

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

June 27, 2014

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

PSF No. 05OD-266
Oahu

Request to Amend Prior Board action of April 11, 2014, Item D-11, Amending Prior Board Action of November 8, 2013, Item D-13, Amending Prior Board Action of March 8, 2013, Item D-8, Approval of the Modification and Assignment of the Development for the Former Ewa Feedlot site at Campbell Industrial Park, Honouliuli, Ewa, Oahu, Hawaii, Tax Map Key: (1) 9-1-031:001. The purpose of the amendment is to extend the benchmark deadline for compliance with Hawaii Revised Statutes Chapter 343, Environmental Assessments that is set forth in the Amended and Restated Development Agreement.

BACKGROUND:

This matter relates to a development agreement and potential lease of 110 acres of industrial zoned land referenced above to PSP III, LLC (“PSP”), a Hawaii limited liability company. The most recent Board action on April 11, 2014, Item D-11, approved the amendment and restatement of the Development Agreement and the assignment of the Amended and Restated Development Agreement to PSP. See Exhibit A-1 attached.¹ Subsequently, staff worked with the Department of the Attorney General to finalize the Amended and Restated Development Agreement. Upon review of the final document, PSP requested that the benchmark deadline to publish its environmental assessment be changed from August 1, 2014 to “six (6) months after the Effective Date of the Amendment and Restatement of Development Agreement.” PSP explains that its environmental consultants have told PSP that the August 1, 2014 deadline would be extremely challenging to meet.

DISCUSSION:

The relevant portion of the Amended and Restated Development Agreement (“ARDA”) currently provides as follows:

¹ Exhibit A-1 comprises the first 26 pages of the April 11, 2014 Board action under agenda item D-11. 108 pages of the document have been omitted from the attachment.

i. Modified Benchmarks. At its sole cost and expense, Developer shall prepare and process any and all required environmental assessments, environmental impact statement preparation notices, and environmental impact statements (“EA/EIS”) required under Chapter 343 of the Hawaii Revised Statutes (“HRS”) and for Developer to implement the Modified Development Plan.

Without limiting the foregoing, Developer shall prepare a draft environmental assessment (“EA”) for the Modified Development Plan and have a draft EA published in the State of Hawaii Office of Environmental Quality Control (“OEQC”)’s publication, *The Environmental Notice* no later than **August 1, 2014**. Should the Developer fail to meet the aforementioned benchmark deadline, any and all exclusive development rights to the Subject Property granted to the Developer shall terminate, and State shall be allowed to accept unsolicited or solicited proposals from other private entities for the Subject Property, or enter into an exclusive agreement or lease covering the Subject Property, without any further consent from the Developer.

PSP requests that the August 1, 2014 deadline be changed, so that the second paragraph of the quoted material above would read as follows:

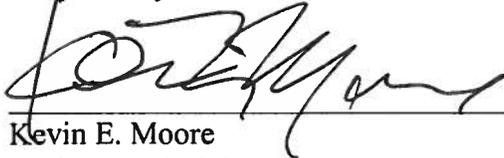
Without limiting the foregoing, Developer shall prepare a draft environmental assessment (“EA”) for the Modified Development Plan and have a draft EA published in the State of Hawaii Office of Environmental Quality Control (“OEQC”)’s publication, *The Environmental Notice* no later than six (6) months after the Effective Date of this Amended Agreement. Should the Developer fail to meet the aforementioned benchmark deadline, any and all exclusive development rights to the Subject Property granted to the Developer shall terminate, and State shall be allowed to accept unsolicited or solicited proposals from other private entities for the Subject Property, or enter into an exclusive agreement or lease covering the Subject Property, without any further consent from the Developer.

“Effective Date” is already defined in the ARDA as the date that all parties execute the document. Staff has no objection to PSP’s requested extension of the publication deadline of its environmental assessment. Staff notes that PSP has already made a payment of \$132,031.34 to DLNR that was required to be made within 30 days of execution of the ARDA (even though the document has not been signed yet). Staff recommends, however, that the ARDA be executed as drafted by the Department of the Attorney General (AGs), and that a separate amendment document or letter agreement be prepared by the AGs to memorialize the change authorized by today’s Board action.

RECOMMENDATION: That the Board of Land and Natural Resources:

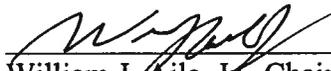
- A. Authorize the modification of the Amended and Restated Development Agreement by a separate amendment document or letter agreement extending the date of the publication deadline for PSP III, LLC's environmental assessment, pursuant to the terms and conditions cited above, which by this reference are incorporated herein, and further subject to:
1. The standard terms and conditions of the most current amendment document or letter agreement form, as may be amended from time to time;
 2. Review and approval by the Department of the Attorney General; and
 3. All other terms and conditions described in that Board action of March 8, 2013, under agenda item D-8, as amended by Board action of November 8, 2013, under agenda item D-13, and as further amended by Board action of April 11, 2014, under agenda item D-11, shall remain the same unless otherwise specifically amended above.

Respectfully Submitted,



Kevin E. Moore
Assistant Administrator

APPROVED FOR SUBMITTAL:



William J. Aila, Jr., Chairperson

D-11

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

April 11, 2014

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

PSF No. 05OD-266
Oahu

Request to Amend Prior Board action of November 8, 2013, Item D-13, Amending Prior Board Action of March 8, 2013, Item D-8, Approval of the Modification and Assignment of the Development for the Former Ewa Feedlot site at Campbell Industrial Park, Honouliuli, Ewa, Oahu, Hawaii, Tax Map Key: (1) 9-1-031:001. The purpose of the amendment is to (1) change the Assignee previously approved by BLNR; (2) modify the proposed development plan; (3) adjust certain milestones, benchmark deadlines and other terms and conditions previously approved by the Board, and (4) approve the form of the development agreement

BACKGROUND:

This matter has been before the Board of Land and Natural Resources a number of times in recent years, and the history of the prior Board actions is recapitulated in Exhibit 1 attached hereto. In short, Land Division staff has been working on a development agreement and potential lease of 110 acres of industrial zoned land referenced above. The most recent Board action on November 8, 2013, Item D-13, approved the assignment of the development agreement to Investricity Ltd. ("Investricity") and the modification of the terms and conditions of the agreement. Subsequently, staff worked with the Department of the Attorney General and representatives of Investricity and to draft an Amendment and Restatement of Development Agreement. During that process, Investricity requested several significant changes to the agreement that require staff to bring the matter back to the Board for review and approval.

