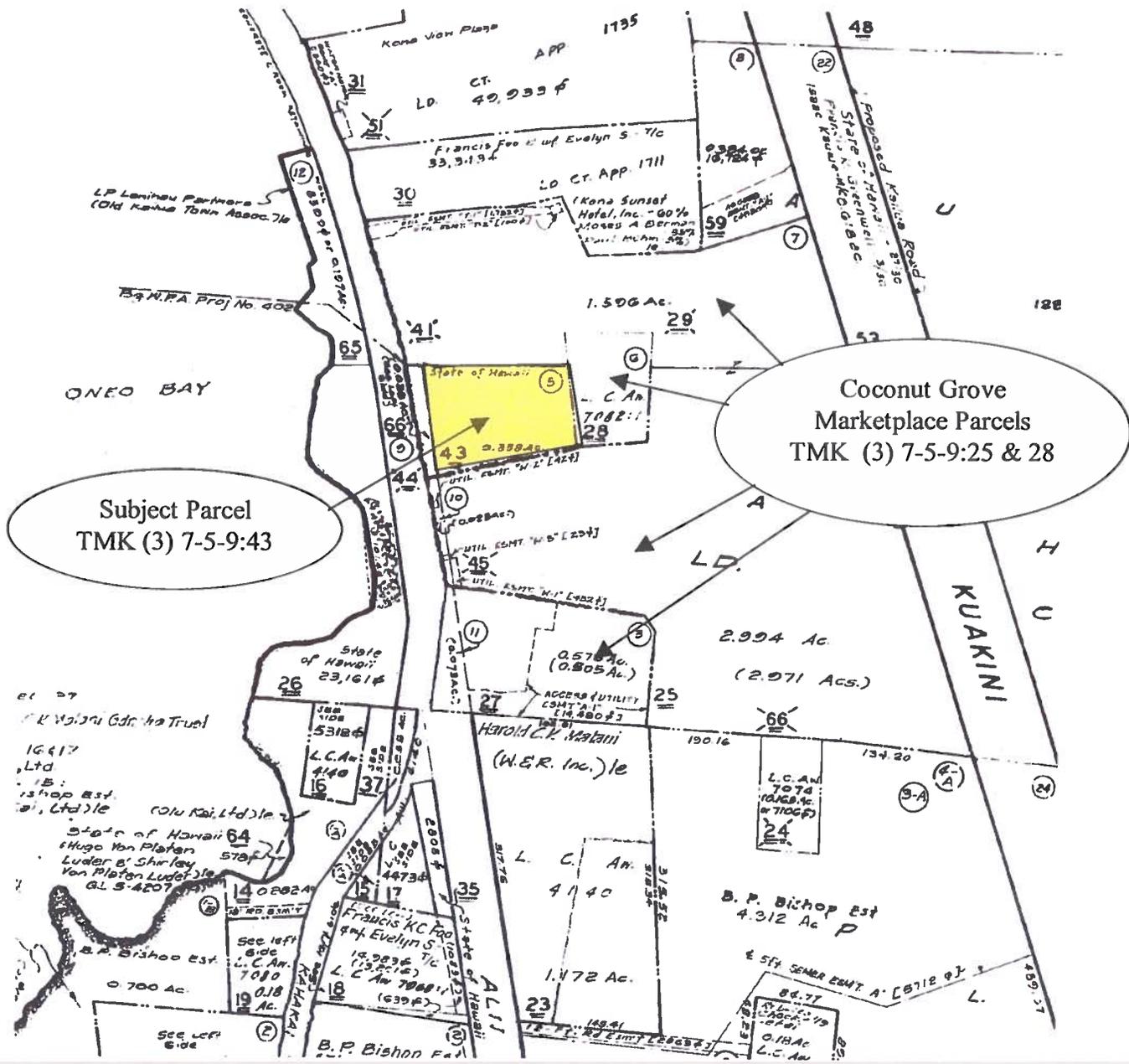


EXHIBIT 1

SPECIAL EVENTS CONTRACT

OWNER: Andersons ("Owners")
Contact: D.G. "Andy" Anderson

USER: John M. Anderson, a OPERATOR OWNER ("User"). User's representative/contact is TBD.
Contact Information:

1285
KAILUA - KAILUA, HAWAII 96740

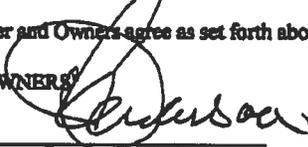
EVENT: Describe the "Event":
RETAILG SHAWE ICE TO WALKING ALI FOOT TRAFFIC
(Attach separate sheet if more space is needed) SEE ATTACHED EXHIBIT B
Date(s): TBD
Time(s):

Location of Event: The Event shall be held on, and User may use only, the Permitted Area described on Exhibit A attached hereto and incorporation herein by reference. The Permitted Area is provided for User's use in its "AS IS, WHERE IS" condition, and User accepts its use with all faults and without warranties, expressed or implied, including, without limitation, any warranties of fitness for a particular purpose or habitability.

