

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

January 11, 2013

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

PSF 12OD-120

OAHU

Consent to Second Amendment to Construction and Operation Agreement under General Lease No. S-3709, Oceanic Institute, Lessee, to Attractions Hawaii, Sublessee, Waimanalo, Koolaupoko, Oahu, Tax Map Key: (1) 4-1-014:004.

APPLICANT:

Oceanic Institute, a domestic nonprofit corporation, as Sublessor, to Attractions Hawaii, a domestic general partnership as Sublessee.

LEGAL REFERENCE:

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

LOCATION:

Portion of Government lands situated at Waimanalo, Koolaupoko, Oahu, identified by Tax Map Key: (1) 4-1-014:portions of 004, as shown on the map attached as **Exhibit 1**.

SUBLEASED AREA:

49.599 acres, more or less.<sup>1</sup>

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act

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

MASTER LEASE CHARACTER OF USE:

Constructing, maintaining and operating a scientific research facility for the study of marine life and a public exhibiting facility of marine life, together with easements for pipeline rights-of-way for the intake and discharge of sea waters purposes.

<sup>1</sup> 12.063 acres previously encumbered by the subject sublease has been withdrawn and set aside to the Department of Transportation under Governor's Executive Order No 4177 for highway improvement and retaining wall purposes.

SUBLEASE CHARACTER OF USE:

Commercial operation of a public exhibit of marine life, including such supporting or other facilities as are not prohibited under General Lease No. 3709.

TERM OF MASTER LEASE:

65 years, commencing on October 21, 1962 and expiring on October 20, 2027. Last rental reopening occurred on October 21, 2002; next rental reopening is scheduled for October 21, 2012.

TERM OF SUBLEASE:

Commencing on December 17, 1963 and expiring on December 31, 1992, further subject to option to renew for one or more additional ten (10) years and a final period of approximately five (5) years.

ANNUAL RENTAL OF MASTER LEASE:

\$91,200 or 1.5% of gross sales and business, whichever is greater.

ANNUAL RENTAL OF SUBLEASE:

Semi-annually the higher of \$50,000 or a sum determined by applying the following percentages to Sea Life's "gross revenues" (as that term is herein defined): 3% of the first \$4 million; 4% of the next \$1 million; 5% of the next \$1 million; and 6% on all sums exceeding \$6 million.

RECOMMENDED ADJUSTMENT TO LEASE RENTAL:

Not applicable.

DCCA VERIFICATION:

SUBLESSOR:

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>

SUBLEESSEE:

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:

In 1962, pursuant to a public auction, General Lease No. 3709 was issued to Pacific Foundation for Marine Research, a domestic nonprofit corporation. Since 1975, the corporation name has been changed to Oceanic Institute ("OI").

In 1963, the Board consented to the Construction and Operation Agreement (“Sublease”) currently held by OI and Attractions Hawaii (“AH”), as successor in interest. An amendment to the Sublease was approved by the Board on December 15, 1972. A copy of the amended Sublease is attached as **Exhibit 2**.

Recently, OI, through its attorney, provided a second amendment to the Sublease drafted in connection with the resolution of a dispute between OI and AH. The cover letter and the proposed second amendment are attached as **Exhibits 3 and 4** respectively.

According to OI, the subject request is to provide the effective date of the agreement and further defines the term “gross revenues” from which the rent payable under the Sublease is derived. Staff notes that the State will be able to participate in sharing any additional revenues from the Sublease based on the percentage rent provision in the master lease. Further, the revised definition of “gross revenues” mentioned on page 2 of Exhibit 4 is even broader, and the subject request is pertaining to the same sublease and sublessee. Therefore, staff does not believe the request trigger any additional sandwich rent under the prevailing sublease policy


OI and AH are in compliance with all the lease terms and conditions and a recent site inspection revealed no violation of any terms and conditions. Staff did not solicit comments from other government agencies as the request pertains to housekeeping purposes only.

RECOMMENDATION:


That the Board consent to the Second Amendment to Construction and Operation Agreement under General Lease No. S-3709 between Oceanic Institute, as Sublessor, and Attractions Hawaii as 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. Aila, Jr., Chairperson

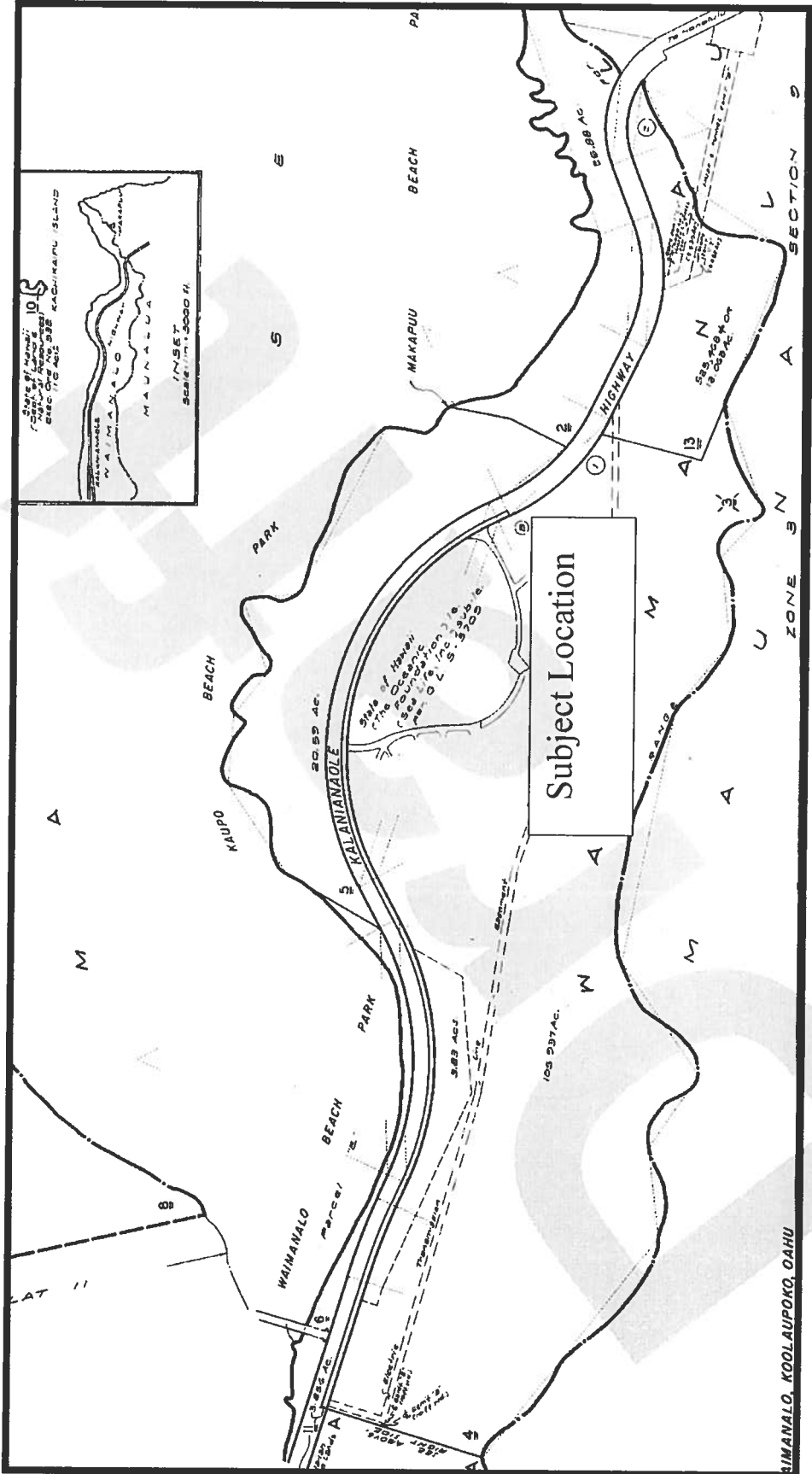


EXHIBIT "1"

