

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

April 25, 2014

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

OAHU

Consent to Sub-Sublease under General Lease No. S-4513, Oahu Special Schools Association, Lessee, Special Education Center of Hawaii, Sublessee/Sub-Sublessor to JK Aquatics, LLC dba Diamond Head Aquatics, Sub-Sublessee, Honolulu, Oahu, Tax Map Key: (1) 3-1-042:034.

APPLICANT:

Oahu Special Schools Association and Special Education Center of Hawaii, both domestic non-profit corporations; and

JK Aquatics, LLC dba Diamond Head Aquatics, a domestic limited liability company.

LEGAL REFERENCE:

Section 171-36(a)(6) and 43.1, Hawaii Revised Statutes, as amended.

"Revision to Sublease Rent Participation Policy" adopted by the Board of Land and Natural Resources (Board) on May 26, 2000, agenda item D-24;

As amended by the Board on January 26, 2001, under agenda item D-8, "Resubmittal: Amendment to the Sublease Rent Participation Policy"; and

Further amended by the Board on August 24, 2012, under agenda item D-14. "Modification of Staff Recommendation in Board Action of January 26, 2001, Item D-8, as Amended, Regarding Sublease Rent Participation Policy. The Purpose of the Modification is to Make the Staff Recommendation Consistent with the Board's Directives and Practice in Determining the State's Participation in Sublease Rents."

LOCATION:

Portion of Government lands situated at Honolulu, Oahu, identified by Tax Map Key: (1) 3-1-042:034, as shown on the attached map labeled **Exhibit A**.

AREA:

4.291 acres, 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:

That the Lessee shall use the premises for the construction and operation of schools, daycare and therapeutic facilities, including athletic facilities, for children and adults with all types of physical, mental and/or emotional disabilities. As an ancillary use, the premises may also be used for educational and/or instructional programs for individuals without disabilities. Services to such individuals with and without disabilities may be provided directly by the Lessee and/or its permitted sublessees on the premises.

SUBLEASE CHARACTER OF USE:

Swim school purposes.

TERM OF LEASE:

65 years, commencing on March 15, 1976 and expiring on March 14, 2041.

TERM OF SUBLEASE:

Thirty-six (36) months, commencing from May 1, 2014.

ANNUAL RENTAL:

\$120.00 for the entire 65-year term.

ANNUAL SUBLEASE RENTAL:

\$28,800.00

RECOMMENDED ADJUSTMENT TO LEASE RENTAL:

None. See Remarks Section

DCCA VERIFICATION:

All parties named in the Applicant Section:

Place of business registration confirmed:	YES <u> x </u>	NO <u> </u>
Registered business name confirmed:	YES <u> x </u>	NO <u> </u>
Good standing confirmed:	YES <u> x </u>	NO <u> </u>

REMARKS:

Background

In April 1973, the Board authorized the issuance of a 65-year lease to Variety Club School ("VCS") and Special Education Center of Hawaii ("SECOH") for the operation and management of school facilities for disabled children. After the lease was signed, the two schools formed Oahu Special Schools Association ("OSSA") and requested the Board consent to the assignment of the lease to OSSA. OSSA became the lessee since 1982. Under the arrangement, SECOH and VCS would sublease from OSSA and operated their programs on the premises separately.

Sub-Sublease

SECOH entered into an agreement ("Agreement") with JK Aquatics, LLC dba Diamond Head Aquatics allowing the latter to use the swimming pool and associated facilities built by SECOH around 1984 on the premises after the daily program of SECOH is completed. A copy of the Agreement is attached as **Exhibit B**.

Pursuant to the sublease between OSSA and SECOH, which the Board has given its consent, any sublease from SECOH would require the written approval from OSSA and the Board. The Agreement is considered as a sub-sublease which will require consent from the Board.

Sub-lease policy

The policy on the State's participating in sandwich rent has undergone a few changes in the past years, with the latest version dated August 24, 2012 attached as **Exhibit C**.

OSSA is paying less than fair market rent under the lease and the sub-sublease premises is not State's property. According to policy as shown on Exhibit C¹, the Board shall receive 50% of the portion of sublease rent in excess of the original ground rent. The State's share in such sandwich rent would be $(\$28,800 - \$120) \times 50\% = \$14,340$. However, staff does not believe collection of such sandwich rent is proper in the subject case, as explained below.

The sublease rent participation policy was modified on August 24, 2012 (Item D-14), with its focus on allowing the staff to "continues to use good land management practices in evaluating the varying factual scenarios that can arise in sublease arrangements and ultimately making a recommendation ... on whether the State should participate in the sublease rent, or not." The approach of using prudent land management practices results

¹ The policy on Exhibit C stipulates that "[i]f the lessee subleases improvements not owner by the State, the Board shall revise the rent to include as additional rent, 50% of that portion of the sublease rent in excess of the original ground rent paid to the State." Some items are considered as allowance to be deducted from the sublease rent before arriving at the State's portion of the sandwich rent.

in refining the policy, in part, to read:

“If the lessee subleases improvements not owned by the State, the Board shall not receive any portion of sublease rents from subleasing improved space unless: (i) that right and method of calculation are specifically stated in the lease, or (ii) participation in sublease rents is warranted considering the age of the improvements (including but not limited to the extent to which the improvements have been depreciated or amortized), lessee’s expenditures to maintain the same in relation to sublease revenues, and the extent to which the lessee actually occupies and uses the lease premises for its own business.”

The 2012 amendment of policy involves three components, namely, depreciation, lessee’s expenditure to maintain, and lessee’s own use of the premises. The subject improvement, i.e. swimming pool, was built in 1984, at the cost of SECOH. According to condition 8 of the Agreement at Exhibit B, SECOH will continue to engage a management and maintenance firm for the pool. Hiring of this service will remain as an expensive item for SECOH. Further, SECOH retains the use of the pool during its normal hours in which its services will be provided to its recipients. The proposed sub-sublease will not deprive or reduce SECOH’s ability to use the pool. Accordingly, staff does not believe the State is entitled to a sandwich rent profit.