DEPOSIT/FEE: 225.00 (EXHIBIT B) is a required deposit ("Deposit") due upon signing of this Special Events Contract; and is the required fee for the Permitted Area ("Fee"), payable two working days prior to the Event. If User fails to pay the Fee (or otherwise defaults), then User shall have no right to use the Permitted Area, and Owners may pursue any and all of its remedies, whether at law, in equity or otherwise.

- TERMS OF USE:** User's use of the Permitted Area is subject to the following:
- A. **Compliance with Law:** User shall comply with all requirements of federal, state or local law applicable to the Permitted Area and the Event. User shall also comply with the requirements State of Hawai'i in accordance with the State Lease which Owners have for the Permitted Area.
 - B. **Limited Use:** User shall use the Permitted Area only for the Event (and no other purpose) and only on the dates and for the times set forth above (for such use and during such dates and times, User's right to use shall be exclusive, subject only to the rights of the State of Hawai'i). Notwithstanding the foregoing, User confirms that User knows that a portion of the property on which the Permitted Area is located is a public park open to the public and as such, (i) all equipment and trade fixtures brought to Permitted Area (such as booths, stages, tents, etc.) and User's and User's invitees' use of the Permitted Area shall be sited and erected so as to not cause damage to the landscaping or foliage on the site, (ii) no heavy equipment or motor vehicles shall be brought on to the Permitted Area without the prior written consent of the Owners, (iii) User and User's invitees shall not block the public's access to the property on which the Permitted Area is located, (iv) User and User's invitees shall be responsible for providing security during the Event and (v) User and User's invitees shall, within 24 hours of the conclusion of the Event) restore the Permitted Area to its condition prior to the Event (the Deposit may be used by Owners if not so restored). This Special Events Contract is gives User only the temporary, revocable right to use the Permitted Area, and shall not be construed to be a lease or a license.
 - C. **Insurance:** User shall obtain and keep in force an insurance policy (with such coverages as may be required by the Owners) naming both the Owners and the State of Hawai'i as additional insured. Proof of such coverage shall be provided no later than two working days prior to the Event.
 - D. **Indemnity:** User agrees to indemnify, defend, save, and hold harmless the Owners, the State of Hawai'i and their respective officials, agents, representatives, agents and employees from any and all claims, demands, suits, causes of action, loss, costs, or expenses (including attorneys' fees) or any damages (of whatsoever kind or nature) arising out of or related to, directly or indirectly, this Special Event Contract, the Event or User's (or its invitees') use of the Permitted Area. This indemnification includes, but is not limited to, compliance with the terms and conditions of the Special Event Contract, User's operations on, and use of, the Permitted Area or any act or omission of User and User's agents, servants, contractors, patrons, guests or invitees, and includes any costs, attorney's fees, expenses and liabilities incurred in the defense of any such claims or the investigation thereof.

User and Owners agree as set forth above this 30 day of DEC, 2011.

"OWNERS"

Name: D. G. ANDERSON

"USER"

Name: John M. Anderson
Title: _____

As presented to DLNR;

It would be helpful if your contract could reference the square footage;

Preliminary discussion +/- 10 X 15 ft. =150 sf Lunch Wagon would be +/- 8 x 20 ft.= 160 sf.

Subject to County Permitting one or the other.

Also discussing to (maybe) place a couple of portable table/ tent 2/4 chair affairs in place for customers to sit. Additional sf +/- 125 sf (2 tents with seats @ 64 sf each x 2)

❖ To round would estimate +/- sf range from 160 sf up top 285 sf max.

As to describing the event:

-----Original Message-----

From: "John Alderson"

Sent: Tuesday, November 15, 2011 3:22 AM

To: [andersonc](#) 1

Subject: Re: Kona Volleyball Court Site and Potential Rental of space.

Mr. Anderson,

As to our recent telephone discussions and emails.

I had my associate visit the site earlier this month while in Kona.

He actually hired a couple of young people to sit at the Volleyball Court site these past two weekends just counting the number of visitors

that walked by between the hours of 10:00 a. m. to 3:30 p.m.

He was very impressed with the foot traffic that walks by the Volleyball Court on weekends.

Yes, we would be interested in renting limited space on some temporary arrangement that would be beneficial to both of us.

How do we proceed? Our preliminary thinking is to erect a very small kiosk-like portable structure on the corner of the parcel next to the existing walkway on Ali'i Drive.

If a small structure is not acceptable as described, we would recommend using a modernized small Lunch-Wagon of sort common throughout Hawaii.