State of Hawaii

AMENDMENT TO CONSTRUCTION  
AND OPERATION AGREEMENT

THIS AMENDMENT made this 18 day of May,  
1973, effective as of January 1, 1972, by and between THE  
OCEANIC FOUNDATION, hereinafter called the "Foundation",  
and SEA LIFE, INCORPORATED, hereinafter called "Sea Life", --

W I T N E S S E T H :

WHEREAS, the Foundation and Sea Life entered into that  
certain Construction and Operation Agreement (herein called  
"sublease") dated December 17, 1963; and

WHEREAS, by Order dated May 1, 1972, entered in the  
United States District Court of Hawaii, No. BK-72-143, First  
Hawaiian Bank and Alexander Wylly were named Trustee and  
Additional Trustee, respectively, in Reorganization of The  
Oceanic Foundation; and

WHEREAS, the parties hereto have determined that as a  
part of a plan of reorganization of the Foundation it is neces-  
sary to amend said sublease in order to assure the Foundation  
the continued use and enjoyment of the facilities initially con-  
structed by Sea Life under the sublease and used by the Founda-  
tion in furtherance of its scientific and educational activities  
and additionally to establish a more equitable return on the  
premises heretofore and herein demised by the Foundation to Sea  
Life and to provide inducements for Sea Life to refurbish and  
maintain its facilities in a first class condition and further  
to expand its facilities by the construction of new improvements

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and the addition of new scientific and educational exhibits and shows at Sea Life Park;

NOW, THEREFORE, in consideration of the mutual covenants hereinafter contained, the parties hereto agree to amend said sublease as follows:

Paragraphs 1, 2, 3, 5, 6, 7, 8, 9, 10, 12, 14, 15, 17, 18 and 20 shall be deleted and the following paragraphs bearing the same numbers are substituted therefor. As a matter of convenient reference only, the remaining paragraphs 4, 11, 13, 16 and 19 contained in said sublease but not amended hereby are reproduced herein merely to have the entire sublease, as hereby amended, contained in one instrument.

1. Premises. Subject to the approval of the Director of Land and Natural Resources as provided in said General Lease No. S-3709, the Foundation hereby sets aside and demises to Sea Life that portion of the premises demised to the Foundation by the State of Hawaii in said General Lease No. S-3709, dated October 19, 1962, as is more particularly described and delineated as Area 1 in Exhibit A attached hereto, together with all rights, easements, privileges and appurtenances thereunto belonging or appertaining.

2. Term of Agreement. Unless sooner terminated as herein provided, this agreement shall remain in effect for twenty-nine (29) years and 14 days, commencing on December 17, 1963 and terminating on December 31, 1992; provided that Sea Life shall have the option to renew this agreement for one or more additional periods of ten (10) years and a final period of approxi-

mately five (5) years, each during the term of said General Lease No. S-3709, by giving written notice thereof on or before ninety (90) days prior to the end of the initial term and of each such renewal period; provided, however, that any changes in the terms and conditions of this agreement which may be mutually agreed upon by the Foundation and Sea Life at such renewal period, with the exception of rental rates, shall be subject to approval of the Director of the Land and Natural Resources as provided in General Lease No. S-3709.

3. Payments to the Foundation. Sea Life shall pay to the Foundation for the premises demised hereby and the privileges and concessions herein granted to it, in semi-annual installments, for the period commencing January 1, 1964 as follows:

(a) Until December 31, 1968, a sum equal to 1.2% of the gross revenues of Sea Life for each six (6) month period, but in no event less than the following semi-annual minimum payments:

January 1 and July 1 of 1964 and 1965:	\$15,000
January 1 and July 1 of 1966 and 1967:	\$30,000
January 1 and July 1 of 1968:	\$60,000;

The Foundation and Sea Life acknowledge and agree that the rent for the period January 1, 1964 through December 31, 1968 has been properly paid and received.

(b) During each of the calendar years 1969, 1970 and 1971, a sum equal to twelve per cent (12%) of the gross revenues of Sea Life for each six (6) month period, or \$60,000, whichever is higher;

(c) During each of the calendar years 1972 through 1977, Sea Life shall pay to the Foundation semi-annually the sum of \$40,000. By contemporaneous agreement between Sea Life and the Foundation, which agreement is a part of the Foundation's plan of reorganization, the Foundation acknowledges the receipt of \$480,000, being the prepayment of said rent for the entire period 1972 through 1977. In addition, Sea Life shall pay directly to the State of Hawaii, as and when due under said General Lease No. S-3709, 1.2% of Sea Life's annual "gross sales and business transacted" (as that term is defined in said General Lease);

(d) During each of the calendar years 1978 through 1982, Sea Life shall pay to the Foundation semi-annually a sum equal to 3% of the "gross revenues" (as that term is herein defined) of Sea Life for the preceding six (6) month period, or \$40,000, whichever is higher; provided, however, that the sum of \$79,582.00, which has been advanced by Sea Life to or for the benefit of the Foundation during 1972, plus the sum of \$22,398.00 which Sea Life is entitled to by way of overpayments made to the Foundation during the years 1969, 1970 and 1971, shall be first applied to reduce the payments which shall be due and payable in 1978 and subsequent years until the total amount of such sums are fully utilized. In addition, Sea Life shall pay directly to the State of Hawaii, as and when due during such years, 1.2% of Sea Life's annual "gross sales and business transacted" (as that term is defined in said General Lease No. S-3709);

(e) During each of the calendar years 1983 through 1992, Sea Life shall pay to the Foundation semi-annually the



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higher of \$50,000 or a sum determined by applying the following percentages to Sea Life's "gross revenues" (as that term is herein defined): 3% of the first \$4 million; 4% of the next \$1 million; 5% of the next \$1 million; and 6% on all sums exceeding \$6 million. In addition, Sea Life shall pay directly to the State of Hawaii, as and when due during such years, the rent which the Foundation is required to pay to the State under said General Lease No. S-3709, but in no event shall such additional sum payable directly to the State exceed 2% of Sea Life's "gross sales and business transacted" (as that term is defined in said General Lease).

Subject to the application of the credits specified in paragraph (d), above, Sea Life shall pay to the Foundation the foregoing minimum payments on July 1 and December 31 of each year of the term hereof commencing July 1, 1978, and shall within sixty (60) days thereafter pay any additional percentage payment, without notice or demand, accompanied by a statement showing the computation thereof. Sea Life shall maintain accounts and records in accordance with generally accepted accounting principles and shall permit the Foundation and the State of Hawaii to inspect them and all contracts concerning the operation of the demised premises at reasonable times. By not later than April 30 of each year of the term hereof, commencing April 30, 1973, Sea Life shall submit to the Foundation and the State of Hawaii a copy of its audited financial statements, prepared and certified by an independent certified public accountant. By not later than the date any rent which the Foundation is required to pay to the State under Lease S-3709 is due, Sea Life shall provide

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to the Foundation and the State a statement showing the computation of such rent in such form as shall satisfy the Foundation's requirements therefor under said Lease S-3709.

In the event this agreement is renewed as herein provided, the annual payments to be made by Sea Life to the Foundation during each ten-year renewal period and final five-year renewal period shall be determined by mutual agreement of the parties, or if they fail to reach such agreement prior to thirty (30) days before the commencement of each renewal period, then such payments as shall be determined by arbitration as specified in paragraph 16, below. In determining said annual payments, the arbitrators shall take into consideration the fair market value of the land demised hereby as committed to the uses permitted hereby and exclusive of the value of any improvements constructed by Sea Life upon the demised premises using the income approach to such valuation. Semi-annual payments shall be expressed in terms of percentages of gross revenues and minimum semi-annual payments, as in the 10 year period 1983 to 1992; provided, however, that in no event shall such minimum semi-annual payments be less than the minimum semi-annual payments made by Sea Life during the calendar year immediately preceding the commencement of such renewal period; provided, further, however that in determining said semi-annual payments, the arbitrators shall take into consideration the amount of rent which the Foundation is required to pay to the State under Lease S-3709.

