

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

January 13, 2012

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

Hawaii

Resubmittal: Request for Additional Time to Cure Notice of Default, General Lease No. S-5188, Brad Radcliffe Anderson, Cord Dominis Anderson, and D.G. Anderson, Lessee, Auhaueake, North Kona, Hawaii, Tax Map Key: (3) 7-5-09:43.

PURPOSE:

Lessees Brad Radcliffe Anderson, Cord Dominis Anderson, and D.G. Anderson (Lessees), are requesting an additional 90 days to cure the notice of default dated September 16, 2011 that was mailed to Lessees on September 22, 2011.

LEGAL REFERENCE:

Section 171-6 and 171-20, Hawaii Revised Statutes, as amended.

LOCATION:

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

AREA:

.338 acres, more or less.

ZONING:

State Land Use District: Urban
County of Hawaii CZO: V-.75 (resort-hotel)

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:

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

TERM OF LEASE:

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

ANNUAL RENTAL:

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

BACKGROUND:

This is a resubmittal of agenda item D-6 that was before the Board of Land and Natural Resources on December 9, 2011. The Board took no action on the item due to a lack of quorum resulting from the recusal of one of the Board members. Staff was directed to bring the matter back to the Board in January 2012.

A notice of default (NOD) dated September 16, 2011 was mailed to Lessees on September 22, 2011 by certified mail correctly addressed to their record address. Additionally, on September 26, 2011, a copy of the NOD was e-mailed to Lessee D.G. Anderson, who confirmed receipt. The NOD was issued for Lessees' non-compliance with the commercial character of use provision of General Lease No. S-5188.

Pursuant to the lease and applicable law, the NOD gave Lessees 60 days to cure the default. Lessees requested a 30-day extension of the cure period, and the Board of Land and Natural Resources granted the extension at its meeting of October 28, 2011, Item D-20. At the same meeting, the Board approved Lessees' request to install a fence on portions of the lease premises on certain conditions, including Lessees' compliance with all applicable permitting requirements.

In the course of seeking the Special Management Area approvals for the fence

installation, Lessees have encountered complications in the County permitting process as explained below. They therefore request an additional 90 days to cure the default on top of the 90 days previously allowed.

REMARKS:

In a letter dated November 15, 2011, Lessee D.G. Anderson explained that the County of Hawaii Planning Department is taking the position that commercial activities are not allowed on the subject State parcel. The Planning Department's position is based on a Planning Commission letter dated October 10, 1990 approving an amendment of Special Management Area (SMA) Use Permit No. 277 to allow the parcel to be developed as a passive park in the center of the previously approved commercial complex. The SMA permit amendment does not discuss commercial use of the passive park. The Planning Department's view is that commercial use of the State parcel is therefore not allowed under the SMA permit, as amended.

Lessees have requested additional information from the Planning Department to in order to investigate the matter further and make a case for commercial use of the State parcel. Lessees are also attempting to contact the attorney who handled the SMA permit amendment application in 1990 to determine whether the attorney has further information or insights. In the meantime, the clock is ticking on the cure period for the NOD issued for the non-compliance with character of use under the lease.

Due to the unusual terms of the lease and the location of the State parcel in the highly regulated SMA, staff has no objection to granting Lessees additional time to cure the NOD. However, there is an issue with respect to the delivery of the NOD to Lessees. The Lease provides at section 21 that an NOD is to be delivered to the Lessees by personal service, registered or certified mail, and that the cure period runs from the date of delivery. As noted above, the NOD was sent by certified mail to Lessees on September 22, 2011. However, the NOD was returned to Land Division unclaimed in October 2011. As a result, delivery of the NOD has technically not been completed, although Lessees do not dispute that they received the NOD when staff e-mailed a copy to Lessee D.G. Anderson on September 26, 2011.

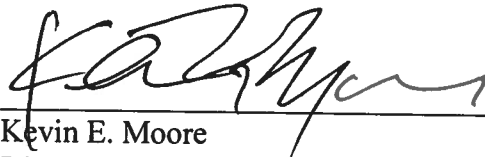
As a condition to granting the extension, staff is recommending that the Lessees acknowledge and agree that the NOD was delivered to Lessees on September 26, 2011, and that the cure period commences as of September 27, 2011. Using this as a starting point, the initial cure period of 60 days would have expired on November 25, 2011, but the 30-day extension the Board approved on October 28, 2011 pushed the expiration of the cure period back to December 25, 2011. An additional 90-day extension would expire on April 3, 2012.

