

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

August 14, 2015

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

Hawaii

Approve Mediated Settlement of Rent Reopening Dispute in General Lease No. S-4201, David S. De Luz, Sr., Lessee, 75 Pohaku Street, Hilo, Hawaii, TMK No. (3) 2-2-058:033

APPLICANTS:

David S. De Luz, Sr., Lessee, through Wayne Richardson III, Successor Co-Trustee of the David S. De Luz, Sr. Revocable Trust, and Land Division, Department of Land and Natural Resources.

LEGAL REFERENCE:

Section 171-17, Hawaii Revised Statutes, as amended.

LOCATION:

Hilo Industrial Development, Pohaku Street Section, Lot 5, Waiakea, South Hilo, Hawaii, TMK No. (3) 2-2-058:033, as shown on the attached map labeled Exhibit A.

AREA:

20,648 sq. ft. (.4740 acre)

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act

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

CHARACTER OF USE:

Light industrial purposes.

TERM OF LEASE:

The entire term of the lease is 55 years. This reopening of rent is for the final ten years, commencing on September 26, 2013.

ANNUAL RENTAL:

The mediated annual rent (subject to the approval of the Board) as of September 26, 2013 is Seventeen Thousand, Five Hundred Seventy Five Dollars (\$17,575), which shall be paid according to the following "stepped" payment schedule:

STEPPED PAYMENT SCHEDULE			
Years	Dates	Type of Rent	Annual Rents
1	9/26/2013 to 9/25/2014	Prior Ten-Yr. Rent	\$10,960 Per Yr.
2	9/26/2014 to 9/25/2015	Prior Ten-Yr. Rent	\$10,960 Per Yr.
3 to 10	9/26/2015 to 9/25/2023	Mediated Rent	\$19,228.75 Per Yr. **
** Mediated rent for the ten-year term is \$17,575 per year x 10 years = \$175,750. Annual rent of \$19,228.75 was derived by deducting the rent that has been paid for years 1 and 2 from the total of \$175,750 and dividing by the remaining eight years ($\$175,750 - [\$10,960 \times 2] = \$153,830 \div 8 \text{ yrs.} = \$19,228.75 \text{ per annum}$).			

Additionally, the lessee's representative requested, and department agreed to allow, a possible lump sum payment on or before September 26, 2015. The size of the lump sum payment (if any), will serve to reduce the aggregate remaining unpaid rent for years 3 to 10, which in turn, would reduce the annual payments for the final eight years.

DCCA VERIFICATION:

Place of business registration confirmed: Not Applicable
Registered business name confirmed: Not Applicable
Good standing confirmed: Not Applicable

REMARKS:

The original lease was issued at public auction and is dated September 26, 1968. Through assignments, the current lessee is David S. De Luz, Sr. Francis Jung, Esq., and Wayne Richardson III, Successor Co-Trustee of the David S. De Luz, Sr. Revocable Trust, have represented to the department and the mediator, Esther Price, that Mr.

Richardson as Successor Co-Trustee of the David S. De Luz, Sr. Revocable Trust has legal authority to act in behalf of David S. De Luz, Sr., lessee. Requests by the Department of Attorney General and staff have been made to attorney Jung for documentation of Mr. Richardson's legal authority, which has not yet been provided.

Disputes in rent reopenings for leases of public lands are governed by Hawaii Revised Statutes Section 171-17, as amended. Prior to July 1, 2014, rent disputes were generally arbitrated by a three-member arbitration panel. However, the Legislature amended HRS Section 171-17 effective as of July 1, 2014 to require (non-binding) mediation by a single mediator prior to (binding) arbitration.¹

In this instance, a three-member arbitration panel had been formed before the July 1, 2014 amendments to Section 171-17 went into effect. However, through the agreement of the lessee and staff (upon consultation with the Department of Attorney General), mediation was conducted and the third, neutral appraiser on the arbitration panel, Esther Price, was selected as the mediator.

Mediation was conducted at Ms. Price's office on May 7, 2015 and May 27, 2015. The lessee was represented by Wayne Richardson III, Successor Co-Trustee of the David S. De Luz, Sr. Revocable Trust, and Francis Jung, Esq. The department was represented by deputy attorney general Cindy Young, Russell Tsuji, administrator of the Land Division, and Pamela Matsukawa, Land Division appraisal and real estate specialist.