The term annual "gross revenues" for the period December 17, 1963 through and including December 31, 1971 shall mean and

include annual "gross sales and business transacted" as defined in said General Lease No. S-3709.

The term annual "gross revenues" for the period commencing January 1, 1972 through the end of the term hereof and during any renewal period shall mean and include all annual revenues received by Sea Life from:

(1) Admission charges to the demised premises;

(2) Sea Life's operation of any food, beverage, gift or other facility located upon the demised premises;

(3) Any concessionaire or licensee who may operate any food, beverage, gift or other facility upon the demised premises; and

(4) Any sublessee of any portion of the demised premises.

In connection with items (1) and (2) immediately above, revenue shall include all sales and charges for cash or credit, but shall exclude and have deducted therefrom: (a) returns and refunds, (b) the amount of any sales tax, general excise tax, gross income tax, value added tax or similar tax or imposition not includable as income under the State or Federal law imposed for such sales and charges, where such tax or imposition is billed to the purchaser as a separate item, (c) sales commissions, rebates, trade discounts, allowances (including advertising and promotion allowances), overrides or any other form of inducement which it is customary to pay to tour operators, agents and others who cause people to attend Sea Life Park, but excluding commissions, bonuses and other incentives paid to Sea Life employees; (d) interest received, (e) postage advanced by purchaser on gift or other

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items purchased by and mailed to any purchaser or purchaser's designee, (f) uncollected or uncollectable credit accounts and (g) proceeds of the sale of trade fixtures, animals, equipment and capital assets, including leasehold improvements.

In connection with items (3) and (4) immediately above, there shall be excluded from revenue received by Sea Life, the amount of any general excise tax, gross income tax, property tax, value added tax or similar imposition or tax imposed upon Sea Life and billed by Sea Life as a separate item to any such concessionaire, licensee or sublessee. With respect to concessionaires, licensees or sublessees, Sea Life agrees to use its best efforts to maximize its return from such persons and to that end will charge for a concession, license or sublease granted a consideration which shall be consistent with good business practices in the operation of similar park complexes and which shall not be designed to avoid or lessen the percentage rents payable to the Foundation hereunder.

In addition to any payments required to be made by Sea Life under this sublease, Sea Life shall also pay or cause to be paid directly to the taxing authority before they become delinquent all real property taxes which lawfully may be assessed against and payable upon the demised premises or any part thereof or improvement thereon.

4. Building Requirement. Sea Life will construct within the first two (2) years of this agreement and will operate, maintain and improve on the premises facilities for exhibiting and research costing not less than \$1,200,000, no less than

\$120,000 of which shall be for the purposes of the research institute. The exhibiting facility shall include an oceanarium containing at least three (3) major exhibits comparable in size, scale and quality to existing oceanarium exhibits elsewhere in the United States and may include administration buildings, restaurants, public sanitary facilities, concession facilities, seating and other facilities customary or desirable to be furnished in connection with the operations to be conducted hereunder. Sea Life shall provide a wholesome recreational and educational attraction in a healthy park-like atmosphere commensurate with first-class public or private attractions of a similar nature elsewhere in the United States. Such facilities, exhibits and attractions shall be constructed, operated and maintained in accordance with the terms and conditions contained in said General Lease No. S-3709.

5. Approval of Foundation. Sea Life shall, prior to commencing any construction upon the demised premises, first obtain the written approval of the Foundation, which approval will not be unreasonably withheld, to all plans and specifications for such improvements. The new improvements shown on Exhibit B attached hereto and incorporated herein by reference shall be deemed to have been approved in concept by the execution hereof. The portion of Area 1 delineated on Exhibit B as scenic trails and nature and educational walks shall, unless otherwise mutually agreed upon between the Foundation and Sea Life, be used only for such purposes and the layout and development of such area shall be subject to the prior approval of the Foundation.

For improvements not already built or shown on Exhibit B and costing less than \$100,000 such approval shall be deemed to have been given if the Foundation does not deliver written notice of disapproval within thirty (30) days after submission for approval. Nothing herein contained shall be deemed to waive or modify any approvals which may be required of the Director of Land and Natural Resources as provided in said General Lease No. S-3709; provided, however, that any approval required of the Foundation shall not be withheld if any prior approval required by the Director of Land and Natural Resources as provided in said General Lease No. S-3709 has been obtained; and provided, further, that in the event there shall be a dispute between Sea Life and the Foundation relating to the grant of any required approval, the same shall be promptly settled by arbitration pursuant to paragraph 16 hereof, save and except only that in such case the arbitrators shall be architects who are members of the American Institute of Architects, and one of whom may be the architect employed by Sea Life to prepare plans for which approval is sought.

6. Required Improvements. Sea Life at its own expense during the whole of the term shall make, build, maintain and repair all fences, sewers, drains and roads which may be required by law or otherwise to be made, built, maintained, and repaired upon or in connection with or for the use of said demised premises or any part thereof, and will also build, maintain and repair all fences which may be necessary to protect the demised premises.

Sea Life agrees to expend by way of refurbishment, asset replacement and deferred maintenance and repairs with respect to

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improvements upon the demised premises not less than \$500,000 over the period 1973 through 1977.

7. Use of Premises. Sea Life shall use and permit use of the premises for the purpose of a commercial operation of a public exhibit of marine life, including such supporting or other facilities as are not prohibited under said General Lease No. S-3709.

8. Inspection. Sea Life shall permit the Foundation and its agents, at all reasonable times but without disruption of normal operations and upon prior reasonable notice, to enter the premises and examine the state of repair and condition thereof, and shall repair and make good at its own expense all defects required by the provisions of this agreement to be repaired by Sea Life promptly upon receipt of notice from the Foundation that such repairs are reasonably required.

9. Compliance with Basic Lease. Sea Life shall be bound by and shall not commit or suffer any act which shall constitute a breach of any term, covenant, agreement or condition of said General Lease No. S-3709.

10. Assignment and Subletting. Sea Life shall not without the prior written consent of the Foundation, which consent will not be unreasonably withheld, assign this agreement nor sublet the whole or any part of the premises; provided, however, that such consent shall be subject to any applicable terms and conditions of General Lease No. S-3709 and any required consent of the State of Hawaii.

Sea Life may from time to time without further consent of

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the Foundation assign this sublease by way of mortgage to any bank, insurance company or other established lending institution as mortgagee, provided that Sea Life shall upon execution of such mortgage promptly deliver a true copy thereof to the Foundation. The mortgagee or its assigns may enforce such mortgage and acquire title to the subleasehold estate in any lawful way, and pending foreclosure of such mortgage may take possession of and rent said premises, and upon foreclosure thereof may without further consent of the Foundation sell and assign the subleasehold estate by assignment in which the assignee shall expressly assume and agree to observe and perform all the covenants of Sea Life herein contained, and such assignee may make a purchase money mortgage of this sublease to the assignor, provided that upon execution of any such assignment or mortgage a true copy thereof shall be delivered promptly to the Foundation and that no other or further assignment of this sublease for which any provision hereof requires the written consent of the Foundation shall be made without such consent. The mortgagee or its assigns of such mortgage shall be liable to perform the obligations herein imposed on Sea Life only during the period such person has possession or ownership of the subleasehold estate. Nothing contained in such mortgage shall release or be deemed to relieve Sea Life from the full and faithful observance and performance of its covenants herein contained or from any liability for the nonobservance or nonperformance thereof, nor be deemed to constitute a waiver of any rights of the Foundation hereunder, and the terms, covenants and conditions of this sublease shall control in case of any conflict



with the provisions of such mortgage.