RECOMMENDATION:

That the Board:


- A. Approve the Lessees' request for an additional 90-day extension of the cure period of the Notice of Default dated September 16, 2011 that was issued to Lessees for non-compliance with the character of use provision under General Lease No. S-5188, making the expiration date of the cure period April 3, 2012, under the terms and conditions cited above, which are by this reference incorporated herein and further subject to the following:
1. Lessees acknowledge and agree that the date of delivery of the Notice of Default to Lessees shall be deemed to be September 26, 2011.

Respectfully Submitted,



Kevin E. Moore
District Land Agent

APPROVED FOR SUBMITTAL:



William J. Aila, Jr., Chairperson

WJ

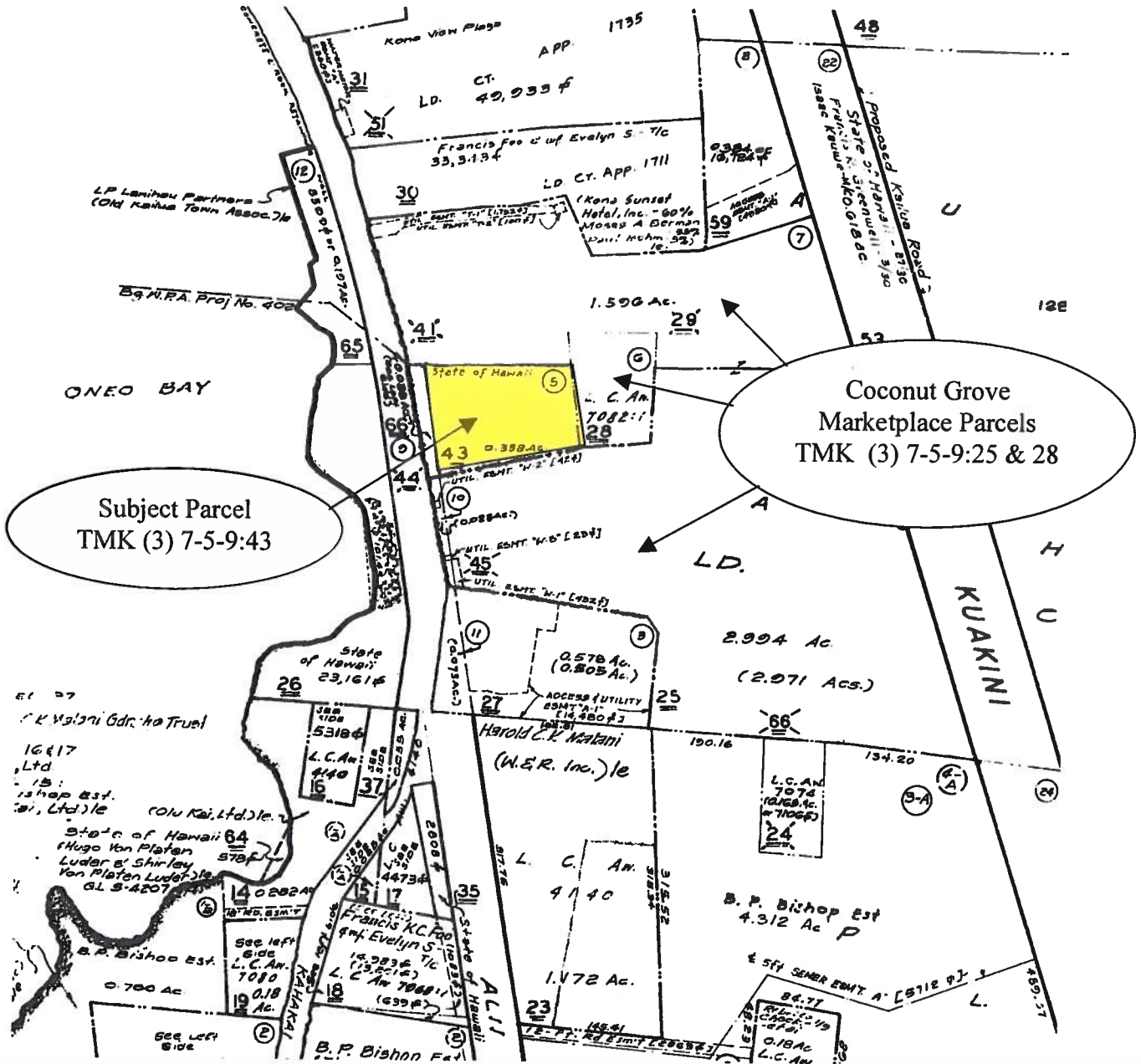


EXHIBIT A