DISCUSSION:

A copy of the draft Amended and Restated Development Agreement ("ARDA") is attached hereto as Exhibit 2. The draft incorporates changes requested by Investricity/PSP, as follows:

First, Investricity and its partner, LJ Capital, have formed a wholly-owned entity, ILJ Oahu Limited, a British Virgin Islands company ("ILJ"). ILJ is the manager of PSP III, LLC ("PSP"), a Hawaii limited liability company. PSP is a manager-managed limited liability company who will be the developer under the development agreement. See page

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

April 11, 2014 C10

2 of the ARDA.

Second, Investricity had proposed to develop a 30 MegaWatt solar park on the property, but PSP is scaling the project down to a 20 MegaWatt peak solar park. See page 5, section 1.f of the ARDA. Staff has no objection to this request as there is no reduction to the rent payable for the premises.

Third, Investricity sought a 25-year lease of the premises, but PSP is now seeking the maximum lease period allowed by law – 65 years. See page 9, section 1.n of the ARDA. Staff has no objection to this request as the rent payable under the lease will be re-opened at the 26th and 46th years of the lease to ensure that the State receives market rents for the land.

Fourth, PSP requested the addition of language in the ARDA allowing it to terminate the development agreement if the market rent for the land is appraised at more than \$30,000 per acre. See page 10, section 1.o.iv of the ARDA. Staff understands that PSP has a business plan for the project, and that its business plan may not succeed with rents higher than \$30,000 per acre. Accordingly, staff has no objection to the requested termination provision.

Fifth, regarding the curing of existing monetary delinquencies, the prior Board approval required the delinquencies be paid in four equal installments of \$132,031.34 upon four different triggering events. PSP has requested that the first installment be paid within 30 days of the effective date of the ARDA instead of upon the effective date. The second installment would be paid upon the execution of a binding Power Purchase Agreement (“PPA”) with Hawaii Electric Company (“HECO”), and that the last two installments would be paid as a lump sum within 30 days after financial close and execution of the lease for the premises. See page 4, section 1.b of the ARDA.

Sixth, PSP requested that the modified development agreement fees of \$55,318 be payable within 30 days after the execution of a binding PPA with HECO (instead of upon execution), and within 30 days of financial close and execution of the lease (instead of upon financial close and execution). See pages 4-5, section 1.c of the ARDA.

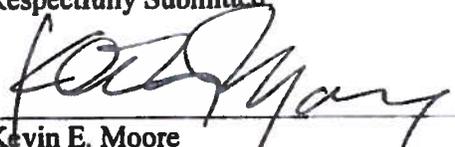
Seventh, PSP seeks language in the ARDA clarifying that PSP has no liability for monetary delinquencies or modified development fees in the event it elects to terminate the ARDA. See page 10, section 1.o of the ARDA.

Eighth, PSP requested extensions of various benchmarks and deadlines in the ARDA, including the expiration date from September 1, 2014 to December 31, 2016 (section 1.a), publication of date of the draft environmental assessment in The Environmental Notice from May 8, 2014 to August 1, 2014 (section 1.i), and Special Management Area approvals (section 1.k). Staff believes the requested time extensions are reasonable under the circumstances.

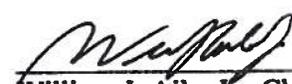
RECOMMENDATION: That the Board of Land and Natural Resources:

- A. Amend its prior action of November 8, 2013, under agenda item D-13, approving the modification and assignment of the Development Agreement for the former Ewa Feedlot Site at Campbell Industrial Park, pursuant to the terms and conditions cited above, which by this reference are incorporated herein, and further subject to:
1. All other terms and conditions described in that Board actions of March 8, 2013, under agenda item D-8, and November 8, 2013, under agenda item D-13, which by this reference are incorporated herein unless otherwise specifically amended above; and
 2. Such other terms or conditions as may be prescribed by the Chairperson to best serve the interest of the State.
- B. Approve the form of the Amended and Restated Development Agreement attached hereto as Exhibit 2, subject to the terms and conditions cited above, which by this reference are incorporated herein, and further subject to:
1. Review and approval by the Department of the Attorney General; and
 2. Such other terms or conditions as may be prescribed by the Chairperson to best serve the interest of the State.

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

November 8, 2013

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

PSF No. 050D-266
Oahu

Request to amend prior Board action of March 8, 2013, Item D-8, approval of the modification and assignment of the Development for the former Ewa Feedlot site at Campbell Industrial Park, Honouliuli, Ewa, Oahu, Hawaii, Tax Map Key: (1) 9-1-031:001. The purpose of the amendment is to modify (1) the Assignee previously approved by BLNR; (2) the area proposed for development; (3) the proposed development plan; and (4) certain milestones, benchmark deadlines and other terms and conditions previously approved by the Board

BACKGROUND:

On November 8, 2009, DLNR issued a Request for Qualifications/Request for Proposals ("RFQ/RFP") to select a developer for 110-acres of industrial zoned land referenced above (the "Subject Property").¹ As a result of the RFQ/RFP process, the State of Hawaii, by its Chairperson of the Board of Land and Natural Resources ("Chairperson") entered in to a Development Agreement with West Wind Works, LLC ("3W"), made effective November 24, 2010 and terminating on December 31, 2013 or sooner (the "Development Agreement").²

At its meeting of March 8, 2013, under agenda item D-8, BLNR approved the modification and assignment of the Development Agreement under the terms as proposed by IEP-ORP, LLC, subject however to IEP-ORP, LLC further agreeing to:

- Relocate the project site to an approximate 15-acre area, identified therein, to preserve access and future development potential of the remaining parcel;
- Provide a bond to provide security that all proposed installments to cure existing monetary delinquency and all proposed future development agreement fees are paid to DLNR as proposed by IEP-ORP, LLC;

¹ At its meeting of August 25, 2006, under agenda item D-12, the Board of Land and Natural Resources authorized the issuance of an RFQ/RFP to select a developer for the Subject Property.

² At its meeting of August 14, 2009, under agenda item H-5, BLNR, in part, amended the RFQ/RFP process and delegated authority to the Chairperson to select a developer for the Subject Property, negotiate the terms of any development agreement or lease, and to execute any documents that are necessary or appropriate to effectuate the intent of the disposition, subject to the provisions of Chapter 171, HRS and Department of the Attorney General's approval.

APPROVED BY THE BOARD OF
LAND AND NATURAL RESOURCES
AT ITS MEETING HELD ON
November 8, 2013 40.

D-13

EXHIBIT 1

- Prepare a draft Environmental Assessment (“EA”) and have it published in the Office of Environment Quality Control’s (“OEQC”) Environmental Notice by August 1, 2013;
- Subdivide the agreed upon project site at its own cost and submit a subdivision application to the City and County of Honolulu no later than January 31, 2014; and
- Surrender any and all rights to the Subject Property’s remaining ±95 acres not required for IEP-ORP, LLC’s modified development plan.