During the continuance in effect of any authorized mortgage of this sublease the Foundation will not terminate this sublease because of any default on the part of Sea Life to observe or perform any of the covenants or conditions herein contained if the mortgagee or its assigns, within 120 days after the Foundation has mailed to the mortgagee or its assigns at the last known address thereof a written notice of intention to terminate this sublease for such cause, shall cure such default, if the same can be cured by the payment of money, or, if such is not the case, shall undertake in writing to perform and shall thereafter perform all the covenants of this lease capable of performance by the mortgagee or its assigns until such time as this sublease shall be sold upon foreclosure of such mortgage commenced promptly and completed with due diligence, and any default consisting of Sea Life's failure promptly to discharge any lien, charges or encumbrance against said premises junior in priority to such mortgage shall be deemed to be duly cured if such mortgage shall be foreclosed by appropriate action instituted within said 120-day period and thereafter prosecuted in a diligent and timely manner.

11. Indemnity. Sea Life shall indemnify and hold the Foundation and the State of Hawaii harmless against all claims and demands whatsoever for loss or damage, including property damage, personal injury and wrongful death, arising out of or in connection with the use or occupancy of the premises by Sea Life or any other person claiming by, through or under it, or

any accident, flooding, fire or nuisance on the premises not caused by the Foundation, its agents, employees or licensees, or any failure by Sea Life to keep the premises and the improvements thereon in a safe condition, and shall reimburse the Foundation for all its costs and expenses including reasonable attorneys' fees incurred in connection with the defense of any such claims.

12. Insurance. Sea Life shall at its own expense at all times during the term keep insured all buildings and improvements erected on the demised premises during said term against loss or damage by fire, with extended coverage, and in time of war against war damage to the extent that such governmental insurance is obtainable at reasonable cost, said insurance to be held in the joint names of the Foundation, Sea Life and any mortgagee as their interests may appear to be issued by an insurance company qualified to do business in the State of Hawaii, to be in an amount as near as practicable to the full replacement cost of said buildings and improvements, and to be payable in case of loss to such trust company qualified under the laws of Hawaii as Sea Life shall designate as trustee for the custody and disposition as herein provided of all proceeds of such insurance. Sea Life will pay all premiums when due and will from time to time upon receipt thereof deposit promptly with the Foundation copies of such insurance policies or current certificates thereof. If the buildings or other improvements are destroyed or damaged by fire or other such casualty covered by insurance, then the parties shall with all convenient speed expend the insurance proceeds in

rebuilding, repairing or otherwise reinstating the buildings and other improvements according to their condition prior to such casualty or to such modification thereof as is approved by the Foundation and any mortgagee, and any costs in excess of available insurance proceeds shall be paid by Sea Life; provided, however, that if any improvements on the demised premises shall during the last five years of the last term hereof (2023 to 2027) be destroyed or damaged to any extent exceeding 50% of the actual cash value thereof immediately prior to such casualty, and the insurance proceeds are insufficient for restoring such buildings as herein provided, Sea Life in lieu of such restoration may at its option within 60 days after such casualty remove all debris and remains of damaged buildings and surrender to the Foundation this sublease and all interest of Sea Life in the remaining insurance proceeds and thereby be relieved of any further obligations hereunder; provided, further, that the foregoing option of Sea Life shall not be effective if the Foundation, within 30 days after tender to it of such surrender and before its written acceptance thereof, shall elect to restore such buildings as herein provided, using the insurance proceeds and making up any deficiency from the Foundation's own funds and in such case Sea Life shall pay to the Foundation, as additional rent at the same times and in the same manner as the payments of rent hereinbefore provided from the date of completion of such restoration until the end of said term, a sum equal to 8% per annum of the amount so expended by the Foundation from its own funds (or such greater percentage as the Foundation may have actually been charged by way of interest

to raise such funds), the first payment of such additional rent to be prorated.

Sea Life shall also at its own expense maintain with respect to the demised premises comprehensive liability insurance with minimum limits of not less than \$1,000,000 for injury to one person and not less than \$5,000,000 for injury to more than one person in any one accident or occurrence and not less than \$500,000 against claims for property damage, in an insurance company qualified to do business in the State of Hawaii, and shall upon request allow the Foundation to inspect current certificates of such insurance.

13. Foundation Expenses. Sea Life shall pay to the Foundation on demand all costs and expenses including reasonable attorneys' fees incurred by the Foundation in enforcing any of the covenants in this agreement, in remedying any breach thereof, in recovering possession of the premises or any part thereof, in collecting any delinquent payments or other charges hereunder payable by Sea Life, or in connection with any litigation commenced by or against Sea Life to which the Foundation shall without fault be made a party.

14. Sharing of Facilities. The Foundation and those designated or authorized by the Foundation may, upon Sea Life's written consent, which consent will not be unreasonably withheld, use the roads and utilities within the demised premises, together with any parking areas specifically designated for joint use upon Exhibit B hereto, without payment of any charge therefor; provided that such roads, utilities and parking areas have addi-

tional capacity beyond Sea Life's requirements and such users shall pay to Sea Life upon request any reasonable proportionate cost relating thereto; and provided, further, however, that the Foundation shall have the nonexclusive right to use, without any prior consent of Sea Life, the roadway hatch marked on Exhibit B and that the Foundation shall in any event have available for its sole use within said joint use parking area space to park not less than 25 automobiles, and in the event such joint parking area shall in the future be required by Sea Life for purposes other than parking, Sea Life shall make available to the Foundation an equal amount of parking space within a convenient walking distance of the Foundation's facilities. Sea Life shall also undertake to keep the presently existing tank adjacent to the Link Cottage (or any replacement thereof with a tank of similar capacity) filled to not less than 75% of its capacity with sea water at all times during the term of this sublease and shall similarly keep active the sea water line which the Foundation may tap into as provided below; provided that Sea Life shall not be responsible for the failure to keep such tank filled or such line active for reasons beyond Sea Life's reasonable control. The Foundation shall be responsible for the maintenance and replacement of such tank. Sea Life further grants the Foundation the right at any time to tap into any active sea water line, at such place as shall be agreed upon by Sea Life, with a 4" sea water line. The Foundation shall pay all costs of such tap, but all water supplied to the Foundation through such tap shall be without cost to the Foundation. The Foundation shall permit Sea Life

all reasonable access to repair and maintain any sea water line serving Sea Life and which may be located on the Foundation's premises.

15. Rights of Sea Life.

(a) The Foundation shall allow Sea Life the right: to peaceably hold, enjoy, use, operate and manage the demised premises in accordance with the terms of this agreement without hindrance or interruption by the Foundation or any other person lawfully claiming by, through or under it; to operate and manage all permanent improvements or additions to the premises and all modifications thereof; to make such financing arrangements as it deems advisable for facilities constructed by or under the supervision of Sea Life and to determine the fees and charges to others for the use of such facilities and any modifications thereof, except as otherwise expressly provided in this agreement.

(b) The Foundation irrevocably agrees that Sea Life, as agent for the Foundation, shall have the right to pay the rental due and owing by the Foundation to the State of Hawaii under said General Lease S-3709 directly to the State, and to cure for the account of the Foundation any and all defaults which might exist under said General Lease S-3709. By its consent hereto, the State of Hawaii agrees that so long as this sublease remains in effect and so long as all the terms and conditions of said General Lease No. S-3709 are being complied with, it will not disturb Sea Life's occupancy or possession of the demised premises hereunder, and further that it will send

directly to Sea Life duplicate copies of any notice of default under said General Lease No. S-3709. Any payments made by Sea Life to the State on account of the Foundation and any costs or expenses, including attorneys' fees, incurred by Sea Life in curing any default by the Foundation shall be offset against any monies which is or which may be hereafter payable hereunder by Sea Life to the Foundation. To assure Sea Life of the timely enjoyment of the foregoing rights, the Foundation shall permit Sea Life reasonable access to its financial records, including review of any statements prepared by or with the assistance of any public accountants, in order to determine the rent which is payable by the Foundation to the State and immediately notify Sea Life of all communications from the State which relate to said General Lease No. S-3709.

