

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

May 25, 2012

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

Ref. No.: GLS-5619

HAWAII

Establish Lease Rent Under General Lease No. S-5619, Natural Energy Laboratory of Hawaii Authority (NELHA), Lessee, at \$480 Per Annum Plus Fifty Percent (50%) of the Net Operating Income for the Period July 3, 2011 to July 2, 2021; Amend General Lease No. S-5619 to Modify the Character of Use Provision to Include Telecommunication Purposes, and Extend the Lease Term for an Additional Twenty (20) Years for a Total Term of Sixty-Five (65) Years; Government Lands at Hamanamana, Kalaoa 1st- 4th, and Ooma 1st & 2nd, North Kona, Hawaii, Tax Map Keys: 3rd/ 7-3-43: 5, 41, 42, 51, 63, 66-94, 98, 100, 101, 102, and 106 (formerly designated as 7-3-43: and 7-3-09: 23 and 24).

APPLICANT:

Natural Energy Laboratory of Hawaii Authority, a body corporate and politic and an instrumentality and agency of the State of Hawaii.

LEGAL REFERENCE:

Section 171-6, 171-7, 171-16, 171-59, 171-95 (a)(2), and other applicable sections of Chapter 171, Hawaii Revised Statutes, as amended.

LOCATION:

Portions of Government lands of NELHA, situate at Ooma 1st & 2nd, Kalaoa 1st - 4th and Hamanamana, North Kona, Hawaii, Tax Map Keys: 3rd/ 7-3-43: 5, 41, 42, 51, 63, 66-94, 98, 100, 101, 102, and 106 (formerly designated as 7-3-43: and 7-3-09: 23 and 24), as shown on the attached map labeled Exhibit A.

AREA:

852.851 acres, more or less, consisting of: Part 1 (726.430 acres),
Part 2 (44.211 acres), and
Part 3 (82.210 acres)

ZONING:

State Land Use District: Conservation/ Urban
County of Hawaii CZO: Open/ MG/ ML

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act

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

CURRENT USE STATUS:

Encumbered under General Lease No. S-5619, to the Natural Energy Laboratory of Hawaii Authority (NELHA)

CHARACTER OF USE:

To develop, maintain, and operate an ocean-related high technology industrial park in accordance with Chapter 227D and Chapter 206M, Hawaii Revised Statutes, and to allow for ancillary and accessory uses that will assist the development to become self-sufficient.

LEASE TERM:

Original term of 45 years, commencing on July 3, 2001 and expiring on July 2, 2046. First rental reopening was scheduled for July 3, 2011.

Negotiations for the rental reopening were ongoing since July 2011. A tentative agreement was reached on January 2012, which is in part, the subject of this request.

Requested extension of 20-years commencing on July 3, 2046 and expiring on July 2, 2066.

ANNUAL RENT:

Current:

Annual rental shall be fifty percent (50%) of the net operating income (NOI¹).

¹ NOI is the actual net income remaining after all adjusted operating expenses are deducted from the effective gross income including a reserve for replacement and for major repairs not covered in the operating budget. This does not include federal funds and grants.

Proposed:

Revised annual rent of \$480 plus fifty percent (50%) of the net operating income (NOI), commencing for period from July 3, 2011 to July 2, 2021.

The inclusion of a \$480 per annum rent in addition to the annual rent of fifty percent of the net operating income is due to the Board of Land and Natural Resource's minimum rent policy established in May 2005.

METHOD OF PAYMENT:

Semi-annual payments, in advance.

RENTAL REOPENINGS:

Reopenings in the original term were to be reopened and re-determined as of the day following the expiration of every 10th year of the term. The first rental reopening was scheduled for July 3, 2011.

Reopenings for the extended term shall be on July 3, 2051 and July 3, 2061.

PERFORMANCE BOND:

None.

DCCA VERIFICATION:

Not applicable. Government agency is not required to register with DCCA.

APPLICANT REQUIREMENTS:

None.