BLNR’s approval also provided that if IEP-ORP, LLC missed the August 1, 2013 or January 31, 2014 deadlines cited above, IEP-ORP, LLC would lose any and all exclusive rights to the ±15-acre project site; and DLNR/BLNR would not be obligated to issue a lease to IEP-ORP, LLC even if all other terms and conditions approved by BLNR were satisfied.

A copy of BLNR’s action of March 8, 2013, under agenda item D-8, is attached as **Exhibit I**. The history of 3W’s performance under the Development Agreement and subsequent proposals to assign and modify the Development Agreement is attached as exhibits thereto.

UPDATE:

Following BLNR’s action on March 8, 2013, IEP-ORP, LLC has proposed additional changes to Development Agreement amendments approved by BLNR. A copy of letter from IEP-ORP, LLC’s legal counsel dated August 7, 2013 (hereinafter the “August Proposal”) requesting such additional changes is attached as **Exhibit II-A**. Generally, the August Proposal indicated that IEP-ORP, LLC never agreed to bond all monetary payments; and provided (1) date-certain deadlines for all milestones, (2) requested new benchmarks deadlines for a draft EA and subdivision application, and (3) provided an alternative to the bonding requirement previously approved by BLNR. The above three components of the August Proposal are summarized in the table attached as **Exhibit II-B**, together with corresponding terms from the Development Agreement and amended terms as previously approved by BLNR.

On October 18, 2013, however, Land Division was informed that IEP was no longer interested in participating in the assignment of a modified Development Agreement. In lieu of IEP, 3W introduced Investricity Ltd. (“Investricity”) as a potential developer for the Ewa Feedlot, and requested a modified Development Agreement be assigned to Investricity. Investricity indicated they were comfortable with the terms of the August Proposal, including the bonding requirement as approved by BLNR. However, Investricity indicated they would:

- Require the entire 110-acre Feedlot site, as compared to the approximate 17 acre portion that IEP-ORP, LLC previously requested;
- Develop a 30-megawatt solar park in lieu of the up to two MW Biomass plants that IEP-ORP previously proposed; and

- Require postponement of the draft EA deadline by at least five to six months. However, Investricity does not expect the integrity of the final project installation to be impacted by the draft EA timing.

Moreover, Investricity has indicated that an annual ground rent based on \$30,000 per acre for the entire 110-acre site, subject to adjustments as the result an independent appraisal, over the term of the lease would be acceptable.

Information on Investricity and their proposed project for the Ewa Feedlot is attached as **Exhibit III**.

Based on the foregoing, and subject to BLNR approval to amend its prior action as described herein, should Investricity satisfy all the terms of an amended Development Agreement, Land Division recommends the term of the proposed lease be limited to 25 years with any request for future extensions subject to future negotiations, and at the discretionary approval by BLNR in the future.

RECOMMENDATION: That the Board of Land and Natural Resources amend its action on March 8, 2013, under agenda item D-8, approving the modification and assignment of the Development Agreement for the former Ewa Feedlot Site at Campbell Industrial Park, pursuant to the terms and conditions cited above, which by this reference is incorporated herein, and further subject to:

1. All other terms and conditions described in that Board action of March 8, 2013, under agenda item D-8, which by this reference is incorporated herein unless otherwise specifically amended above; and
2. Such other terms or conditions as may be prescribed by the Chairperson to best serve the interest of the State.

Respectfully Submitted,



Russell Y. Tsuji
Administrator

APPROVED FOR SUBMITTAL:



William J. Aila, Jr., Chairperson

EXHIBIT I

BLNR Action dated March 8, 2013, agenda item D-8

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

March 8, 2013

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

PSF No. 050D-266
Oahu

THIRD RESUBMITTAL: DEVELOPMENT AGREEMENT BETWEEN STATE OF HAWAII AND WEST WIND WORKS, LLC FOR THE FORMER EWA FEEDLOT SITE AT CAMPBELL INDUSTRIAL PARK, HONOULIULI, EWA, OAHU, HAWAII, TAX MAP KEY: (1) 9-1-031:001:

- (1) Status of outstanding delinquencies and rejection of proposed amendments to the Development Agreement between the State of Hawaii and West Wind Works, LLC, for the former Ewa Feedlot site at Campbell Industrial Park, Honouliuli, Ewa, Oahu, Hawaii, Tax Map Key: (1) 9-1-031:001
- (2) (a) Termination of the Development Agreement between the State of Hawaii and West Wind Works, LLC, for the former Ewa Feedlot site at Campbell Industrial Park, Honouliuli, Ewa, Oahu, Hawaii, Tax Map Key: (1) 9-1-031:001; or
(b) Approval of the modification and assignment of the Development Agreement for a portion of the former Ewa Feedlot site at Campbell Industrial Park, Honouliuli, Ewa, Oahu, Hawaii, Tax Map Key: (1) 9-1-031:Portion 001

BACKGROUND:

At its meeting of January 25, 2013, under agenda item D-13, a copy of which is attached as Exhibit AA, Land Division recommended BLNR reject the requested amendments to the Development Agreement between the State of Hawaii and West Wind Works, LLC ("3W") for the former Ewa Feedlot site, identified therein. In sum, Land Division expressed the following concerns with the requested amendments:

- Existing monetary delinquencies would not be cured in a timely manner, if at all;
- The requested site would adversely impact the remaining ±93 acre site;
- No timely payments of future development agreement fees; and
- The requested lease term, specifically a requested option for renewal, is legally prohibited.

APPROVED BY THE BOARD OF
LAND AND NATURAL RESOURCES
AT ITS MEETING HELD ON
March 8, 2013 *uo.*

D-8

Land Division also noted that the requested amendment's proposed project schedule did not identify the preparation of any environmental studies, subdivision application/approvals, or any other governmental permits or approvals that may be required.

Based on staff concerns, Land Division recommended BLNR reject the requested amendments to the Development Agreement and either:

- (a) Terminate the Development Agreement; or
- (b) Approve modifying the requested amendments to provide at the very least:
 1. The relocation the project site to one of two areas identified by Land Division;
 2. IEP-ORP, LLC agree to bond all proposed payments to cure existing monetary delinquencies and for future Development Agreement fees, as was otherwise proposed;
 3. IOEP, ORP, LLC prepare a draft environmental assessment ("EA") and have it published in the Office of Environmental Quality Control's Environmental Notice by August 1, 2013; and
 4. Subject to DLNR approval of the final location and configuration of the project site, IEP-ORP, LLC agree to subdivide the project site at its own cost and submit a subdivision application to the City and County of Honolulu no later than January 31, 2014.

However, at IEP-ORP, LLC's request BLNR deferred this matter for a period of no more than 60 days so IEP-ORP, LLC could provide Land Division a list of concerns regarding two additional milestones and provide BLNR a modified Development Agreement for review.