The policy, as amended, aims to protect the interest of the State. Since SECOH is a non-profit organization, all revenue generated from its program or activities will go back to its non-profit mission and will be properly accounted for. While non-profit organizations will try hard to secure their funding for their programs through donation, or grant from the government, a positive outcome is not guaranteed. Therefore, additional source of funding from a private party, like the proposed sublease arrangement, is a prudent budget practice for the non-profit organization. Theoretically, the State’s interest will be enhanced since SECOH’s financial position will be relatively improved due to this private source of funding.

There are no other compliance issues under GL 4513. There are no other pertinent issues or concerns. Staff recommends the Board consent to the proposed sublease between SECOH and JK Aquatics, LLC dba Diamond Head Aquatics.

RECOMMENDATION:

That the Board consent to the sub-sublease under General Lease No. S-4513 between Special Education Center of Hawaii, as Sub-Sublessor, and JK Aquatics, LLC dba Diamond Head Aquatics, as Sub-Sublessee, subject to any applicable conditions cited above which are by this reference incorporated herein and further subject to the following terms and conditions:

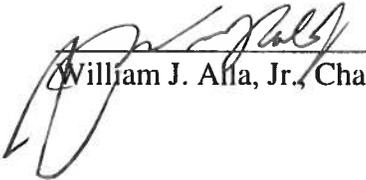
1. The standard terms and conditions of the most current consent to sublease form, as may be amended from time to time;

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

Respectfully Submitted,


Barry Cheung
District Land Agent

APPROVED FOR SUBMITTAL


William J. Alfa, Jr., Chairperson

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

August 24, 2012

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

Statewide

Modification of Staff Recommendation in Board Action of January 26, 2001, Item D-8, as Amended, Regarding Sublease Rent Participation Policy. The Purpose of the Modification is to Make the Staff Recommendation Consistent with the Board's Directives and Practice in Determining the State's Participation in Sublease Rents.

BACKGROUND:

On May 26, 2000, under agenda item D-24, as amended on January 26, 2001, under agenda item D-8, as amended, the Board of Land and Natural Resources was presented with staff recommendation for a sublease rent participation policy, which can be summarized as follows for lessees paying fair market rent:¹

- a. If the lessee subleases unimproved lands, the Board shall revise the rent to include as additional rent, 50% of that portion of the sublease rent in excess of the original ground rent paid to the State.
- b. If the lessee subleases improvements owned by the State, the Board shall revise the rent to include as additional rent, 50% of that portion of the sublease rent in excess of the original ground rent paid to the State.
- c. If the lessee subleases improvements not owned by the State, the Board shall not receive any portion of sublease rents from subleasing improved space unless that right and method of calculation are specifically stated in the lease.

The Board ultimately adopted a sublease rent participation policy, but specifically

¹ The policy includes detailed formulas for calculating the amount of sublease rent participation as shown in Exhibit 1 attached hereto. The policy also covers rent participation in subleases where the lessee is paying less than fair market rent.

APPROVED BY THE BOARD OF
LAND AND NATURAL RESOURCES
AT ITS MEETING HELD ON
August 24, 2012

DM

amended the staff recommendation by clearly articulating that it was approving general principles or guidelines for a rent participation policy and it desired and authorized staff to continue to use good land management practices in evaluating the varying factual scenarios that can arise in sublease arrangements and ultimately making a recommendation to the Board on whether the State should participate in the sublease rents, or not. Therefore, the Board amended the staff recommendation by adding the following statement into the record and minutes of the meeting (Board's amending language in bold):

This policy shall apply to leases under the direct management of the Land Division. Furthermore, the following formulae generally reflect the intent of the Board regarding the calculation of sublease sandwich profit and shall serve as guidelines in such calculation. The board authorizes staff to use their discretion in representing the State's interest in applying these formulae to address the varying sublease arrangements that may not fit neatly into the formulae.

Staff has followed, and intends to continue to follow the Board's directive by continuing to use good land management practices in evaluating a sublease arrangement and recommending departure from the general formulas noted above when adherence to them seems contrary to the State's best interests. Recent Land Board actions involved consenting to a particular lessee's sublease arrangement and participation in the sublease rents. Although the staff submittals discussed the Board's sublease rent participation policy and explained how the recommendation to participate in the sublease rents was, in staff's view, consistent with the Board's sublease rent participation policy, as amended, the staff submittals did not formally seek to refine or elaborate upon the Board policy adopted, as amended, in 2001. This submittal formally and expressly seeks to do so.

REMARKS:

The situations where the formulas summarized above would normally not allow the State to participate in sublease rent when staff's assessment is that the State should receive some benefit from the sublease often arise where the improvements have been substantially depreciated or amortized, and in cell tower or telecommunication leases, or a combination thereof. Telecommunications companies often hold leases that were entered into by direct negotiation pursuant to statute. The lessee typically obtains the lease and constructs the required improvements, usually consisting of one or two equipment/office buildings and the cell tower or antenna itself. With the Board's consent, the lessee can sublease space on the antenna to other telecommunications companies and generate revenues that more than cover the expense of the lessee's ground rent to the State.

For example, at its meeting of October 28, 2011, Item D-27, the Board approved staff's

recommendation for the State to receive 50% of the sandwich profits generated in a sublease/license situation under General Lease No. S-4223, which was issued in 1969 for microwave station and other radio communication facilities purposes. In that case, the ground rent under General Lease No. S-4223 was \$31,400 per year, and the sublease rent collected by the lessee was \$33,153.57 per year. The staff submittal noted that the improvements constructed by the lessee had largely been depreciated over the course of approximately 40 years since the issuance of the lease. The Board approved the State's participation in sublease rents at the rate of 50% even though the right to participation and method of calculation were not specifically stated in the lease.²

Similarly, at its meeting of November 10, 2011, Item D-5, the Board approved the State's participation in sublease rents under another cell tower lease at the rate of 25% in General Lease No. S-5511. In that case, the lease was issued in 1997 and less time had passed for the depreciation of the cost of improvements. Additionally, the lessee submitted evidence of its ongoing maintenance costs for the tower. General Lease No. S-5511 allowed the Board to adjust the rent in the event of a sublease, but the right to participation and method of calculation were not specifically stated in the lease.