Our clientele would be limited to the pedestrian traffic walking by the property. We do not require any parking and do no advertising.

Traditionally we jack it up off the tires, block it up and skirt the base to hide the tires etc. We don't require much space.

We would be limiting our sales going in to just Shaved Ice, often referred to Smoothies in some markets. The Kona weather is a natural for this product we believe.

I'm sure you have seen the success of this item on the North Shore at two local firms, Matsumoto's and Aoki's.

You mentioned a Rental Agreement may I ask you send me one so our people can review it?

We would provide the necessary insurance policy as required naming you (Anderson's) as additionally insured.

EXHIBIT A

If you think this is something you might consider, we would be happy to sit and see if we can reach a financial arrangement.

This would be limited to start with to only a two day a week effort and go from there.

Sincerely,

John Alderson

On Nov 16, 2011, at 3:30 PM, "andy anderson" <andy.anderson@hawaii.gov> wrote:

John,

Thank you for query.

Interesting proposal as to product.

Yes, we are very familiar with Matsumoto and Aoki's history both with Shaved Ice success and reputation.

I have attached a Draft Contract that is presently being reviewed by our landlord, the State.

They promised we would hear by week's end. I will advise or send you amended copy if needed.

However, think this will give you an idea as to where we are heading.

Looking forward to finding agreement.

Regards

Andy

From: andy anderson <andy.anderson@hawaii.gov>
To: 'John Alderson'
Cc: Cord Anderson <cord.anderson@hawaii.gov>; Kevin E. Moore <kevin.E.Moore@hawaii.gov>
Sent: Thursday, December 1, 2011 2:03 PM
Subject: RE: Kona Volleyball Court Site Potential Rental.

Mr. Alderson

John,

I have attached our Special Event Contract for your review and signature if acceptable.

Would propose:

Site availability to be limited to start with to

Two (2) days a week Saturday and Sunday

Hours 10:00 a.m. to 3:30 p. m. (5 1/2 hours)

Rental Fee: @ \$5.00 an hour x 5.5 hrs. = \$27.50 a day x 2 = \$55.00 a week

x 4.3 weeks = \$236.50 a month...plus 4.5% GET

Deposit of \$225.00

- We must retain the right to cancel contract with 90 day notice.
- Understood we would not sign up a competitor for the identical product.

If this is acceptable please reduce to writing. Fill in the contract or an attached addendum o.k. sign the contract and return as soon as possible.
Once approved, we will give you a 45 day lead time notice to begin.
Looking forward to working with you guys.

Regards
andy



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
LAND DIVISION

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

December 16, 2011

MEMORANDUM

TO: Russell Y. Tsuji, Land Division Administrator

FROM: Kevin E. Moore, Hawaii District Land Agent

SUBJECT: Sublease Sandwich Calculation

GL No.: S-5188
Lessee: Brad Radcliffe Anderson, Cord Dominis Anderson, and D.G. Anderson
Sublessee: John M. Alderson
Location: Auhaueae, North Kona, Hawaii
Lease Area: .338 acre (14,723 square feet)
Sublease Area: 285 square feet
Tax Map Key: (3) 7-5-09:43

Brad Radcliffe Anderson, Cord Dominis Anderson, and D.G. Anderson (the Andersons) are proposing to sublease a portion of the unimproved land currently under General Lease No. S-5188 to John M. Alderson on a part-time basis on weekends for the operation of a mobile shave ice stand. The subject sublease specifies that it is temporary and revocable. The rent payable is \$5.00 per hour for six hours each on Saturday and Sunday. On an annualized basis, the rent amounts to \$3,120 calculated as follows: $\$5 \times 12 \text{ hours per weekend} = \$60 \times 52 \text{ weeks} = \$3,120$. Based on a review of the lease and sublease, we have applied the sublease rent participation policy, approved by the Board on May 26, 2000, Item D-24, and amended January 26, 2001, Item D-8, as follows.

The lessee is paying fair market rent and is subleasing unimproved lands pursuant to paragraph 1.a. of the policy. The prorated ground rent allocated to the sublease area was calculated by dividing the total ground rent the Andersons are paying for 14,723 square feet and multiplying that figure by the square footage under the sublease ($\$31,150/\text{yr.}/14,723 = \$2.12 \text{ per sq. ft.} \times 285 = \604.20 , rounded to \$604/yr.). In applying the policy, we calculate the additional rent as follows:

EXHIBIT 3

Annual Sublease Ground Rent	\$3,120.	
LESS: General Excise Tax (Not included)		<u>\$(0)</u>
Net Annual Sublease Ground Rent		\$3,120
LESS: Annual Ground Rent	<u>\$(604)</u>	
Additional Annual Rent	\$2,516	
MULTIPLIED by 50%		<u>x 0.50</u>
Additional Annual Rent Due	<u>\$1,258</u>	