STATUS REPORT:

At IEP-ORP, LLC's request, on February 7, 2013 staff accompanied three IEP-ORP, LLC representatives (Keith Avery, Dexter S. Sato, and Paul Shinkawa) to the subject site.¹ The only area IEP-ORP, LLC requested to inspect was the area highlighted in red on Exhibit BB, attached (the "Project Site"). Following the inspection, IEP-ORP, LLC representatives indicated that the Project Site would be an acceptable alternative and their legal counsel would be contacting Land Division.

On February 20, 2013, Staff informed IEP-ORP, LLC and its legal counsel by email of Land Division's plans to resubmit this item to the BLNR at today's meeting. However, as of the date of the

¹ Keith Avery, Dexter S. Sato, and Paul Shinkawa are all members (or principles of members) in Oahu Renewable Energy Park, LLC ("ORP"). As previously mentioned, ORP was involved in JW's original proposal, the negotiations of the existing Development Agreement, and other previous activities under the Development Agreement, including prior site inspections.

drafting of this submittal, Land Division has not been contacted by IEP ORP, LLC or its legal counsel to discuss any concerns IEP ORP, LLC may have. Moreover, Land Division has not been provided any drafts of proposed modifications to the Development Agreement.

REMARKS:

A relocation of IEP-ORP, LLC's proposed biomass plant to the Project Site, as generally shown highlighted in red on Exhibit BB, is not expected to adversely impact future development of the remaining subject property. Accordingly, staff would not object to the relocation of the biomass plant to the Project Site, provided:

1. The final configuration of the Project Site, including any interior roads, shall be subject to DLNR approval and legally subdivided by IEP ORP, LLC at IEP-ORP, LLC's expense; and
2. DLNR/BLNR is allowed to accept unsolicited or solicited proposals for the remaining lands.

Notwithstanding the above, under the proposed amendments DLNR would only be assured to receive 25% of the \$528,125.35 (or about \$132,031) in existing monetary delinquencies that IEP-ORP, LLC proposes to cure. All other payments to cure existing monetary delinquencies (totaling over \$396,000) and all future development agreement fees would remain dependent on IEP-ORP, LLC successfully obtaining other discretionary approvals, two of which are not expected to occur until 2015, including BLNR's issuance of a lease to IEP-ORP, LLC for the Project Site.³

RECOMMENDATION: That the Board reject the proposed amendments of the Development Agreement as previously submitted by West Wind Works, LLC, and International Electric Power, LLC, and either:

- (a) Terminate the Development Agreement between the State of Hawaii and West Wind Works, LLC, for the former Ewa Feedlot site at Campbell Industrial Park, Honouliuli, Ewa, Oahu, Hawaii, Tax Map Key: (1) 9-1-031:001, under the terms and conditions recommended on May 25, 2012, under agenda item D-16, which by this reference are incorporated herein; or
- (b) Approve the modification and assignment of the Development Agreement for the Project Site under the terms and conditions cited above, which by this reference is incorporated herein, and further subject to:
 - i. The terms and conditions as recommended on January 25, 2013, under agenda item D-13, which by this reference is incorporated herein; and

³ As previously objected to, IEP-ORP, LLC's proposed lease terms include an option to renew, which is prohibited by Section 171-36, Hawaii Revised Statutes

- ii. Such other terms or conditions as may be prescribed by the Chairperson to best serve the interest of the State.

Respectfully Submitted,



Gavin Chun
Project Development Specialist

APPROVED FOR SUBMITTAL:



William J. Aila, Jr., Chairperson

The Board approved the modification and assignment of the development agreement under recommendation b of the submittal (and did not approve alternative recommendation a).

EXHIBIT AA

Deferred BLNR action

dated

January 25, 2013, agenda item D-13

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

January 25, 2013

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

PSF No. 050D 266

Oahu

SECOND RESUBMITTAL: DEVELOPMENT AGREEMENT BETWEEN STATE OF HAWAII AND WEST WIND WORKS, LLC FOR THE FORMER EWA FEEDLOT SITE AT CAMPBELL INDUSTRIAL PARK, HONOULIULI, EWA, OAHU, HAWAII, TAX MAP KEY: (1) 9-1-031:001:

- (1) Status of Outstanding Delinquencies and Termination of the Development Agreement Between the State of Hawaii and West Wind Works, LLC, for the former Ewa Feedlot site at Campbell Industrial Park, Honouliuli, Ewa, Oahu, Hawaii, Tax Map Key: (1) 9 1 031:001
- (2) (a) Termination of the Development Agreement between the State of Hawaii and West Wind Works, LLC, for the former Ewa Feedlot site at Campbell Industrial Park, Honouliuli, Ewa, Oahu, Hawaii, Tax Map Key: (1) 9 1 031:001; or
(b) Approval of a modified Development Agreement for a portion of the former Ewa Feedlot site at Campbell Industrial Park, Honouliuli, Ewa, Oahu, Hawaii, Tax Map Key: (1) 9-1-031:Portion 001

BACKGROUND:

At its meeting of May 25, 2012, under agenda item D-16, (the "May Submittal"), staff recommended the Board of Land and Natural Resources ("BLNR") terminate the Development Agreement between West Wind Works, LLC ("3W") and the State of Hawaii ("State"), which set forth the terms and conditions under which BLNR would issue a directly-negotiated lease to 3W (the "Development Agreement").

In response, 3W introduced International Electric Power, LLC (IEP), a privately-held company with purported experience in developing large renewable energy projects. Together, 3W and IEP requested BLNR defer action on the May Submittal, and proposed amending the Development Agreement and assigning the modified Development Agreement from 3W to an entity in which IEP would be a majority partner, with 3W participating in a reduced capacity.

Based on the foregoing, BLNR approved 3W's request to defer termination of the Development Agreement for a period of 60 days.

~~Deferred~~
~~APPROVED~~ BY THE BOARD OF
LAND AND NATURAL RESOURCES
AT ITS MEETING HELD ON
January 25, 2013 UO.

D-13

BLNR's deferral was to provide 3W and IEP an opportunity to work with staff on possible solutions, including but not limited to curing of existing defaults, amendments to the Development Agreement, and the subsequent assignment of a modified Development Agreement as requested. A copy of BLNR's action is attached as Exhibit A.

Following BLNR's deferral of the May Submittal, IEP initiated discussions with Land Division and subsequently submitted proposal to DLNR on July 25, 2012 (the "Initial Proposal"), a copy of which is attached as Exhibit B.

On August 6, 2012, Land Division met with IEP ORP to discuss the Initial Proposal. Based on those discussions, IEP ORP agreed to provide DLNR with another proposal.