BACKGROUND:

NELHA manages the Natural Energy Laboratory of Hawaii in North Kona, Hawaii pursuant to General Lease No. S-5619 with a commencement date of July 3, 2001 and expiration date of July 2, 2046.² The leased lands encompass approximately 870 acres of fastlands, together with an easement over approximately 3,000 acres of submerged lands. Roughly 240 acres of fastlands have been subleased for natural energy uses. Another 170 acres are used for roadways or reserved for setbacks and preserves. The balance of approximately 460 acres of leasable lands remains in an unimproved state.

² Prior to the issuance of General Lease No. S-5619, NELHA operated on the premises pursuant to General Lease Nos. S-4717 and 5157, and Executive Order No. 3282.

The NELHA and HOST park facilities were originally intended to provide for the research and development, prototype incubation facilities utilizing the unique deep, cold-water technology at the facility. The ultimate goal of this effort was to develop commercially viable companies in the field of marine and ocean sciences. As the technology was perfected, the forecast was that rents would increase based on the fixed reopening dates in the leases.

General Lease S-5619 includes a requirement that NELHA submit an annual report of its revenues and expenses with its net operating income (NOI) calculations with a comparison against projections and a 5-year projection.

At its meeting of June 23, 2006, under agenda Item D-18, the Board of Land and Natural Resources approved to amend the provision of General Lease No. S-5619 relating to consents to sublease. At its meeting of October 27, 2006, under agenda Item D-3, the Board approved to amend its June 23, 2006 approval relating to consents to sublease. The amendment of General Lease No. S-5619 was executed on December 11, 2006.

ANALYSIS:

Annually, our Appraisal Section monitors rental reopenings of Land Divisions' tenants. Historically, government agencies obtain their leases from the Land Board through negotiation. This also has resulted in varying lease provisions. A government agency lease rent could be set for the full-term at gratis, fair market, 20% of fair market, \$156 or \$480 per year for the first ten years. The reopening is taken to the Land Board for its approval. Independent real estate appraisers are normally not hired to determine the fair market rent in a lease to a government agency.

General Lease No. S-5619 on page 1 states:

The annual rent reserved shall be reopened and re-determined as of the day following the expiration of every tenth year of the term.

The Lessee is not paying the Department any rent, as there is no net operating income being realized at this time.

The Land Board is authorized to lease State lands to qualifying government agencies, as follows:

§171-95 Disposition to governments, governmental agencies, public utilities, and renewable energy producers. (a) Notwithstanding any limitations to the contrary, the board of land and natural resources may, without public auction: (2) Lease to the governments, agencies, public utilities, and renewable energy producers public lands for terms up to, but not in excess of, sixty-five years at such rental and on such other terms and conditions as the board may determine." [L 1962, c 32, pt of §2; am L

1963, c 40, §§1, 2, 3; am L 1965, c 239, §35; Supp, §103A-90; HRS §171-95; am L 1983, c 179, §1; am L 2002, c 102, §1; am L 2007, c 205, §5; am L 2008, c 90, §2]

When considering lease dispositions to, or rental reopenings for, government agencies, the Land Board may therefore set the rent by direct negotiation at an amount below fair market rental (i.e., nominal rent).

On May 13, 2005, the Land Board established a Minimum Rent Policy that stated, among other things, that the minimum rent for a lease to a charitable organization be no less than \$480 per year. Staff believes "nominal rent" under Section 171-43.1, Hawaii Revised Statutes ought to be anywhere between fair market rent and the minimum rent of \$480 per year. In order to have a standard nominal rent for qualifying government agencies, staff would recommend rent be set at \$480 per year to cover administrative costs in staff's management of the lease.

Staff reviewed the latest report for fiscal year ending June 30, 2011. To date no rent has been paid to the Department.

Accordingly, staff is recommending the Land Board establish the annual rent under General Lease No. S-5619 for the period July 3, 2011 to July 2, 2021 at \$480 plus fifty percent (50%) of NOI. This would be consistent with current Board policy to cover Land Division staff's administrative time while NELHA endeavors to become self-sufficient.

The NELHA Board is also requesting a twenty (20) year lease term extension of General Lease No. S-5619. The remaining thirty-five (35) years may be too short for some potential tenants that invest a significant amount of funds for their projects. It is believed that the extension will further assist in NELHA's marketing efforts.