Another situation that sometimes arises is where a State lessee acts strictly as a sub-landlord in subleasing improved lands to various sublessees.³ In such case, the State lessee may not actually occupy or operate a business (such as for industrial, commercial or agricultural use) at the premises but, instead, generates sublease income from multiple sublessees that exceeds the amount of rent the lessee pays to the State. Under the general formulas set forth above, the State would not ordinarily share in the sublease rents when the improvements constructed or owned by the lessee, unless the right to participate and method of calculation are specifically stated in the lease, regardless of whether the improvements have been substantially or fully amortized or depreciated (e.g., a 65-year lease in its 40th year noted above).

The cell tower and sub-landlord situations discussed above are two cases in which staff believe the State's participation in sublease rents is warranted depending on the age of the improvements (including the extent to which the improvements have been depreciated or amortized), lessee's expenditures to maintain the same in relation to sublease revenues, and the extent to which the lessee actually occupies and uses the premises for its own business. Staff is including a recommendation below that the Board refine and elaborate upon its existing policy to cover circumstances that may warrant the State's participation in sublease rents even where the improvements are owned by the lessee and right to participate and method of calculation are not specifically stated in the lease.

² By statute, the Board can adjust the rent under a lease as a condition to a consent to assignment or sublease, even if the lease is silent on rent adjustment in such cases. See HRS Section 171-36(a)(6).

³ In other words, the lessee is acting as a pure landlord and is in a sandwich lease position.

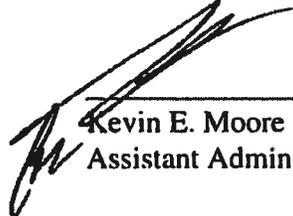
RECOMMENDATION: That the Board:

1. Refine its prior approval (as amended) of January 26, 2001, Item D-8, by modifying the staff's prior recommendation A.1.c on page 3 to read as follows

If the lessee subleases improvements not owned by the State, the Board shall not receive any portion of sublease rents from subleasing improved space unless: (i) that right and method of calculation are specifically stated in the lease, or (ii) participation in sublease rents is warranted considering the age of the improvements (including but not limited to the extent to which the improvements have been depreciated or amortized), lessee's expenditures to maintain the same in relation to sublease revenues, and the extent to which the lessee actually occupies and uses the lease premises for its own business.

2. Except as amended hereby, the Board's prior action of January 26, 2001 shall remain the same.

Respectfully Submitted,



Kevin E. Moore
Assistant Administrator

APPROVED FOR SUBMITTAL:



William J. Aila, Jr., Chairperson

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

January 26, 2001

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

Statewide

RESUBMITTAL: Amendment to the Sublease Rent Participation Policy

BACKGROUND:

On May 26, 2000, under agenda item D-24, the Board of Land and Natural Resources ("Board") approved the "Revision to Sublease Rent Participation Policy" (refer to Exhibit A). The policy was stated as follows:

"The following policy shall apply to leases under the direct management of the Land Division.

- 1) For unimproved lands, the Board shall revise the rent to include as additional rent, 50% of that portion of the sublease rent in excess of the original ground rent paid to the State.
- 2) For improved lands, the Board shall not receive any portion of sublease rents obtained from subleasing improved space unless that right and method of calculation are specifically stated in the lease."

Recently, staff has come across a situation which this sublease policy does not address. The non-profit Waimanalo Teen Project was issued general lease S-5468 under section 171-43.1, HRS, and received nominal rent (25% of fair market) at \$317 per year (see Exhibit B for calculation). Sometime in mid-1999, the Waimanalo Teen Project requested that they be able to sublet part of their building to Castle Medical Center.

On July 9, 1999, under agenda item D-16, the Board approved and amended staff's recommendation to amend General Lease S-5468 by allowing for subleasing under the lease. The Board amended staff's recommendation by deleting the consent to sublease with Castle Medical Center due to concerns regarding the calculation of the sublease sandwich amount and the issue of whether Castle Medical Center was a for-profit operation circumventing the public auction process.

Based on staff's addressing of these concerns, the Board

As Amended
APPROVED BY THE BOARD OF
LAND AND NATURAL RESOURCES
AT ITS MEETING HELD ON

January 26, 2001. per

ITEM D-8

EXHIBIT 1

consented to the sublease between Waimanalo Teen Project and Castle Medical Center on November 19, 1999 under agenda item D-27. Item 4 of the recommendation was amended as follows:

"Increase of the annual rental by the amount of the annual sandwich rental profit as calculated by the staff appraiser, subject to adjustment upon renegotiation of the sublease or reopening of General Lease S-5468, or change in the policy."

Regarding the added language, Board meeting minutes reveal that there had been concern about a discrepancy in the sandwich rental calculations. The Administrator suggested deferring this item until a Board briefing to discuss a revision to the sublease policy could be conducted. The Waimanalo Teen Project accepted the rent as calculated and indicated a need to get Castle Medical Center onto the property. In response, the Board approved the consent to sublease and added that the consent would be subject to any future change in the sublease policy.

Based on this situation, staff is recommending changes to the Sublease Rent Participation Policy in this submittal. (This submittal was deferred by the Board on December 15, 2000 to allow the new Chairperson and Board Member McCrory the opportunity to comment on this matter.)

REMARKS:

When the Revision to Sublease Rent Participation Policy was drafted, staff did not account for the situation where a non-profit pays less than fair market rent. As such, staff did not address the public policy question of whether a non-profit, which is being subsidized by the State through nominal rent, should be subject to the same sublease policy provisions as lessees who are paying fair market rent.