Considering the amount of time that lapsed and BLNR's 60 day deferral, BLNR was provided a status report at its meeting on August 10, 2012, and under agenda item D-10, approved deferring this matter or an additional 60 days to allow Land Division and its assigned counsel sufficient time to thoroughly review and analyze a submitted proposal.

STATUS REPORT:

Since BLNR's deferral of this agenda item on August 10, 2012, Land Division has received and reviewed several proposals, which are identified below along with brief comments. For comparison purposes, the general terms of the Development Agreement and 3W's original proposal, together with the general terms of the subsequent proposals are summarized on the table attached as Exhibit C.

- Proposal dated September 27, 2012, submitted by 3W (the "September Proposal").¹ Attached hereto as Exhibit D-1.

Whereas the September Proposal was inconsistent with discussions between IEP-ORP and Land Division, Land Division expressed its dissatisfaction with the September Proposal to 3W.

- Proposal dated October 1, 2012, hereinafter the "October Proposal", submitted by 3W and IEP, a copy of which is attached as Exhibit D-2.

Based on a review of the October Proposal, Land Division submitted questions to 3W and requested additional information for further clarification of the October Proposal.

¹ Both IEP and 3W separately informed Land Division that IEP had submitted a revised proposal to 3W for review. However, 3W apparently was not satisfied with IEP's proposal, and 3W forwarded its own proposal to Land Division in lieu of IEP's proposal.

- Answers to DNR Questions, dated November 8, 2012, submitted by 3W in conjunction with IEP (the "November Proposal"). A copy of the November Proposal is attached as Exhibit D 3.

In sum, the November Proposal proposes the modified Development Agreement be assigned to an entity owned and managed by a subsidiary of IEP, with additional ownership interests held by ORP, and Abacus Financial Group ("Abacus"), hereinafter "IRP ORP, LLC"; installment payments to cure monetary delinquencies with payments being due upon certain events; a proposed 17 acre site located along Olai Street; prorated Development Agreement fees payable upon the execution of a Power Purchase Agreement and the closing of project financing; and proposed lease terms.

REMARKS:

Qualifications for IEP and its principals were previously submitted. Based on the information provided therein, IEP itself appears to possess experience in the development, management and operations of renewable energy facilities. Members of ORP include individuals or entities that have been involved in 3W's original proposal, prior negotiations, and all previous activities under the current Development Agreement. No qualifications for Abacus were provided.² However, only individuals or entities holding a 10% ownership interest were required to be identified under the Request for Qualifications/Request for Proposals dated November 8, 2009 (the "RFQ/RFP"). Consequently, qualifications for Abacus, which purportedly will have a 5% ownership interest, are not required under the RFQ/RFP provisions.

The November Proposal, however, is not acceptable to Land Division for the following reasons:

- Existing monetary delinquencies will not be cured in a timely manner. The November Proposal proposes to cure monetary delinquencies totaling \$528,125.35, paid in four equal installments if and when certain events occur. Moreover, two of the proposed events are not expected to occur until 2015, if at all;
- The proposed site would adversely impact the remaining ±93 acre site. As shown in the November Proposal, the location of the proposed 17-acre site takes up about half of the subject Property's Olai Street frontage located closest to the Kalaeloa Boulevard intersection. Consequently access and

² The November Proposal indicates "Abacus Financial Group" is primarily a financial investor that will have a limited role in project development. A cursory search for "Abacus Financial Group" resulted in a listing of multiple entities nation-wide.

future development potential to the remaining +93 acres would be adversely impacted;

- No timely payments of future development agreement fees. The November Proposal indicates the payment of future development would occur if JBP ORP, LLC executes a Power Purchase Agreement with HECO and upon the closing of project financing. Both of those events are not expected to occur until 2015, if at all, and just prior to the proposed execution of a lease; and
- The proposed lease term is legally prohibited. The November Proposal proposes a lease term of up to 65 years, with an option to renew. Pursuant to Section 171 36, Hawaii Revised Statutes, options for the renewal of lease terms are prohibited.

Moreover, although the November Proposal indicates the proposed annual rent is subject to adjustment based on an independent appraisal, staff believes the proposed annual rent of \$30,000 per acre for the initial fixed rent period is low for industrial land.³

Moreover, Land Division notes the November Proposal's project schedule does not identify the preparation of any environmental studies necessary for compliance with Chapter 343, Hawaii Revised Statutes, the subdivision of proposed project site from the subject ±110 acre site, or any other governmental permits or approvals that may be required.

Notwithstanding the above, should BLNR consider approving a modified Development Agreement (whether as proposed by IEP or 3W, or simply as the BLNR deems in the best interest of the State), Land Division recommends BLNR require at the very least:

- Relocation of the project site to preserve access and future development potential of the remaining site. Land Division recommends BLNR require the project site to be located generally in the area as originally proposed by 3W for biomass processing facilities under the currently existing Development Agreement, and previously approved by DLNR,⁴ together with a driveway or interior road, subject to DLNR approval.

Land Division notes that the November Proposal does not indicate that the flight clearance easements would prohibit the development of improvements other than the smokestack, or that the smokestack could not be situated on the original site

³ Based on a 8% rate of return, the proposed annual rent of \$30,000 per acre reflects a fee simple value of \$375,000 per acre, or \$8.60 per square foot.

⁴ The biomass facility originally proposed by 3W and approved by DLNR totaled 10 acres of land located at the western end of the former Ewa Feedlot, referred to as "Green Waste", and as shown on Exhibit 3a. in the November Proposal.

in areas outside of the flight easement. Furthermore, it is not apparent that the distance from Olai Street, or the proximity to the shoreline, prohibits the development of the proposed biomass processing facilities at the original location previously approved.

As an alternative to locating the project site generally as originally proposed/approved, Land Division would also consider a location along the eastern end of Olai Street.

The two project sites (i.e., Land Division's recommended site and the alternate site along the eastern end of Olai Street), are generally shown on Exhibit E, attached.

The final location and configuration of the project site, including any interior roads, shall be subject to DLNR approval and legally subdivided by IEP ORP, LLC at IEP ORP, LLC's expense. Land Division further recommends that IEP-ORP, LLC be allowed to give up the remaining ±93 acres not included in the revised project site, allowing DLNR/BLNR to accept unsolicited or solicited proposals for the remaining lands.

- **Bonding of monetary payments.** Land Division recommends BLNR allow IEP-ORP, LLC to cure existing monetary delinquencies as proposed and pay future development agreement fees based on the ±15-acre project site as discussed above. However, Land Division recommends BLNR require IEP-ORP, LLC to provide a bond to provide security that all proposed installments to cure the existing monetary delinquency and all proposed future development agreement fees are paid to DLNR as proposed by IEP ORP, LLC and summarized below:
 - Monetary delinquency of \$528,125.35, paid in four equal installments, within 30 days of:
 1. The assignment of the Development Agreement to IEP-ORP, LLC;
 2. IEP-ORP, LLC becoming short listed on HECO's RFP;
 3. Signing of Power Purchase Agreement; and
 4. Financial close and execution of lease agreement.
 - Future development agreement fees of \$53,318 annually, accruing quarterly and paid upon:
 1. Execution of a PPA with HECO; and
 2. Closing of project financing.