NELHA further requests an amendment of the "Character of Use" provision in the lease to include commercial telecommunication purposes. Over the years, several telecommunication companies have approached NELHA with proposals to construct telecommunication towers on the premises. The strategic placement of such towers would enhance the telecommunication services of the NELHA tenants, residents of adjacent properties, and provide NELHA with a small, but much needed source of income. Act 61, Session Laws of Hawaii 2010, provides NELHA with the ability to enter into contracts or any other instruments for cellular tower concessions, but the lease character of use does not allow such uses.

On April 12, 2012, various government agencies and interest groups were solicited for comments. To date, all respondents did not have any objections to the request.

AGENCIES	COMMENTS
County of Hawaii:	
Planning Department	* see comments.

Public Works	No response
State of Hawaii:	
DLNR – Aquatics	No comments/ no objections
DLNR - Historic Preservation	No response
DLNR – OCCL	* see comments.
DOT - Airports	No response
Federal Agencies:	
Federal Aviation Administration	* see comments.
Other Agencies/ Interest Groups:	
Office of Hawaiian Affairs	* see comments.

The County of Hawaii, Planning Department had no objections to the request, but provided the comments that the proposed use conform to Coastal Zone Management (CZM) and State & County land use laws.

The Office of Conservation and Coastal Lands provided comments, confirming that portions of the State parcels consisting of the NELHA Facility is within the Conservation District, General and Resource Subzone. Review of the project site concludes that a mapped, historical fishpond, named Pa'aiea Fishpond is on Parcel 42, located adjacent to the shoreline.

The Federal Aviation Administration had no objections to amend the NELHA lease, but provided the following comments:

1. Due to the proximity of the leased area to FAA facilities, please have any new or additional telecommunications facility proposals subject to Title 14, Code of Federal Regulations, Part 77, pursuant to 49 U.S.C., Section 44718, that requires that a "Notice of Proposed Construction or Alteration" (FAA Form 7460-1) is filed and approvals obtained. This may be best accomplished online at <http://oeaa.faa.gov>. This requirement also pertains to any telecommunication technical parameter change and/or addition (ex. Changing power, adding frequencies to existing approved tower obstructions, etc.).
2. If possible, require that all users and/or operators located on the leased area provide to the FAA a list of all frequencies and contact information of all pertinent personnel, companies, or organizations, in the event that any issues arise that require immediate notification of all or certain parties.
3. The FAA recommends the formation of a "Users Group" made up of all parties sharing the property for telecommunications purposes to jointly resolve any potential or actual interference or other issues of common concern.

The Office of Hawaiian Affairs commented on the extended term of the lease. "An

extended lease term of twenty years (for a total of 65 years) appears excessive because the lease length unduly encumbers public land with a long-term lease that exceeds the length of a generation. OHA recommends an extension of no more than ten (10) years at this time, subject to a later review in ten years.

Additionally, under the Hawaii State Constitution, OHA is entitled to a pro rata share of the income and proceeds generated from ceded lands, which in the case of General Lease No. S-5619 may include land use fees, base rent fees, lease rent received, and other miscellaneous.”

NELHA is familiar with the various archaeological/historical sites on record and have been taking appropriate precautions to protect and preserve these sites. It is also familiar with and does comply with Federal Aviation Regulations, Part 77.

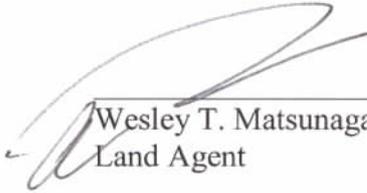
RECOMMENDATION:

That the Board:

1. Establish the annual lease rent under General Lease No. S-5619 at FOUR HUNDRED EIGHTY AND NO/100 DOLLARS (\$480.00) plus fifty percent (50%) of the net operating income (NOI) for the period July 3, 2011 through July 2, 2021;
2. Authorize the amendment of General Lease No. S-5619, Natural Energy Laboratory of Hawaii, Lessee, by:
 - A. Modifying of the “Character of Use” provision to include telecommunication purposes on the demised premises;
 - B. Extending the Lease Term for an additional Twenty (20) Years for a Total Term of Sixty-Five (65) Years, resulting in a new termination date of July 2, 2066;
 - C. The lease amendment shall further be subject to:
 - a. The standard terms and conditions of the most current lease amendment document form, as may be amended from time to time;
 - 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 interest of the State.