(c) The Foundation will not assign, mortgage or otherwise convey, lease, sublease, license or transfer any of its rights in and to this sublease or said Lease No. S-3709 or any of the premises covered by said Lease No. S-3709 to any third party without first offering the same to Sea Life upon the same terms and conditions and giving Sea Life thirty days within which to accept the same; provided, however, that this provision shall not apply to any assignment, conveyance, lease, sublease, license or transfer of any of the Foundation's premises under said Lease No. S-3709 which is solely for and restricted to scientific, research or educational uses and purposes. If Sea Life shall fail to accept such offer within said thirty day period, the Foundation shall then be free to assign, mortgage or otherwise convey, lease,

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sublease, license or transfer said rights to any third party upon the terms and conditions expressed in its offer to Sea Life; provided, however, that if said rights are not assigned, mortgaged, conveyed, leased, subleased, licensed or transferred to a third party within four months of the offer to Sea Life, the Foundation shall repeat the procedure before disposing of said rights to any third party.

(d) In the event this sublease shall terminate for any reason other than the expiration of its term, Sea Life shall have a period of one hundred twenty (120) days from such termination within which to remove any animals (which shall include all mammals, birds and other species of non human life) belonging to Sea Life or to any person with whom Sea Life has a contract relating to the collection or training of such animals. During such one hundred twenty (120) day period, Sea Life shall be given: (i) reasonable access to the premises to assure that said animals are properly fed and cared for and to attend to their removal, and (ii) complete authority and responsibility to operate the sea water system used on the demised premises. Sea Life shall pay to the Foundation rental of \$100 per day for each day after the sixtieth (60th) day following termination that such animals remain on the premises.

16. Arbitration. In the event of any dispute arising under this agreement, the parties hereto shall submit the matter to a board of three arbitrators for determination. If the dispute concerns the amount of annual payments to be made by Sea Life to the Foundation during any renewal term, the arbitrators selected



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shall be members of the American Institute of Real Estate Appraisers or an organization requiring similar qualifications for membership. All arbitrators shall be impartial and shall not be employed by or have other business connections with either party. The party seeking arbitration shall give written notice thereof to the other party in which notice the arbitrator of the party seeking arbitration shall be named and the other party shall appoint an arbitrator within twenty (20) days after receipt of such notice. The two arbitrators so selected shall agree upon a third arbitrator within twenty (20) days of the appointment of the second arbitrator. Should either party fail to appoint an arbitrator within the time required, the other party may apply to a court of competent jurisdiction for the appointment of the second arbitrator or, if the two arbitrators appointed by the parties shall fail to appoint a third arbitrator within twenty (20) days after they both have been appointed, either party may apply to a court of competent jurisdiction for the appointment of the third arbitrator. The costs of such arbitration shall be borne equally by the parties. The decision of any two of the arbitrators thus selected shall be final and binding upon the parties.

17. Condemnation. If the premises or any part thereof shall be condemned for a public purpose by any governmental agency or other organization having the power of eminent domain, all right, title and interest of Sea Life in and to the part so condemned and to all improvements thereon or rendered useless thereby shall cease and terminate, and Sea Life shall have no

interest in or claim to any part of the compensation and damages payable on account of such condemnation, except that Sea Life shall be entitled to receive from the Foundation that portion of such compensation and damages paid to the Foundation by the condemning authority which pertains exclusively to improvements constructed on the premises by Sea Life and so taken or rendered useless for the purposes for which constructed, including severance damages, by which the unexpired term of this agreement plus all renewal option bears to the full term of this agreement plus all renewal option periods.

In case only part of said premises shall be so condemned, the rent payable for the remainder of said term shall be reduced in the ratio that the land area of such part bears to the total area of demised land immediately prior to such event.

If more than half of the demised land shall be so condemned thereby rendering the remaining premises unsuitable for the purposes of Sea Life, Sea Life may at its option surrender to the Foundation this sublease and all interest of Sea Life in the compensation and damages payable on account of any improvements on the premises so surrendered and thereby be relieved of any further obligations hereunder.

Nothing herein shall otherwise affect or diminish any right to damages which Sea Life may have or assert directly against the condemning authority.

18. Termination for Default. If any one or more of the following events of default occur:

- (a) Sea Life fails to pay the payments due hereunder

within thirty (30) days after written notice to Sea Life that the same are due.

(b) Sea Life fails to observe or perform any of the other covenants herein contained and on the part of Sea Life to be observed and performed and such failure continues for a period of ninety (90) days, or such longer period as the Foundation determines is necessary to remedy such default, after written notice thereof is given by the Foundation to Sea Life, or

(c) Sea Life becomes bankrupt or insolvent, or

(d) Sea Life abandons the premises,

then and in case of any such event of default the Foundation may, upon the occurrence of such event of default and subject to the provisions of paragraphs 10 and 15(d), above, enter into and upon the premises or any part thereof in the name of the whole and at its option terminate and cancel this agreement and thereupon take possession of the premises and all improvements thereon, and thereby become wholly vested with all right, title and interest of Sea Life therein and may expel from the premises Sea Life and those claiming under it and its and their effects, all without resort to any legal process and without being deemed guilty of any trespass or becoming liable for any loss or damage which may be occasioned thereby and without prejudice to any other remedy or right of action which the Foundation may have for such breach or for arrears of rent or for other or preceding breach of covenant of this agreement.

19. Surrender. At the end of the term or sooner termina-

tion of this agreement or any renewal thereof as herein provided, Sea Life shall peaceably deliver up to the Foundation possession of the premises, together with all buildings and other improvements upon or belonging to the same, by whomsoever made, in good repair, order and condition except for reasonable wear and tear and damage by unavoidable casualty.

20. Benefit. This agreement shall inure to the benefit of and be binding upon the successors and permitted assigns of the Foundation and the successors and permitted assigns of Sea Life.

THE OCEANIC FOUNDATION

FIRST HAWAIIAN BANK

By *Lee J. Reed*  
Its TRUST OFFICER

*Alexander Wyllie*  
Alexander Wyllie

Trustees in Reorganization

SEA LIFE, INCORPORATED

By *John W. Bunn*  
Its President

By *James A. Blair*  
Its Secretary

STATE OF HAWAII )  
CITY AND COUNTY OF HONOLULU ) SS.

On this 18 day of May, 1973, before me appeared I.R.N. Bund and Bruce R. Blau, to me personally known, who, being by me duly sworn, did say that they are the President and Secretary, respectively, of SEA LIFE, INCORPORATED, a Hawaii corporation, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said I.R.N. Bund and Bruce R. Blau acknowledged said instrument to be the free act and deed of said corporation.

Charlotte Bailey  
Notary Public, First Judicial  
Circuit, State of Hawaii

My Commission expires: 6-30-76

STATE OF HAWAII )  
CITY AND COUNTY OF HONOLULU ) SS.

On this 16<sup>th</sup> day of May, 1973, before me appeared Earl Gould, to me personally known, who, being by me duly sworn, did say that he is the TRUST OFFICER of FIRST HAWAIIAN BANK, a Hawaii corporation, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said Earl Gould acknowledged said instrument to be the free act and deed of said corporation, as Trustee in Reorganization for The Oceanic Foundation.