Land Division also recommends the following two benchmarks be established to allow Land Division to monitor progress of the proposed project;

- IEP-ORP, LLC's preparation of a draft environmental assessment ("EA") and publication of the draft EA in the Office of Environment Quality Control's Environmental Notice by August 1, 2013; and

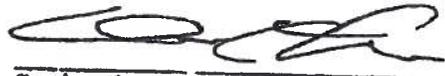
- IEP-ORP, LLC to submit a subdivision application to the City and County of Honolulu no later than January 31, 2014.

In lieu of assessing monetary penalties for missing any future benchmark deadlines, Land Division recommends that DLNR/BLNR be allowed to consider alternative development proposals for the land from other potential developers.⁵

RECOMMENDATION: That the Board reject the terms of the proposed Development Agreement amendments submitted by West Wind Works, LLC, and International Electric Power, LLC, dated November 8, 2012, which is attached as Exhibit D 3, and either:

- Terminate the Development Agreement between the State of Hawaii and West Wind Works, LLC, for the former Ewa Feedlot site at Campbell Industrial Park, Honouliuli, Ewa, Oahu, Hawaii, Tax Map Key: (1) 9 1 031:001, under the terms and conditions recommended on May 25, 2012, under agenda item D 16, attached hereto as Exhibit A, which by this reference are incorporated herein; OR
- Approve the modification and assignment of the Development Agreement under the terms and conditions cited above, which by this reference are incorporated herein, and subject to any other terms or conditions as may be prescribed by the Chairperson to best serve the interest of the State.

Respectfully Submitted,


Gavin Chun
Project Development Specialist

APPROVED FOR SUBMITTAL:


William J. Afa, Jr., Chairperson

Land Board Meeting: January 25, 2013
D-13

Deferred for no more than sixty(60) days. See full text of minutes for discussion.

⁵ Should IEP-ORP, LLC fail to meet any of the future benchmark deadlines, IEP-ORP, LLC could continue seeking all necessary approvals at their own risk without accruing additional Development Agreement fees. However, DLNR/BLNR would no longer be obligated to issue a lease to IEP-ORP, LLC as to the current proposed to reserve ±17 acres, even if they satisfied all other terms and conditions set forth in the modified Development Agreement; and, as proposed for the remaining ±93 acres, DLNR/BLNR would also be allowed to accept unsolicited or solicit proposals from other private entities as to the ±17-acre site as well; or enter into an exclusive agreement or lease for the land covered by the modified Development Agreement. At the end of the day, if IEP-ORP, LLC is successful in obtaining all of its benchmark deadlines and entitlements, and no other takers come forward for the ±97 acre site or the ±13 acre site, then the BLNR may consider at that time issuing a lease to IEP-ORP, LLC, again.

EXHIBIT A

Copy of BLNR Deferral

May 25, 2012, Agenda Item D-16

D4

DEFERRED

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

PSF No. 050D 266
Oahu

- (1) Status of Outstanding Delinquencies and Termination of the Development Agreement Between the State of Hawaii and West Wind Works, LLC, for the former Ewa Feedlot site at Campbell Industrial Park, Honouliuli, Ewa, Oahu, Hawaii, Tax Map Key: (1) 9-1-031:001
- (2) Termination of the Development Agreement between the State of Hawaii and West Wind Works, LLC, for the former Ewa Feedlot site at Campbell Industrial Park, Honouliuli, Ewa, Oahu, Hawaii, Tax Map Key: (1) 9-1-031:001

APPLICANT:

Department of Land and Natural Resources ("DLNR")

SUBJECT PROPERTY:

Approximately 110.106 acres of government lands at Honouliuli, Ewa, Oahu, Hawaii, identified by Tax Map Key: (1) 9-1-31:01, as shown on the attached tax map labeled Exhibit X ("Subject Property").

OVERVIEW OF SUBJECT DEVELOPMENT AGREEMENT:

On November 8, 2009, DLNR issued a Request for Qualifications/Request for Proposals ("RFQ/RFP") to select a developer for the Subject Property.¹ As a result of the RFQ/RFP process, the State of Hawaii, by its Chairperson of the Board of Land and Natural Resources ("Chairperson") entered in to a Development Agreement with West Wind Works, LLC ("3W"), made effective November 24, 2010.² A copy of the Development Agreement is attached as Exhibit XI.

Generally, the Development Agreement allows 3W to conduct due diligence and perform predevelopment activities necessary for the successful development of a proposed renewable energy park on the

¹ At its meeting of August 25, 2006, under agenda item D-12, the Board of Land and Natural Resources authorized the issuance of an RFQ/RFP to select a developer for the Subject Property.

² At its meeting of August 14, 2009, under agenda item H-5, DLNR, in part, amended the RFQ/RFP process and delegated authority to the Chairperson to select a developer for the Subject Property, negotiate the terms of any development agreement or lease, and to execute any documents that are necessary or appropriate to effectuate the intent of the disposition, subject to the provisions of Chapter 171, HRS and Department of the Attorney General's approval.

DETERMINED BY THE BOARD OF
LAND AND NATURAL RESOURCES
AT ITS MEETING HELD ON
May 25, 2012

Subject Property as proposed by JW. The Development Agreement also sets forth terms and conditions that JW must satisfy in order for it to be issued a ground lease for the Subject Property.

In part the Development Agreement requires JW to pay DLNR a Development Agreement Fee of \$345,000 per year, payable in quarterly installments, and to:

1. Prepare a draft environmental assessment ("EA") for JW's proposed renewable energy park, and have the Draft EA published in the State of Hawaii Office of Environmental Quality Control's ("OEQC") "The Environmental Notice by October 31, 2011. Thereafter, follow the EA process, prepare a final EA, and obtain a Finding of No Significant Impact by August 31, 2012;
2. Obtain a non-utility generator determination or approval from Hawaii Electric Company by June 30, 2011;
3. Have an application for a Special Management Area Permit ("SMP") accepted by the City and County of Honolulu ("City") by December 31, 2011, and obtain City Council approval of the SMP by December 31, 2012;
4. Obtain approval from the United States of America and the State Department of Transportation (if applicable) that allows JW to develop and operate its' proposed renewable energy park;
5. Have an application for a Conditional Use Permit ("CUP") accepted by the City by January 5, 2012;
6. Obtain fully executed Power Purchase Agreements ("PPA") for a 5MW of wind-to-hydrogen component, a 5MW biomass-to-energy component, a 5MW tracking solar farm component, and a +5MW expansion solar farm(s); and
7. By January 31, 2013, obtain State of Hawaii Public Utilities Commission approval of all PPAs cited above.