Upon discussion among staff, including the staff appraiser, we believe that the sublease policy, as approved, should not apply to any lessee who is paying less than fair market rent. In this case, the lessee is receiving a State subsidy and should not be allowed to solely benefit from subleasing the State property without participation by the State, even where the improvements constructed by the lessee are being subleased rather than raw land.

Further, staff noticed that the approved sublease policy stated "for improved lands, the Board shall not receive any portion of sublease rents obtained from subleasing improved space unless that right and method of calculation are specifically stated in the lease."

This provision was based on the premise that the lessee constructed the improvements and assumed the risk and therefore should solely benefit from any subleasing arrangements. Staff would like to clarify where the State owns the improvements (i.e., the lessee assumed no risk), then the lease rent would be revised to include as additional rent, 50% of that portion of the sublease rent in excess of the original ground rent.

RECOMMENDATION:

That the Board amend the Revision to Sublease Rent Participation Policy approved by the Board on May 26, 2000, under agenda item D-24, by:

- A. Amending paragraph 2) of the Recommendation section by replacing the entire "Policy" statement to read as follows:

"Policy

This policy shall apply to leases under the direct management of the Land Division.

1. For lessees paying fair market rent:

- a. If the lessee subleases unimproved lands, the Board shall revise the rent to include as additional rent, 50% of that portion of the sublease rent in excess of the original ground rent paid to the State. The following calculation shall be used:

Annual Sublease Ground Rent	\$
LESS: General Excise Tax	\$ ()
Net Annual Sublease Ground Rent	\$
LESS: Annual Ground Rent	\$ ()
Additional Annual Rent	\$
MULTIPLIED by 50%	x .50
Additional Annual Rent Due DLNR	\$

- b. If the lessee subleases improvements owned by the State, the Board shall revise the rent to include as additional rent, 50% of that portion of the sublease rent in excess of the original ground rent paid to the State. The following calculation shall be used:

Annual Sublease Income	\$
LESS: General Excise Tax	\$ ()
Net Annual Sublease Income	\$
LESS: Allowances	\$ ()
Management and vacancy loss (eff. inc. x %)	
Repair and maintenance	
Real property tax	
Insurance	
Ground lease rent	
Additional Annual Income	\$
MULTIPLIED by 50%	x .50
Additional Annual Rent Due DLNR	\$

- c. If the lessee subleases improvements not owned by the State, the Board shall not receive any portion of sublease rents from subleasing improved space unless that right and method of calculation are specifically state in the lease.

2. For lessees paying any amount less than fair market rent:
- a. If the lessee subleases unimproved lands, the Board shall revise the rent to include as additional rent, 50% of that portion of the sublease rent in excess of the original ground rent paid to the State. The calculation delineated in 1.a. above shall be used.
 - b. If the lessee subleases improvements owned by the State, the Board shall revise the rent to include as additional rent, 50% of that portion of the sublease rent in excess of the original ground rent paid to the State. The calculation delineated in 1.b. above shall be used. *changed to 100%*
 - c. If the lessee subleases improvements not owned by the State, the Board shall revise the rent to include as additional rent, 50% of that portion of the sublease rent in excess of the original ground rent paid to the State. The following calculation shall be used:

Annual Sublease Income	\$
LESS: General Excise Tax	\$()
Net Annual Sublease Income	\$
LESS: Allowances	\$()
Management and vacancy loss (eff. inc. X %)	
Investment return (total invest. X %)	
Repair and maintenance	
Real property tax	
Insurance	
Ground lease rent	
Additional Annual Income	\$
MULTIPLIED by 50%	x .50
Additional Annual Rent Due DLNR	\$ "

- B. Deleting paragraph 4) of the Recommendation section in its entirety.
- C. The remaining approved recommendations of agenda item D-24 shall remain in effect.

Respectfully Submitted,

Dierdre S. Mamiya

DIERDRE S. MAMIYA, Asst Administrator

APPROVED FOR SUBMITTAL:

Gilbert S. Coloma-Agaran
GILBERT S. COLOMA-AGARAN, Chairperson

[Handwritten mark]

8. **Approved as Amended.**—The staff recommendation was amended to read as follows:

This policy shall apply to leases under the direct management of the Land Division. Furthermore, the following formulae generally reflect the intent of the Board regarding the calculation of sublease sandwich profit and shall serve as guidelines in such calculation. The Board authorizes staff to use their discretion in representing the State's interest in applying these formulae to address the varying subleasing arrangements that may not fit neatly into the formulae.

Condition 2.b. was also amended by changing ". . . [50%] to 100% of that portion of the sublease rent . . ."

D-24

STATE OF HAWAII
Department of Land and Natural Resources
Land Division
Honolulu, Hawaii 96813

May 26, 2000

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

STATEWIDE

Subject: RESUBMITTAL - REVISION TO SUBLEASE RENT PARTICIPATION
POLICY

Background

Chapter 171-36(a) (6), 1998 Hawaii Revised Statutes states:

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

On July 9, 1982, under agenda item F-9, the Land Board approved staff's recommendation to adopt a sublease evaluation policy. As stated in this submittal, staff recommended the Board formally adopt the format and procedure used to determine the amount of sandwich profit which was first developed and utilized in 1968. The rationale behind the policy was that the State should not allow anyone to make sandwich profits from the use of State owned property. As stated, the purpose of this policy was "to prevent speculation and to prevent the sublessor from becoming the predominant landlord." The policy also recognized the lessee's right to receive a fair return on his investment. Presently, sandwich profits are estimated using the computation sheet identified as Exhibit A. On the computation sheet, the ground rent and that portion of the rent attributable to the lessee's investment are subtracted from the sublease income to determine what rent, if any, is due DLNR.