Linda Ross  
Notary Public, First Judicial  
Circuit, State of Hawaii

My Commission expires: 8-15-74



AREA 1  
LAND SITUATED ON THE SOUTHERLY SIDE OF  
KALANIANAOLE HIGHWAY  
AT WAIMANALO, KOOLAUPOKO, OAHU, HAWAII

Being a Portion of Government Land of Waimanalo  
(General Lease No. S-3709)

Beginning at the East corner of this parcel of land, on the boundary between the lands of Waimanalo and Maunalua and on the Southwesterly side of Kalanianaole Highway, the coordinates of said point of beginning referred to Government Survey Triangulation Station "MAKAPUU" being 226.82 feet North and 1,609.82 feet West as shown on Government Survey Registered Map 2832 and running by azimuths measured clockwise from true South:

Following along top of main ridge of Koolau Range, along L. C. Aw. 7713 Apana 30 to V. Kamamalu (Lard of Maunalua) for the next eight (8) courses, the direct azimuths and distances between points being:

- |    |              |  |
|----|--------------|--|
| 1. | 92° 09'      | 483.40 feet;   |
| 2. | 59° 35'      | 500.00 feet;   |
| 3. | 136° 55'     | 690.00 feet;   |
| 4. | 96° 55'      | 490.00 feet;   |
| 5. | 159° 00'     | 250.00 feet;   |
| 6. | 109° 50'     | 370.00 feet;   |
| 7. | 155° 45'     | 350.00 feet;   |
| 8. | 127° 15'     | 1100.00 feet;  |
| 9. | 247° 33' 10" | 719.39 feet along Area 2, along remainder of Government Land of Waimanalo; |

**EXHIBIT A**



- 10. 224° 00' 100.00 feet along Area 2, along remainder of Government Land of Waimanalo;
- 11. 286° 00' 60.00 feet along Area 2, along remainder of Government Land of Waimanalo;
- 12. 239° 20' 76.00 feet along Area 2, along remainder of Government Land of Waimanalo;
- 13. 228° 20' 61.00 feet along Area 2, along remainder of Government Land of Waimanalo;
- 14. 189° 10' 102.00 feet along Area 2, along remainder of Government Land of Waimanalo;
- 15. 207° 40' 49.00 feet along Area 2, along remainder of Government Land of Waimanalo;
- 16. 294° 00' 111.64 feet along Area 2, along remainder of Government Land of Waimanalo;
- 17. 15° 40' 136.00 feet along Area 2, along remainder of Government Land of Waimanalo;
- 18. 296° 25' 146.80 feet along Area 2, along remainder of Government Land of Waimanalo;
- 19. 204° 45' 171.08 feet along Area 2, along remainder of Government Land of Waimanalo;
- 20. 110° 35' 173.00 feet along Area 2, along remainder of Government Land of Waimanalo;
- 21. 192° 30' 220.51 feet along Area 2, along remainder of Government Land of Waimanalo;

Thence running along the Southwesterly side of Kalaniana'ole Highway on a curve to the right with a radius of 1081.28 feet, the chord azimuth and distance being:

22. 322° 38' 30" 1341.05 feet;

23. 00° 58' 49.80 feet along the Southwesterly side of Kalaniana'ole Highway;

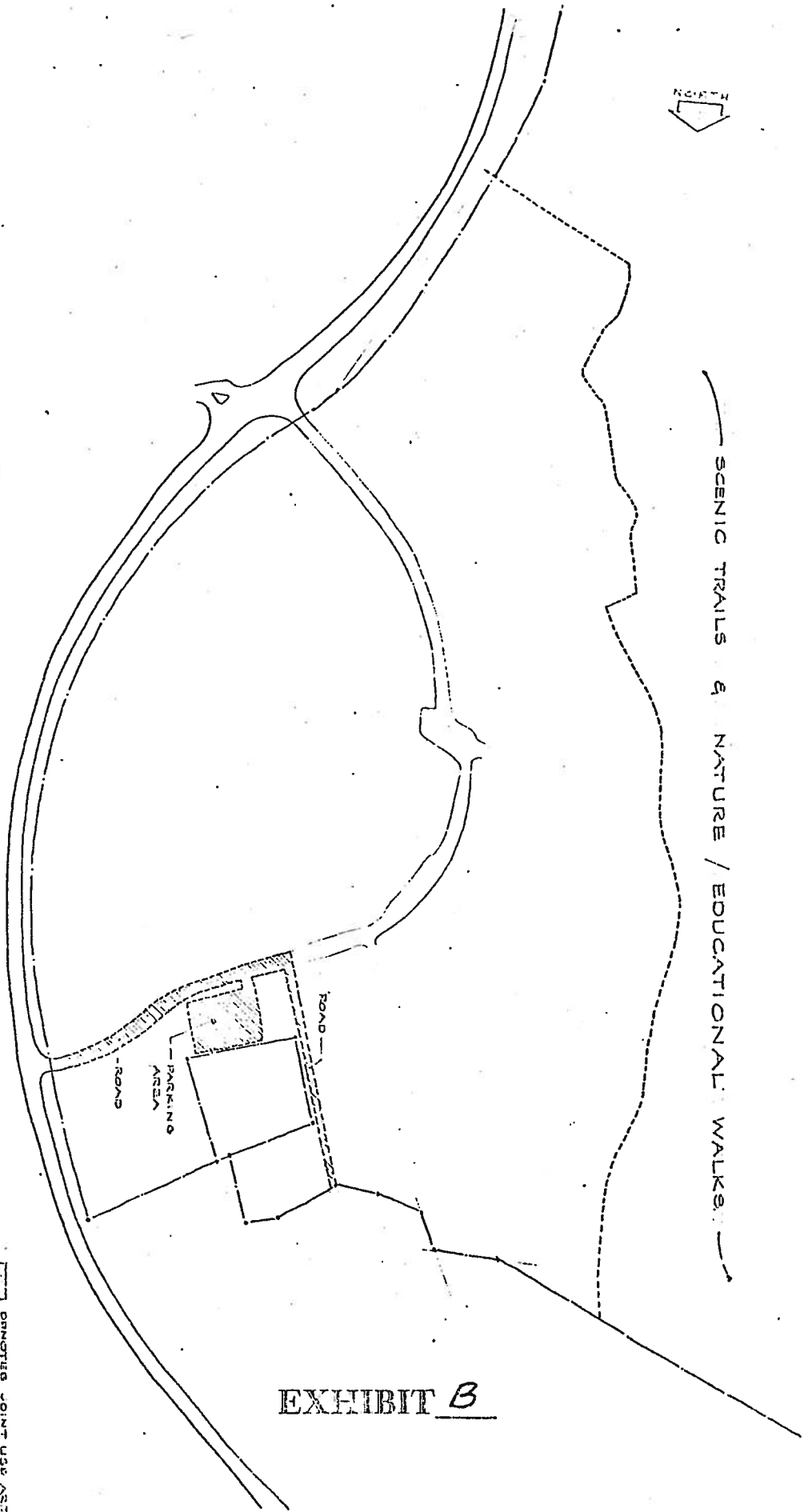
Thence running along the Southwesterly side of Kalaniana'ole Highway on a curve to the left with a radius of 884.02 feet, the chord azimuth and distance being:

24. 341° 29' 589.70 feet;
25. 322° 00' 340.41 feet along the Southwesterly side of Kalaniana'ole Highway;
- Thence running along the Southwesterly side of Kalaniana'ole Highway on a curve to the left with a radius of 702.27 feet, the chord azimuth and distance being:
26. 298° 30' 560.06 feet;
27. 275° 00' 256.88 feet along the Southwesterly side of Kalaniana'ole Highway;
- Thence running along the Southwesterly side of Kalaniana'ole Highway on a curve to the right with a radius of 345.28 feet, the chord azimuth and distance being:
28. 303° 32' 48" 330.00 feet to the point of beginning and containing and area of 61.662 acres.