Mediation was successful. An agreement on rent of \$17, 575 per year was reached, subject to the approval of the Board. A copy of the signed mediation settlement is attached as Exhibit B. However, through the course of mediation, staff learned that the lessee has a sublessee who has not been approved by the Board. Staff informed the lessee that, in accordance with paragraph 14 of the lease, the matter must be brought to the Board for after-the-fact approval of the sublessee, and that the Board has the right to review and approve the rent charged to the sublessee and, if necessary, to revise the rent to the lessee based upon the rental rate charged to the sublessee. Staff will bring the matter of the sublessee to the Board after staff has an opportunity to review and assess the sublessee situation.

Staff agreed to a "step" payment schedule to allow the lessee to collect the back rent owed based on the mediated rent from the sublessee by paying less in the first two years and adding the balance of the new rent owed for those years to the rent paid to the department in the later years.

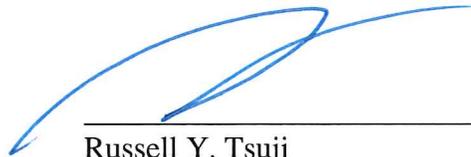
The prior rent for the ten years ending on September 25, 2013, was \$10,960 per year.

¹ Additionally, under the amended law, arbitrations for reopenings are now submitted to a single arbitrator for determination, rather than to a three-member panel. The amending act is Act 168 Session Laws of Hawaii 2014.

RECOMMENDATION:

That the Board approve the mediated rent with the stepped payment schedule as set forth hereinabove, subject to the receipt by the Department of Attorney General and staff of acceptable documentation that Wayne Richardson III, Successor Co-Trustee of the David S. De Luz, Sr. Revocable Trust, has the legal authority to act in behalf of lessee David S. De Luz, Sr., in regard to GL No. S-4201 and this mediated settlement.

Respectfully Submitted,



Russell Y. Tsuji
State Lands Administrator

APPROVED FOR SUBMITTAL:



Suzanne D. Case, Chairperson



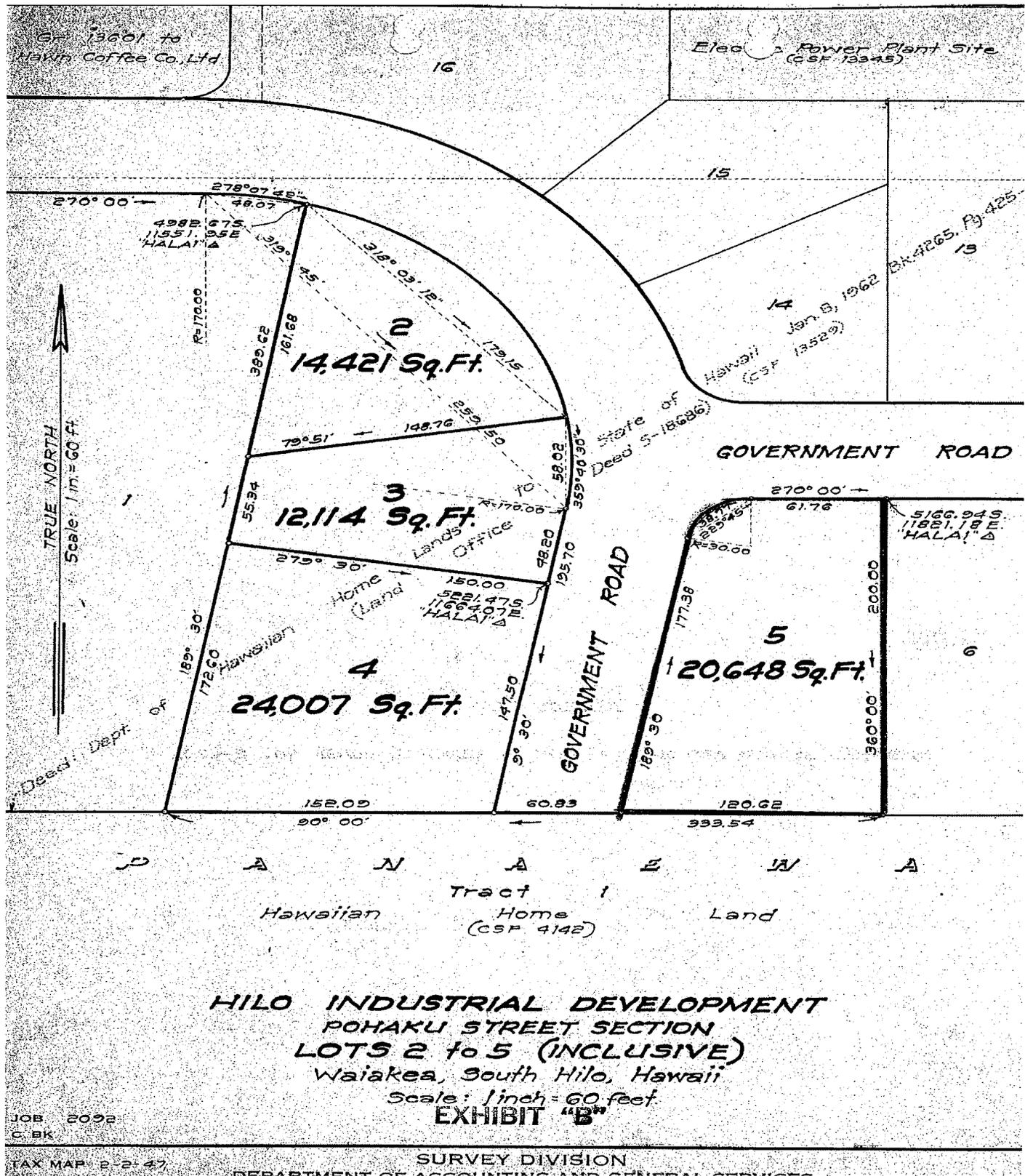


EXHIBIT A

MEDIATION SETTLEMENT AGREEMENT

Re: **State of Hawaii General Lease No. S-4201**
75 Pohaku Street, Hilo, Hawaii 96720
Third Division Tax Map Key 2-2-58, Parcel 33

PARTIES

The State of Hawaii Department of Land and Natural Resources is the Lessor and David S. De Luz, Sr. is the Lessee under the above referenced lease which commenced on September 26, 1968. The Lessor and Lessee, within the body of this document, are referred to as "DLNR" and "De Luz", and in plural as "Parties".

FAIR MARKET RENT RESET TERMS

The total term of the lease is 55 years. According to the lease, "The rental for any ensuing rental period shall be the rental for the immediately preceding rental period or the fair market rental at the time of reopening, whichever is higher." The rent was scheduled to be reset for the final ten-year term of the lease on September 26, 2013.

LEGAL REFERENCE

Pursuant to Hawaii Revised Statutes (HRS) Chapter §171-17 subsection (d) (2), which states, in part: "If the board's and the lessee's appraisers do not agree upon the lease rental, the lessee and the board shall in good faith attempt to resolve the dispute by nonbinding mediation by a single mediator mutually agreed upon by the parties".

MEDIATION SETTLEMENT

Fair market rental was conceptually but tentatively settled by mediation on May 27, 2015, subject only to the review and approval by the Board of Land and Natural Resources (BLNR) after a presentation by staff. The mediation was held at the CBRE office, located at 1003 Bishop Street, Suite 1800, Honolulu, Hawaii 96813. DLNR was represented by Russell Y. Tsuji, DLNR Land Division Administrator; Pamela K. Matsukawa, DLNR Appraisal and Real Estate Specialist, and Cindy Y. Young, Esq, Deputy Attorney General. David S. De Luz, Sr. was represented by his legal counsel, Francis L. Jung, Esq. and Wayne Richardson, III, Successor Co-Trustee of the David S. De Luz, Sr. Revocable Trust. Esther H.C. Price served as the mediator.

The Parties agreed to the following Fair Market Rent per annum for the ten-year term beginning September 26, 2013.