APPROVED BY THE BOARD OF
LAND AND NATURAL RESOURCES
AT ITS MEETING HELD ON

May 26, 2000 *AV*

EXHIBIT A

ITEM D-24

Problem Definition

In light of the changed economic environment in which we operate – in particular, the dramatic decline in property values since the Japanese bubble burst in or about 1990 -- staff revisited the Sublease Evaluation Policy. In evaluating the appropriateness of current policies, staff examined appraisal-related policies, including the sublease rent participation policy. Staff identified the following concerns regarding this policy and accompanying worksheet:

Fairness to Lessees: The current sublease evaluation policy may be unfair to the lessee because it assigns 100% of the sandwich profit to DLNR even though it is the lessee who assumes the risk.

Reduced Marketability: DLNR ground leases may not be as marketable because of the sublease evaluation policy. This may be particularly true in today's depressed economy or when a business savvy lessee is involved.

Lack of Clarity: The current worksheet is open to considerable interpretation and difficult to support.

Cost/Benefit of Implementation: The additional income received may not justify the time spent calculating and applying sandwich profits. For example, one industrial lease may have several subleases with terms of one year or less. Each time these subleases are extended and/or the rents changed, staff must re-evaluate the rents for sandwich profits. Because the law requires that we revise the lessee's rent based on the sublease rent, staff ends up continually changing the lessee's rent based on the sandwich profits determined.

Analysis

Staff's concern is the current worksheet may be too harsh on lessees who essentially act as entrepreneurs and assume much of the risk. This concern was addressed in a January 8, 1987 study done by Ming Chew Associates for the Department of Hawaiian Home Lands (DHHL). The study noted that "many lessees felt that having entered into the original lease in good faith at a set rental, it was unfair to change the rental terms of the lease during "mid-stream" with rental adjustments that were neither discussed nor agreed to during the initial signing of the lease."

The DHHL study also indicated the attempt to prevent speculation is based on the wrong circumstance (the sublease). If the intent is to have lease rents keep up with increases in land value, then the lease should be modified to consider step up rents, percentage rents, rent adjustments based on the CPI, and/or shorter reopening periods. The report stated that in the private sector, most lessors do not participate in sublease rents.

On December 9, 1999, staff conducted a briefing to provide background on the relevant issues of the sublease policy and to explore the Board's views and opinions on different alternatives for the policy.

At this Board briefing, the following issues were discussed:

- 1) The Board questioned whether other large land owners participated in sublease rents and requested that staff expand its survey of other large land owners.
- 2) The Board agreed that a 50% split was more reasonable but questioned the policy's cost/benefit.

Following this Board briefing, staff surveyed large Hawaii landowners and found the following:

Campbell Estate: The estate may take 50% of a sandwich when vacant land is concerned. Once the site is improved, Campbell does not directly participate in sandwich rents.

Bishop Estate: Bishop may also take 50% of a sandwich when vacant land is subleased; however, when a vacant parcel is leased Bishop typically knows what is planned and accounts for this via percentage rent, step-ups, etc. Finding that one of their lessees has created an unexpected sandwich position is rare. Bishop stated that either the lease prohibits such a sandwich or the lessee is being forced to sublease due to difficult economic conditions, hence a sandwich position is unlikely. Bishop would not rule out participating in sandwich rents should one ever exist.

Kaneohe Ranch: Kaneohe Ranch does not directly participate in sandwich rents. Like Bishop, Kaneohe Ranch typically knows what is planned at the start of a lease and does not expect to find unauthorized sandwich positions on its property.

Department of Hawaiian Home Lands: DHHL collects sandwich rents on both vacant and improved sites. The department revises the rent based on 50% of the amount by which the sublease rent exceeds the original rent for that portion of the property. DHHL estimates it receives less than \$5,000 per year in sandwich rents.

Damon Estate: The Damon Estate does not participate in sandwich rents and does not condemn a lessee when one is created. They have no unimproved lands.

Robinson Estate: The Robinson Estate also does not participate in sandwich rents nor does it discourage a lessee from creating a sandwich position. They stated that in fact, much of their lands got developed because sandwich positions on vacant land were permitted. The estate deals only with ground leases.

Based on these findings, staff recommends revisions to the Sublease Evaluation Policy presented at the December 9, 1999 Board briefing to ensure fairness in our dealings with lessees and increase the marketability of our leases.

Staff now believes that when a lessee improves a vacant site and subsequently subleases improved space, the State should not participate in sandwich profits obtained from subleasing that space. Staff recognizes that it is the lessee who has the vision and assumes the risk, and it is the lessee who should benefit.

Staff also believes sublease rent participation should apply when vacant land is leased and subsequently subleased. Staff suggests that when vacant land is subleased the rent paid to the State should be revised to include as additional rent, 50% of that portion of the sublease rent in excess of the rent paid to the State. This leaves the lessee with some economic incentive and allows the State to participate in sandwich profits. This should also help discourage lessees from overtly speculating with State land. The Sublease Participation Worksheet, examples of rent due and rent loss are attached as Exhibits C and D. Note the only expense is G.E. tax (4%) on the sublease rent received, which the sublessor is required to pay.

Staff notes that we are requesting the Board delegate its authority to the Chairperson when sandwich profits do not exist due to: 1) application of the new, recommended policy or; 2) the absence of a sandwich provision in the lease. This request is made to streamline the consent to sublease process.

Policy:

The following policy shall apply to leases under the direct management of the Land Division.

- 1) For unimproved lands, the Board shall revise the rent to include as additional rent, 50% of that portion of the sublease rent in excess of the original ground rent paid to the State.
- 2) For improved lands, the Board shall not receive any portion of sublease rents obtained from subleasing improved space unless that right and method of calculation are specifically stated in the lease.

The Revision to Sublease Rent Participation Policy dated April 28, 2000 was deferred due to concerns the Board had regarding the Sublease Participation Worksheet. The Board questioned the worksheet's clarity and was particularly concerned about deductions for property taxes and miscellaneous allowances. Upon review, staff determined these and all other deductions, with the exception of G.E. tax, should not be included. The revised Sublease Participation Worksheet identified as Exhibits B eliminated these deductions and simplified the line item descriptions.