TOWILL, SHIGEOKA & ASSOCIATES, INC.



By Haruo Shigeoka  
 Haruo Shigeoka  
 Registered Professional Surveyor  
 Certificate Number 2279



SCENIC TRAILS & NATURE / EDUCATIONAL WALKS

ROAD

PARKING AREA

ROAD

EXHIBIT B

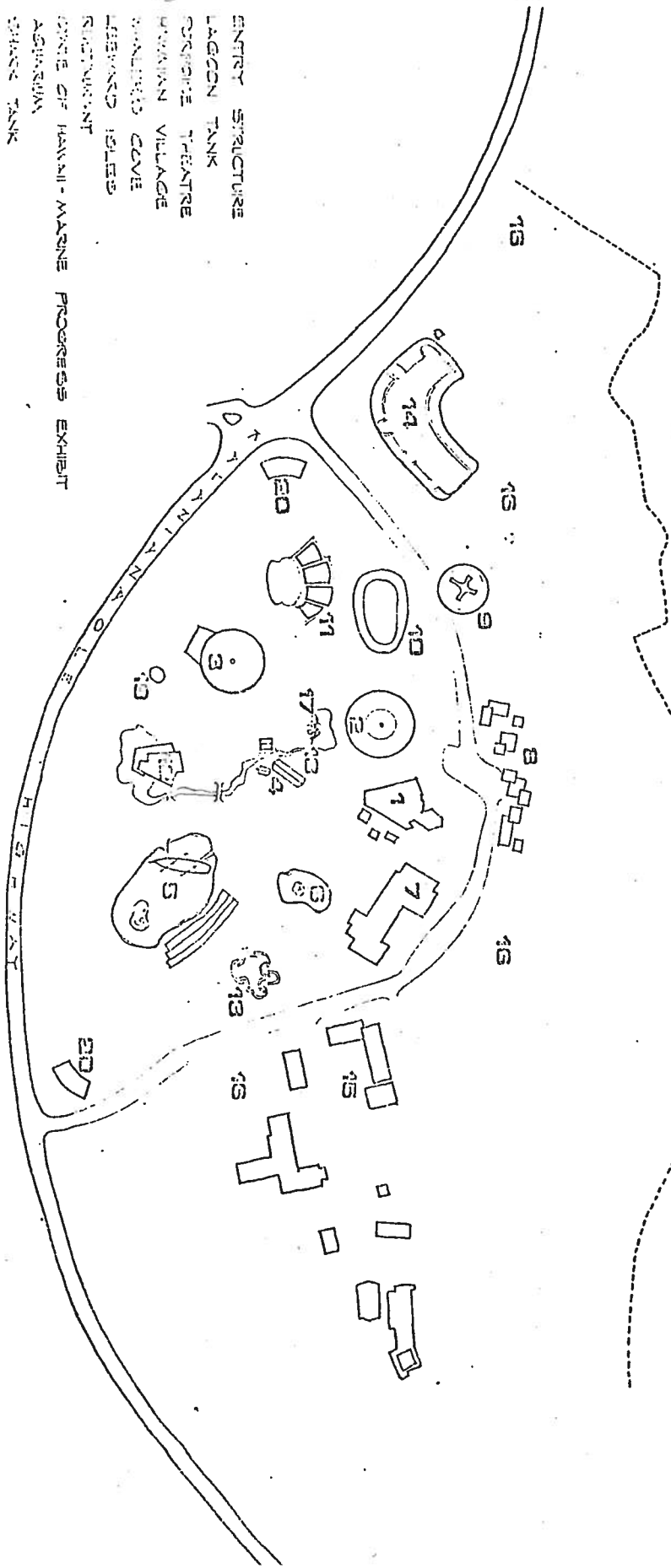


ORINOTIS JOINT USE AREA

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100



— SCENIC TRAILS & NATURE / EDUCATIONAL WALKS —



- 1 ENTRY STRUCTURE
- 2 LAGOON TANK
- 3 PORCINE THEATRE
- 4 OAHIAN VILLAGE
- 5 SEALER'S COVE
- 6 HERBARD ISLES
- 7 RESTAURANT
- 8 HOUSE OF HAWAII - MARINE PROGRESS EXHIBIT
- 9 AQUARIUM
- 10 SHARK TANK
- 11 BIRD LION SHOW
- 12 FISH POND
- 13 AQUARIUM GROTTO
- 14 RESTAURANT & COMMUNITY FACILITY
- 15 TRAINING AREA
- 16 PLANNING AREA

- 17 TURTLE POND
- 18 WATERFALL
- 19 FOOD STAND
- 20 ENTRANCE: PONDS & PYLONS

EXHIBIT 13 PLAN 34

GOODSILL ANDERSON QUINN & STEIN

A LIMITED LIABILITY LAW PARTNERSHIP LLP

RANDALL C. WHATTOFF

ALII PLACE, SUITE 1800 • 1099 ALAKEA STREET  
HONOLULU, HAWAII 96813

MAIL ADDRESS: P.O. BOX 3196  
HONOLULU, HAWAII 96801

TELEPHONE (808) 547-5600 • FAX (808) 547-5880  
info@goodsill.com • www.goodsill.com

DIRECT DIAL:  
(808) 547-5870

INTERNET:  
rwhattoff@goodsill.com

August 1, 2012

**BY U.S. MAIL**

Mr. Russell Y. Tsuji  
Department of Land and Natural Resources, Land Division  
Kalanimoku Building  
1151 Punchbowl Street, Room 220  
Honolulu, HI 96813

RECEIVED  
LAND DIVISION  
2012 AUG -2 P 2:48  
DEPT. OF LAND &  
NATURAL RESOURCES  
STATE OF HAWAII

**Re: General Lease No. S-3709**

Dear Mr. Tsuji:

This law firm represents Oceanic Institute in connection with certain matters related to (1) the "Kaupo Park Lease," General Lease No. S-3709, between the State of Hawai'i and Pacific Foundation for Marine Research, now known as Oceanic Institute ("Oceanic"), dated August 12, 1962 (the "Lease"); and (2) the "Construction and Operation Agreement" between Oceanic and Attractions Hawai'i ("Attractions"), as successor in interest to Sea Life, Inc., dated December 17, 1963 and amended by the "Amendment to Construction and Operation Agreement" dated May 14, 1973 (the "Sublease").

On May 31, 2012, in connection with the resolution of a dispute between the parties, Oceanic and Attractions executed the enclosed "Second Amendment to Construction and Operation Agreement" solely to amend the definition of the term "gross revenues" for purposes of determining the amount of certain payments to be made under the Sublease by Attractions to Oceanic. Significantly, the amendment does not affect in any way the amounts owed under the Sublease or Lease by any party to the State, or make any changes to the Sublease or Lease other than as described in the preceding sentence.

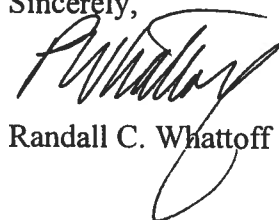
Although not expressly required under the Sublease or the Lease, the parties hereby request that the Department of Land and Natural Resources approve the Second Amendment to Construction and Operation Agreement by causing an authorized officer to execute the same where indicated and returning one (1) originally executed copy of the amendment to the undersigned and one (1) originally executed copy of the amendment to Attractions at the following address:

Mr. Russell Y. Tsuji  
August 1, 2012  
Page 2

Attractions Hawaii  
c/o McCorriston Miller Mukai MacKinnon LLP  
Attention: Darren L. Nunn, Esq.  
P.O. Box 2800  
Honolulu, Hawaii 96803-2800

Should you have any questions about the amendment or the Sublease, please do not hesitate to contact me at the number above or Mr. Nunn at (808) 529-7412.