SEVENTEEN THOUSAND
FIVE HUNDRED SEVENTY FIVE DOLLARS
(\$17,575)

EXHIBIT B

The Parties also agreed to a memorandum of understanding that the rent will be stepped for the ten-year term. The following schedule is the step arrangement that was discussed by the parties:

MEMORANDUM OF UNDERSTANDING Regarding the Rent Step Payments			
Years	Dates	Type of Rent	Annual Rents
1	9/26/2013 to 9/25/2014	Prior Ten-Yr. Rent	\$10,960 Per Yr.
2	9/26/2014 to 9/25/2015	Prior Ten-Yr. Rent	\$10,960 Per Yr.
3 to 10	9/26/2015 to 9/25/2023	Mediated Rent	\$19,228.75 Per Yr. (1)
(1) Mediated rent for the ten-year term is \$17,575 per year x 10 years = \$175,750. Annual rent of \$19,228.75 was derived by deducting the rent that has been paid for years 1 and 2 from the total of \$175,750 and dividing by the remaining eight years (\$175,750 - [\$10,960 x 2] = \$153,830 ÷ 8 yrs. = \$19,228.75 per annum).			

The Lessee's representative requested, and DLNR agreed to allow, a possible lump sum payment on or before September 26, 2015. The size of the lump sum payment (if any), will serve to reduce the aggregate remaining unpaid rent for years 3 to 10, which in turn, would reduce the annual payments for the final eight years. By way of example:

If the Lessee makes a lump sum payment on or before September 26, 2015, of say \$10,000, then:

$\$175,750 - [\$10,960 \times 2] - \$10,000 \text{ lump sum payment} = \$143,830 \div 8 \text{ yrs.} = \$17,978.75 \text{ per annum for each of the remaining eight years of the lease.}$

ADDITIONAL AGREEMENTS

The Parties also mutually agree that subject to the BLNR review and approval of the rent conceptually but tentatively agreed upon with DLNR staff:

This agreement constitutes the complete understanding between the Lessor and Lessee and is binding on the Parties, their successors, and their representatives. No other terms, promises, or agreements will have any force or effect unless reduced to writing and signed by the individuals signing this agreement.

All promises, conduct and statements made in the course of reaching this Mediation Settlement Agreement are confidential and are governed by HRS Chapter §626, Hawaii Rules of Evidence, Rule 408 Compromise, offers to compromise and mediation proceedings. The Parties acknowledge as a State agency, DLNR's files are public and that access to the final mediated fair market rent can be accessed by public request.

Mediation Settlement Agreement
Page 3

This agreement is binding on the signatories upon their signature. Both parties acknowledge that the Mediated Settlement agreement will be presented to the State of Hawaii's Board of Land and Natural Resources.

By signing below, the Parties acknowledge they have read this agreement in its entirety, understand all the terms and conditions of the Agreement, and having done so, knowingly, voluntarily and freely enter into this Agreement without coercion or duress.

It is understood that this Agreement may be executed in counterparts but it will have no force or effect unless and until executed by the mediator and authorized representatives of the Lessor and Lessee. The Parties and mediator will have each executed at least one but not necessarily the same counterparts. Russell Y. Tsuji will serve as the signatory for the Lessor and William Richardson, III as the agreed upon signatory for the Lessee.



Esther H.C. Price, MAI
Mediator

APPROVED AND ACCEPTED:

Lessor: STATE OF HAWAII
Department of Land & Natural Resources

By 

Name: Russell Y. Tsuji
Title: Land Division Administrator

Lessee: DAVID S. DE LUZ , SR.

By _____
Name: Wayne Richardson, III
Title: Successor Co-Trustee
David S. De Luz, Sr.
Revocable Trust

Mediation Settlement Agreement
Page 3

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Esther H.C. Price, MAI
Mediator

APPROVED AND ACCEPTED:

Lessor: STATE OF HAWAII
Department of Land & Natural Resources

By _____
Name: Russell Y. Tsuji
Title: Land Division Administrator

Lessee: DAVID S. DE LUZ, SR.

By  _____
Name: Wayne Richardson, III
Title: Successor Co-Trustee
David S. De Luz, Sr.
Revocable Trust