The Development Agreement also describes the terms and conditions for any deadline extension, Development Agreement modifications, and both party's rights to terminate the Development Agreement. The State's right to terminate includes, but is not limited to the JW's failure to obtain permits, approvals and PPAs by the specified deadlines, and JW's failure to make full payments of any installment.

HISTORY OF NOTICES OF DEFAULT ("NOD") ISSUED:

DLNR has issued three NOD's to JW for monetary and non-monetary defaults under the Development Agreement. The three NOD's along with JW's responses are briefly summarized below.

1. On March 2, 2011, JW was issued an NOD for an outstanding balance due of \$142,500.00, which was due on February 24, 2011. The amount due represented the second quarterly installment of Development Agreement Fees.

In response, 3W submitted the \$142,500.00 payment on March 28, 2011.

2. On October 13, 2011, 3W was issued an NOD for failure to keep Development Agreement fee payments current and failure to comply with Section 9.b.1) of the Development Agreement.¹ The amount owed by 3W was \$96,300.35, being attributed to the fourth quarterly installment of Development Agreement Fees and other accrued fees and assessments, including a bank assessed service charge for a returned check.

Although 3W failed to cure the cited defaults, 3W submitted a letter to Land Division dated November 30, 2011 (Exhibit III.a), requesting a meeting to discuss "adequate remedies".

3. On March 2, 2012, DLNR issued 3W an NOD for failure to keep Development Agreement fee payments current and failure to comply with Section 9.b.1), 2) and 3) of the Development Agreement. The amount owed by 3W at the time was \$268,975.35, resulting from failure to make fourth, fifth and sixth quarterly installments of the Development Agreement Fee and other accrued fees and assessments, but not including a \$25 service charge resulting for a returned check.

Pursuant to the NOD and consistent with the terms of the Development Agreement, 3W was given until April 9, 2012 to cure all monetary defaults and until May 8, 2012 to cure all non-monetary defaults.

In lieu of curing the cited defaults, 3W submitted a letter to DLNR dated April 8, 2012, requesting additional time to cure all monetary defaults. A copy of 3W's letter dated April 8, 2012 is attached as Exhibit IV.

CURRENT STATUS OF SUBJECT DEVELOPMENT AGREEMENT:

Despite the issuance of NODs cited above, 3W remains delinquent in its payments of Development Agreement Fees and satisfying non-monetary benchmark deadlines. The current statuses of 3W's monetary and non-monetary obligations are summarized below.

1. **Development Agreement Fees (Monetary).** 3W has paid DLNR \$260,360.25 in Development Agreement Fees, accrued late fees, and interest penalties. The last Development Agreement Fee installment 3W paid was credited to the third quarterly

¹ 3W previously submitted a written request to extend the deadline for obtaining a NUG determination to October 31, 2011 and to amend the Development Agreement. 3W also submitted a check to DLNR (dated September 19, 2011) in the amount of \$96,275.35. DLNR was notified by memorandum dated October 10, 2011, that the check was returned due to insufficient funds. Consequently, approval of 3W's requested extension and amendment was held in abeyance and the NOD dated October 13, 2011 was issued.

² In response DLNR submitted a letter to 3W dated December 21, 2011, in which DLNR agreed to meet 3W provided 3W first submit written explanations of its inability to comply with the terms of the Development Agreement, proposed remedies and timelines, and evidence of 3W's ability to pay past due amounts and future development fees. A copy of DLNR's letter dated December 21, 2011, is attached as Exhibit III.b.

installment due May 24, 2011. As of the May 25, 2012, the date of this Land Board meeting, 3W is \$374,375.35 in arrears.⁵

2. **Land Use Entitlements, Regulatory/Utilities Approvals, and Power Purchase Agreements (Non-Monetary).** Thus far, 3W has failed to meet the following non-monetary benchmark deadlines set forth in the Development Agreement:
 - A. Prepare a draft EA for 3W's proposed renewable energy park and have the Draft EA published in OEQC's *The Environmental Notice* by October 31, 2011;
 - B. Obtain a MUG determination or approval from Hawaii Electric Company by June 30, 2011;
 - C. Have a SMP application accepted by the City by December 31, 2011; and
 - D. Have a CUP application accepted by the City by January 5, 2012.

REMARKS:

In a letter dated January 4, 2012, attached as Exhibit V.a, 3W proposed to pay on or before March 9, 2012, all past due payments and all remaining payments to DLNR expected through November 23, 2013, and requested converting the Development Agreement into a "Conditional Lease". In response, DLNR requested 3W to provide specific information necessary for DLNR to properly evaluate 3W's alternate proposal.⁶ As indicated in DLNR's letter to 3W dated March 2, 2012, attached as Exhibit V.c, DLNR reminded 3W that "[a]s previously explained to you in our meeting and then again in writing, the Development Agreement that was entered into is probably the most the Land Board can legally approve at this point, especially because the Chapter 343 requirements have not yet been satisfied."

Although as of yet no written response from 3W has been received by DLNR, DLNR has received a letter from International Electric Power ("IEP") dated April 23, 2012.⁷ Therein, IEP ensures 3W will cure all monetary defaults, proposing two installments totaling \$368,287.85 be made to DLNR on May 2, 2012 and May 30, 2012. Thereafter, IEP requested to meet with DLNR to discuss how 3W's proposed renewable energy project might move forward. A copy of IEP's April 23, 2012 letter to DLNR is attached as Exhibit VI.

⁵ The amount owed as of May 25, 2012 is applicable through May 31, 2012, after which, pursuant to the Development Agreement, additional late fees and/or interest will be applied. The amount owed is allocated as follows: \$345,025.35 in Development Fees; \$18,975.00 in interest; \$10,000 in Extension Fees; \$350.00 in Monthly Late Fees; and \$25.00 service charge for a returned check due to insufficient funds.

⁶ Letters from DLNR to 3W (dated February 3, 2012 and March 2, 2012) both requesting information from 3W are attached as Exhibits V.b and V.c, respectively.

⁷ 3W previously identified IEP as a financial partner and majority shareholder in an entity being formed to own the renewable energy project proposed by 3W.

Notwithstanding the above requests, as of the date of this Land Board meeting, May 25, 2012, 3W has not provided the information requested by DLNR that is necessary to allow a proper evaluation of any alternative resolution 3W has, or intends to propose. Moreover, as DLNR has previously notified 3W, the Development Agreement is probably the most the Land Board can legally approve considering Chapter 343 requirements have not been satisfied.