Respectfully Submitted,



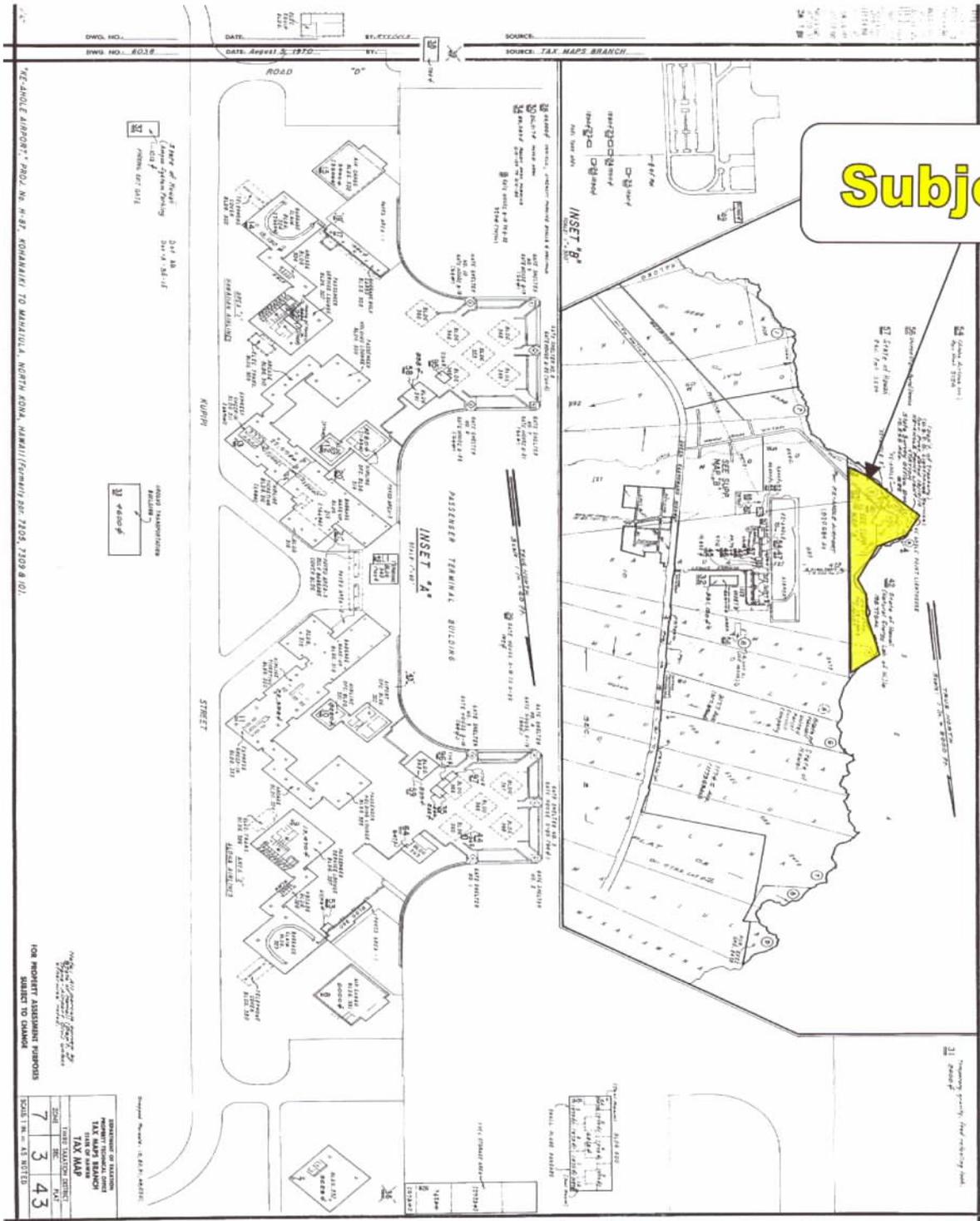
Wesley T. Matsunaga
Land Agent

APPROVED FOR SUBMITTAL:



William J. Aila, Jr., Chairperson





Subject

EXHIBIT A