April 14, 2000

Recommendation: That the Board:

- 1) Rescind its prior Board action of July 9, 1982, under agenda item F-9, including the computation worksheet identified as Exhibit A.
- 2) Approve the above stated policy.
- 3) Authorize the Chairperson to consent to a sublease when no sandwich profit exists because: 1) the lease has no provision which allows for sandwich profits or 2) the sublease involves improved property and according to the above stated policy, the State is not entitled to a sandwich profit; subject to the review and approval of the Department of the Attorney General.
- 4) Approve the revised Sublease Participation Worksheet identified as Exhibit B.

Respectfully submitted,



Benjamin L. Marx III, Staff Appraiser



Approved for Submittal:



Timothy E. Johns, Chairperson

EXHIBIT A

Format

COMPUTATION SHEET

General Lease No. S-_____, _____, Sublessor, sublease to
_____, Sublessee

Gross Annual Sublease Income
Less 4% tax

\$ _____

Effective Income

\$

Less Allowances:

Management, and vacancy loss
(Eff. Inc. x %)

-\$

Investment return
(Total Inv. x %)

Other operating expenses paid
by sublessor such as real
property tax, insurance premium,
painting, repair and maintenance,
etc.

Reserves for Replacements

General Lease No. S-_____ rental

Total Allowances:

SANDWICH PROFIT:

Exhibit B

SUBLEASE PARTICIPATION WORKSHEET
LAND ONLY

General Lease No.	xxxx	
Lessee:	xxxx	
Location:	xxxx	
Tax Map Key:	xxxx	
Land Area (sf):		0
Annual Ground Rent:		\$0

CALCULATIONS:

Annual Sublease Ground Rent	\$0
LESS: G.E. tax	0
Net Annual Sublease Ground Rent:	\$0
LESS: Annual Ground Rent	0
Additional Annual Rent	\$0
Additional Annual Rent Due DLNR (50%)	\$0

Exhibit C

SUBLEASE PARTICIPATION WORKSHEET
LAND ONLY

General Lease No.	S-xxxx
Lessee:	John Doe
Location:	Honolulu, Hawaii
Tax Map Key:	(1) x-x-xx:xx
Land Area (sf):	20,000
Annual Ground Rent:	\$5,000

CALCULATIONS:

Annual Sublease Ground Rent	\$10,000
LESS: G.E. tax	<u>400</u>
Net Annual Sublease Ground Rent:	\$9,600
LESS: Annual Ground Rent	<u>5,000</u>
Additional Annual Rent	\$4,600
Additional Annual Rent Due DLNR (50%)	\$2,300

Exhibit D

SUBLEASE PARTICIPATION WORKSHEET
LAND ONLY

General Lease No.	S-xxxx
Lessee:	John Doe
Location:	Honolulu, Hawaii
Tax Map Key:	(1) x-x-xx:xx
Land Area (sf):	20,000
Annual Ground Rent:	\$10,000

CALCULATIONS:

Annual Sublease Ground Rent	\$10,000
LESS: G.E. tax	<u>400</u>
Net Annual Sublease Ground Rent:	\$9,600
LESS: Annual Ground Rent	<u>10,000</u>
Additional Annual Rent	(\$400)
Additional Annual Rent Due DLNR (50%)	\$0

VALUE ESTIMATE

REVOCABLE PERMIT NO. S-5870 (LOT B of TMK: 4-1-09-01)

TOTAL LAND AREA: = 10.8930 Acres.
Adjustment: Less: Open Stream Ditch = 0.0953 Acre
Net Area = 10.7977 Acres

1. Total value of banana crop products for Oahu in 1990 = \$1,489,000 (10/12/90 Value Date)
2. Total acreage devoted to banana crop products for Oahu in 1990 = 485 acres

THUS: \$1,489,000 ÷ 485 = \$3,070.10 per acre per year
\$3,070.10 x 3.5% = \$ 107.45 per acre per annum lease rental
ROUNDED = \$ 107.00 per acre per annum

VALUATION:

Total Net Land Acreas 10.7977 acs. @ \$107.00 p/acre = \$1,155.35
(FAIR MARKET ANNUAL RENTAL)

Adjustment:

Permitted use of land for multi-community facility use +10% = 115.53

TOTAL FAIR MARKET LEASE RENTAL PER ANNUM = \$1,270.88

SPECIAL DISCOUNT (See Attached Board Approval)
Minimum annual rent which is 20% of the market
annual rental and 5% management fee which is
5% of the annual market rental = .25

ADJUSTED FAIR MARKET LEASE RENTAL PER ANNUM = \$ 317.72

ROUNDED = \$ 317.00

FINAL ESTIMATE

\$317.00

ANNUAL LEASE RENTAL

DATE OF VALUE: October 12, 1990

EXHIBIT B

SECOH

708 Palekua St. • Honolulu, Hawaii 96816 • Telephone 734-0233

AGREEMENT TO UTILIZE SECOH PROPERTY

Date: June 13, 2013

Name of Lessor: Special Education Center of Hawaii (SECOH)
Address of Lessor: 708 Palekua Street, Honolulu, Hawaii 96816
Telephone/Fax: Ph.: 321-1629 Fax: 734-0391
Contact Person: Glenn H. Tsugawa, President & CEO
Leasable Space: Founder's Center Pool, Spa, Bathhouse, and Pavilion

Name of Lessee: JK Aquatics, LLC dba Diamond Head Aquatics
Address of Lessee: 4126 Keanu Street #4 Honolulu, HI 96816
Telephone/Fax: (808) 377-8841
Contact Person: Jane Kratochvil, Owner
Nature of Business/Use: Swim School

Terms of Agreement:

JK Aquatics, LLC dba Diamond Head Aquatics is hereby authorized by the Special Education Center of Hawaii (SECOH), to utilize the aforementioned space at the aforementioned address at SECOH. It is understood and agreed that SECOH authorizes the Lessee to utilize said space subject to the adherence to the following terms and conditions:

1. Use of the Founder's Center Pool, Bathhouse, and Pavilion ("the Premises") and terminating upon at least 30 days written notice by either party.
2. Lessee is permitted to utilize the Premises on Tuesdays, Wednesdays, and Thursdays for a maximum of 4 hours per day commencing at 3 p.m. and concluding at dusk. Lessee is also permitted to utilize said space on from 7:00 a.m. on Saturdays and Sundays for a maximum of 10 hours per day, which may commence at sunrise and must conclude by dusk. Lessee is not permitted to utilize said space prior to sunrise or after sunset.
3. For the period July 1, 2013 to June 30, 2014, fees for utilizing said space shall be \$2,400 per month plus Hawaii State General Excise Tax, currently set at 4.712%. For each year thereafter, fees shall increase annually by 3%. Lessee will use the Premises for 11-months each year. This period shall exclude mid-December to mid-January. Fees are due on the 1st of each month payable to SECOH. No rent is due in January. Payment of fees shall be mailed to SECOH at 708 Palekua Street, Honolulu, Hawaii 96816 or hand-delivered to the SECOH Business Office during standard business hours, which are Monday-Friday between 8 a.m. and 4 p.m.
4. Lessee will provide at least one 30-minute water exercise or swimming technique class for SECOH customers or employees at a mutually acceptable date and time each week. SECOH staff will be responsible for customers' entry/exit as well as water safety during the classes.
5. Lessee will repaint the Bathhouse on an annual basis.

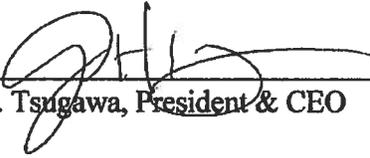
6. Lessee and SECOH will collaborate on other activities to involve Lessee's service recipients and families in activities to benefit the developmentally disabled community served by SECOH.
7. Lessee accepts the Premises as is and will be responsible for cleaning and restoring said space to its original condition after each use and prior to termination of this agreement. All supplies, materials and refuse will be disposed of in an environmentally safe manner in accordance with local, State and Federal regulations. Lessee may use utilities, supplies, and equipment associated with said space. Smoking is not permitted in said space and parking is permitted in the SECOH parking lot on the weekends only.
8. Lessee shall clean the Bathhouse and vacuum and brush down the pool prior to each use. SECOH will engage a licensed pool management and maintenance firm. Lessee interference with such activities will be grounds for termination of this agreement.
9. Lessee will be assigned two sets of keys to said space, which may not be duplicated. Lessee will secure the Premises after each use. Lessee will contact the designated SECOH personnel if a situation requiring SECOH intervention presents itself while Lessee is using the Premises.
10. Lessee will ensure employees possess a valid certification or license to engage in Lessee's principal business activities. The Lessee will furnish SECOH with such certifications or licenses prior to utilization of said space and as requested thereafter. Lessee agrees to comply with all policies posted at the Premises.
11. The Premises may be used only for activities directly related to the nature of the Lessee's business activities as identified above. No use shall be made which is illegal or which will endanger the lives or well-being of any person(s) on SECOH's property at the address identified above. Lessee will not commit or allow to be committed any act or any public or private nuisance or other act which disturbs the quiet enjoyment of any other businesses or residences neighboring SECOH at the above stated address.
12. Lessee will hold SECOH, its officers, directors, employees and/or agents harmless from any and all claims for damages that may arise in connection with Lessee use of the Premises or egress/ingress over SECOH property. Lessee will hold harmless SECOH, its officers, directors, employees and/or its agents from the consequences of any incidents or injuries, which might occur in conjunction with the use of the Premises by Lessee, its employees, contractors, agents or service recipients. Lessee will provide SECOH with waiver of liability release forms signed by the legal guardian(s) of Lessee's service recipients.
13. Lessee will maintain a Comprehensive General Liability Insurance Policy or Certificate of Insurance with a single combined liability limit of \$1,000,000.00 and workers compensation coverage for its employees, listing SECOH as additionally insured and insuring against all liability of Lessee and its employees, customers, and agents arising out of and in connection with Lessee's use of the Premises for the duration of this agreement. Lessee will provide SECOH with the aforementioned documentation before utilizing said space and annually thereafter.
14. The Lessee, the Lessee's staff, customers, visitors, or other agents will adhere to all of the terms and conditions set forth by SECOH, or its agents.

Terms Accepted:



Jane Kratochvil, JK Aquatics, LLC dba Diamond Head Aquatics

Date: June 25, 2013



Glenn H. Tsugawa, President & CEO

Date: 6-25-2013

SECOH

708 Palekaua St. • Honolulu, Hawaii 96816 • Telephone 734-0233

USE AGREEMENT

Date: April 03, 2014

Name of Sub Sublessor: Special Education Center of Hawaii (SECOH)
Address: 708 Palekaua Street, Honolulu, Hawaii 96816
Telephone/Fax: Ph.: 594-8291 Fax: 734-0391
Contact Person: Glenn H. Tsugawa, President & CEO
Leasable Space: Founder's Center Pool, Spa, Bathhouse, and Pavilion

Name of Sub Sublessee: JK Aquatics, LLC dba Diamond Head Aquatics
Address: 4126 Keanu Street #4 Honolulu, HI 96816
Telephone/Fax: 377-8841
Contact Person: Jane Kratochvil, Owner
Nature of Business/Use: Swim School

Terms of Agreement:

JK Aquatics, LLC dba Diamond Head Aquatics (DHA) is hereby authorized by the Special Education Center of Hawaii (SECOH), to utilize the aforementioned space at the aforementioned address at SECOH. It is understood and agreed that SECOH authorizes DHA to utilize said space subject to the adherence to the following terms and conditions:

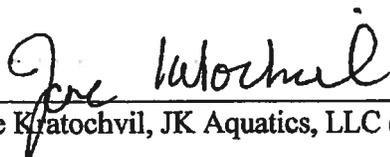
1. DHA is permitted to use the Founder's Center Pool, Bathhouse, and Pavilion ("the Premises") for a term beginning on the commencement date and terminating in thirty-six (36) months. However, SECOH may unilaterally terminate the Use Agreement with ninety (90) day notice.
2. DHA is permitted to utilize the Premises on Tuesdays, Wednesdays, and Thursdays for a maximum of 4 hours per day commencing at 3 p.m. and concluding at dusk. DHA is also permitted to utilize the Premises from 7:00 a.m. on Saturdays and Sundays for a maximum of 10 hours per day, which may commence at sunrise and must conclude by dusk. DHA is not permitted to utilize the Premises before sunrise or after sunset. DHA will provide SECOH with a schedule of classes each quarter. SECOH will have use of the Premises on those days that DHA is not conducting classes.
3. DHA's employee may park in any open SECOH stall, except those fronting the Senior Center that are reserved for SECOH customers. DHA's service recipients may park in any of the same open SECOH stalls after 5 p.m. on weekdays. There shall be no parking in Variety School of Hawaii (VSH) stalls on weekdays. All SECOH & VSH parking stalls are available for use on weekends. SECOH & VSH reserve the right to close parking for DHA's employees and service recipients at any time for special events. SECOH & DHA will provide at least one-week notice for parking closures.
4. For the period beginning with the commencement date of this Use Agreement through June 30, 2015, the use fee shall be \$2,400 per month plus Hawaii State General Excise Tax, currently set at 4.712%. For each year thereafter, the monthly use fee shall increase annually by 3%. DHA will use the Premises for 11-months each year. The use period shall exclude mid-December to mid-January. Fees are due on the 1st of each month payable to SECOH. No rent is due in January. Payment of fees shall be mailed to

SECOH at 708 Palekaua Street, Honolulu, Hawaii 96816 or hand-delivered to the SECOH Business Office during standard business hours, which are Monday-Friday between 8 a.m. and 4 p.m.

5. DHA will provide at least one 30-minute water exercise or swimming technique class for SECOH customers or employees at a mutually acceptable date and time each week. SECOH staff will be responsible for customers' entry/exit as well as water safety during the classes.
6. DHA will award two (2) swim lesson scholarships per session to students recommended by VSH.
7. DHA will repaint the Bathhouse on an annual basis.
8. DHA and SECOH will collaborate on other activities to involve DHA's service recipients and families in activities to benefit the developmentally disabled community served by SECOH.
9. DHA accepts the Premises as is and will be responsible for cleaning and restoring said space to its original condition after each use and prior to termination of this agreement. All supplies, materials and refuse will be disposed of in an environmentally safe manner in accordance with local, State and Federal regulations. DHA may use utilities, supplies, and equipment associated with said the Premises. Smoking is not permitted on the Premises.
10. DHA shall clean the Bathhouse and vacuum and brush down the pool prior to each use. SECOH will engage a licensed pool management and maintenance firm. DHA will fully cooperate with the pool management and maintenance firm.
11. DHA will be assigned two sets of keys to the Premises, which may not be duplicated. DHA will secure the Premises after each use. DHA will contact the designated SECOH personnel if a situation requiring SECOH intervention presents itself while DHA is using the Premises.
12. DHA will ensure employees possess a valid certification or license to engage in DHA's principal business activities. The DHA will furnish SECOH with such certifications or licenses prior to using the Premises and as requested thereafter. DHA agrees to comply with all policies posted at the Premises.
13. The Premises may be used only for activities directly related to the nature of the DHA's business activities as identified above. No use shall be made which is illegal or which will endanger the lives or well-being of any person(s) on SECOH's property at the address identified above. DHA will not commit or allow to be committed any act or any public or private nuisance or other act which disturbs the quiet enjoyment of any other businesses or residences neighboring SECOH at the above stated address.
14. DHA will hold SECOH, Oahu Special Schools Association (OSSA), Variety School of Hawaii (VSH) and their respective officers, directors, employees and/or agents harmless from any and all claims for damages that may arise in connection with DHA's use of the Premises or egress/ingress over SECOH, OSSA and VSH property. DHA will hold harmless SECOH, OSSA, VSH, and its respective officers, directors, employees and/or its agents from the consequences of any incidents or injuries, which might occur in conjunction with the use of the Premises by DHA, its employees, contractors, agents or service recipients. DHA will provide SECOH with waiver of liability release forms signed by the legal guardian(s) of DHA's service recipients.

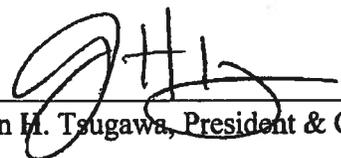
15. DHA will maintain a Comprehensive General Liability Insurance Policy or Certificate of Insurance with a single combined liability limit of \$1,000,000.00 and workers compensation coverage for its employees, listing SECOH, OSSA, and VSH as additionally insured and insuring against all liability of DHA and its employees, customers, and agents arising out of and in connection with DHA's use of the Premises for the duration of this agreement. DHA will provide SECOH with the aforementioned documentation before utilizing said space and annually thereafter.
16. DHA and its staff, service recipients, visitors, or other agents will adhere to all of the terms and conditions set forth by SECOH, or its agents.
17. This Use Agreement is subject to the terms and conditions of General Lease No. S-4513 and subsequent amendments between OSSA and the State of Hawaii, Department of Land and Natural Resources (DLNR) and sublease agreements and amendments between OSSA and SECOH.
18. This Use Agreement is subject to the consent of DLNR. This Use Agreement will commence as of the 1st day of month following DLNR's consent.

Terms Accepted:



Jane Kratochvil, JK Aquatics, LLC dba Diamond Head Aquatics

Date: 4/3/14



Glenn H. Tsugawa, President & CEO

Date: 4-3-14