Sincerely,



Randall C. Whattoff

RCW

Enclosures

cc: Mr. Darren Nunn

**SECOND AMENDMENT  
TO  
CONSTRUCTION AND OPERATION AGREEMENT**

THIS SECOND AMENDMENT TO CONSTRUCTION AND OPERATION AGREEMENT ("*Amendment*") is made and entered into as of May \_\_, 2012, with the intent that the same shall be effective as of January 1, 2012 (the "*Effective Date*"), by and between OCEANIC INSTITUTE, a Hawaii nonprofit corporation ("*Sublessor*"), whose address is 41-202 Kalaniana'ole Highway, Waimanalo, Hawaii 96795, and ATTRACTIONS HAWAII, a Hawaii general partnership ("*Sublessee*"), whose address is 41-202 Kalaniana'ole Highway #7, Waimanalo, Hawaii 96795.

**RECITALS**

A. Sublessor (formerly known as The Oceanic Foundation) and Sublessee (as successor in interest to Sea Life, Incorporated) are parties to that certain unrecorded Construction and Operation Agreement dated December 17, 1963, as amended by that certain unrecorded Amendment to Construction and Operation Agreement dated May 14, 1973, and made effective as of January 1, 1972, as disclosed by instrument recorded May 18, 1973 as Book 9158 Page 211 of the Bureau of Conveyances of the State of Hawaii (together with all exhibits and addenda thereto, the "*Sublease*"), demising a portion of the premises demised to Sublessor by the State of Hawaii in General Lease No. S-3709, dated October 19, 1962, as is more particularly described and delineated as Area 1 (containing an area of 61.662 acres) in Exhibit A to the Amendment to Construction and Operation Agreement dated May 14, 1973.

B. Concurrently with the execution of this Amendment, the parties are entering into that certain Settlement Agreement and Release of even date herewith (the "*Settlement Agreement*") to resolve certain matters and claims related to payments required to be made by Attractions to Oceanic under paragraph 3 of the Sublease, as more particularly set forth therein.

C. In connection with the Settlement Agreement, and as a material inducement therefor, the parties desire to amend the Sublease to provide that, from and after the Effective Date, the term "gross revenues" shall be defined as set forth herein.

**AGREEMENT**

NOW, THEREFORE, for and in consideration of the foregoing premises and the mutual promises set forth herein, and for other good and valuable consideration, the sufficiency of which is acknowledged by the parties hereto, and intending to be legally bound hereby, Sublessor and Sublessee hereby agree as follows:

1. Certain Defined Terms. Capitalized terms used but not defined in this Amendment have the meanings ascribed to such terms in the Sublease.

2. Amendment to Definition of "Gross Revenues". For purposes of determining the amount of certain payments to be made under the Sublease by Sublessee to Sublessor from

January 1, 1972 through the end of the term thereof, Paragraph 3 of the Sublease, at page 7, defines the term "gross revenues" as follows:

*"The term annual "gross revenues" for the period commencing January 1, 1972 through the end of the term hereof and during any renewal period shall mean and include all annual revenues received by Sea Life from:*

- (1) Admission charges to the demised premises;*
- (2) Sea Life's operation of any food, beverage, gift or other facility located upon the demised premises;*
- (3) Any concessionaire or licensee who may operate any food, beverage, gift or other facility upon the demised premises; and*
- (4) Any sublessee of any portion of the demised premises."*

Sublessor and Sublessee hereby agree to amend the foregoing provision of the Sublease by deleting the provision in its entirety and restating it to read as follows:

*"For the period beginning on January 1, 2012, and continuing through the end of the term hereof and during any renewal period, the term "gross revenues" shall mean and include all revenue actually received by Sea Life from any of the following sources:*

- (1) Admission charges to the demised premises;*
- (2) The operation by Sea Life of any food, beverage, gift or other facility located upon the demised premises;*
- (3) Any concessionaire or licensee who may operate any food, beverage, gift or other facility upon the demised premises; and*
- (4) Any sublessee of any portion of the demised premises.*

*For purposes of items (2) and (3) above, revenue received from the operation of any food, beverage, gift or other facility located upon the demised premises by any person or entity that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with Sea Life shall be deemed to be revenue received by Sea Life from such activity and shall be included in the term "gross revenues."*

3. Prospective Effect of Amendment. This Amendment shall have effect as of the Effective Date and prospectively thereafter only. Nothing herein shall be deemed to modify the meaning of the term "gross revenues" as used in the Sublease prior to the Effective Date.

4. No Other Changes. Except as specifically modified by this Amendment, all other terms and conditions in the Sublease shall remain in full force and effect, unmodified in any way.



All references to the Sublease contained therein shall hereafter be deemed to be references to the Sublease as amended by this Amendment. In the event of any inconsistency between the provisions of this Amendment and any other provision of the Sublease, the terms and provisions of this Amendment shall govern and control

5. Ratification. All clauses and terms of the Sublease, as modified by this Amendment, are hereby ratified and are deemed to apply fully and without exception to the demised premises. Additionally, each of Sublessor and Sublessee hereby further confirms and ratifies that, as of the date of this Amendment, the Sublease is and remains in good standing and in full force and effect.

6. Binding Effect; Governing Law. This Amendment inures to the benefit of and shall be binding upon Sublessor and Sublessee and their respective successors and permitted assigns. This Amendment and the rights of the parties hereunder shall be governed by and construed in accordance with the laws of the State of Hawaii.

7. Authority. Each person signing this Amendment warrants and represents that he or she has authority to sign on behalf of the entity he or she represents and that this Amendment has been validly authorized and constitutes a legally binding and enforceable obligation.

8. Counterparts. This Amendment may be signed in any number of counterparts, each of which when executed and delivered shall constitute and be deemed an original and all of which together shall constitute one and the same agreement, with the same effect as if the signatures thereto and hereto were upon the same instrument, notwithstanding that all of the parties are not signatories to the same original or counterpart, or that signature pages from different counterparts are combined. The signature of any party to any counterpart shall be deemed to be a signature to and may be appended to any other counterpart. Facsimile or electronically transmitted copies of original signature pages shall be deemed to be, and shall be legally effective as, originally signed signature pages for all purposes of this Amendment.

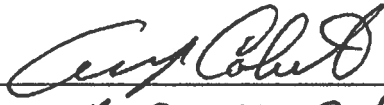
9. No Recording. This Amendment shall not be filed for public record.

*[Remainder of page left blank intentionally; the signatures of the parties follow.]*

IN WITNESS WHEREOF, each of the parties hereto has executed and delivered or caused this Amendment to be executed and delivered by its duly authorized representative as of the date first written above.

**"Sublessor"**

**OCEANIC INSTITUTE,**  
a Hawaii nonprofit corporation

By:   
Name: ANTHONY C. OSFROWSKI  
Title: PRESIDENT

**"Sublessee"**

**ATTRACTIONS HAWAII,**  
a Hawaii general partnership

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**APPROVED BY:**

Department of Land and Natural Resources,  
State of Hawai'i

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**SIGNATURE PAGE TO  
SECOND AMENDMENT TO CONSTRUCTION AND OPERATION AGREEMENT**

IN WITNESS WHEREOF, each of the parties hereto has executed and delivered or caused this Amendment to be executed and delivered by its duly authorized representative as of the date first written above.

**"Sublessor"**

**OCEANIC INSTITUTE,**  
a Hawaii nonprofit corporation

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**"Sublessee"**

**ATTRACTIONS HAWAII,**  
a Hawaii general partnership

By: Fernando Eiroa

Name: Fernando Eiroa

Title: President

**APPROVED BY:**

Department of Land and Natural Resources,  
State of Hawai'i

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

**SIGNATURE PAGE TO  
SECOND AMENDMENT TO CONSTRUCTION AND OPERATION AGREEMENT**