Based on the foregoing, and considering 3W's continuing inability to satisfy both monetary and non monetary requirements set forth in the Development Agreement; or cure both monetary and non-monetary defaults pursuant to the Development Agreement, Staff recommends BLNR terminate the Development Agreement, effective as of May 25, 2012, the date of this meeting.

Subject to BLNR's approval to terminate the Development Agreement, pursuant to Section 171-13, Hawaii Revised Statutes, 3W, including 3W principles and/or partners, may not be eligible to purchase or lease public lands, or be granted a license, permit, or easement covering public lands for a period of five years from the date of termination.

RECOMMENDATION: That the Board terminate the Development Agreement effective as of May 25, 2012, pursuant to Paragraph 13 of the Development Agreement, and without waiving any other remedies to which the State may be entitled:

1. Authorize retention of any advance payment of Development Agreement Fees or other payments or charges made by 3W;
2. Authorize the prosecution of any claim against 3W for Development Agreement Fees or other payments or charges that accrued prior to the effective date of termination, including interest thereon;
3. Authorize the assertion of any claim that the State may have against the 3W for any damages, costs, or expenses, suffered or incurred by the State; and
4. Require 3W to remove, at 3W's sole cost and expense, immediately and with due diligence, any improvements made on or to the Subject Property by 3W and return the portions of

Staff is cognizant of the fact that it takes a minimum of 4 Board members to vote in favor of, or against a proposed course of action, in order for any board action to take place. In the event the majority of the Board is inclined to accept a payment or allow 3W more time, staff strongly recommends no payment should be accepted unless the payment cures all outstanding monetary arrearages, and such payment should be made by 3W unconditionally. Unconditionally would mean no promise or obligation upon the State or DLNR to subsequently negotiate even the possibility of amending certain provisions of the DA.

At its meeting on August 8, 2008, under Agenda Item D-10, the Land Board, in part, approved in principle of the issuance of a direct lease to 3W covering State lands in Kahuku-Maiekahana, Koolauloa, Oahu, Tax Map Key (1) 5-6-08:06. At the time the Land Board was informed that 3W had not had a lease, permit or other disposition of State lands terminated within the last five (5) years due to non-compliance with such terms and conditions. As a result of the termination of this Development Agreement, the Land Board may be subsequently requested to rescind its prior approval in principle to issue 3W a direct lease.

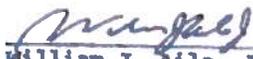
- the Subject Property under such JW-made improvements to a good and even grade; and
5. Provided that the termination of the Development Agreement shall not revoke the Board's prior approvals of August 25, 2006, under Agenda Item D-12, and August 14, 2009, under Agenda Item H-5.

Respectfully Submitted,



Gavin Chun
Project Development Specialist

APPROVED FOR SUBMITTAL:


William J. Aila, Jr., Chairperson

Land Board Meeting: May 25, 2012; D-16; Deferred:
Deferred for sixty (60) days.³

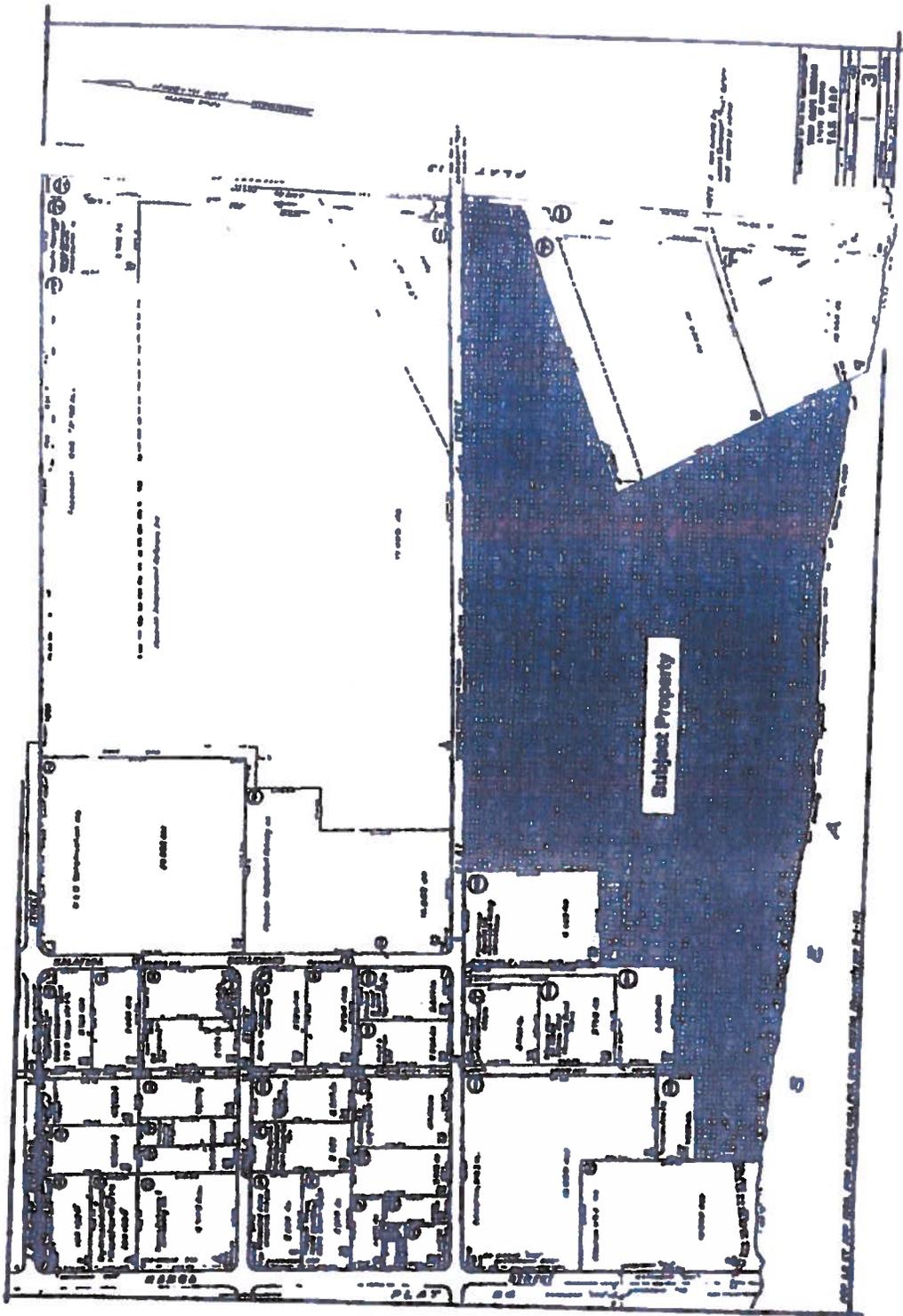


EXHIBIT "I"