

State of Hawaii  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Division of Boating and Ocean Recreation  
333 Queen Street  
Honolulu, Hawaii 96813

March 22, 2013

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

PETITION OF COON BROTHERS INC. TO NEGOTIATE A LEASE OF  
CERTAIN SUBMERGED AND FAST LANDS AND DOCK AT MANELE SMALL  
BOAT HARBOR, LANAI, HAWAII

Applicant:

Applicant Coon Brothers Inc. is a Hawai'i corporation. Its principal business is the transportation of passengers between the islands of Maui and Lanai by boat. Applicant presently conducts business through three wholly owned subsidiaries, including Trilogy Corporation, under use permits issued by the Division of Boating and Ocean Recreation for Manele Small Boat Harbor.

Legal reference:

Hawaii Revised Statutes §§ 171-59, 171-17, and 171-53(c). § 171-53(c) requires prior approval of the Governor and authorization of the Legislature by concurrent resolution for the leasing of state submerged land. § 171-59(b) allows for the disposition of leases by negotiation for specified operations, including maritime and maritime-related operations, subject to certain requirements, including that the disposition must encourage competition.

Character or proposed use:

Lease of a passenger loading dock that will be re-constructed by the Department with federal funds, which lease shall be subject to federal funding requirements and federal and state law.

Location:

Berth 24, Manele SBH, island of Lanai, as shown on the attached map labeled Exhibit "A."

Area:

The area to be leased will include a loading dock to be re-built with federal funds (approximately 1,100 square feet) and the adjoining water column (approximately 4,000 square feet, more or less), along with the submerged land and necessary adjoining fast land.

Zoning:

State Land Use District: Conservation

Ceded Land Status:

Section 5(b) lands of the Hawaii Admission Act

YES  NO

DHHL 30% entitlement lands pursuant to the Hawaii State

Constitution: YES  NO

Current Use:

Trilogy uses berth 24 and surrounding waters to moor three sailboats in the course of transporting passengers to and from the island of Lanai. Passengers board and disembark the vessels from a loading dock on the northeast side of the berth. One of Trilogy's vessels occupies berth 24 under a regular mooring permit; its other vessels use the waters adjacent to the berth 24 loading dock on a transient basis as "vessels moored elsewhere."

Character of Use:

Commercial use

Commencement Date:

To be determined by the Chairperson

Lease rental and other financial terms:

To be determined by appraisal pursuant to HRS §171-17

Term of Lease:

To run concurrently with the term of boating lease no. B-93-02 issued to Trilogy Corporation.

Chapter 343 – Environmental Assessment:

The subject request is exempt from the requirement of an environmental assessment pursuant to Haw. Rev. Stat. ch. 343. H.A.R. § 11-200-8(a)(1) exempts from assessment “[o]perations, repairs and maintenance of existing structures, facilities, equipment or topographical features, involving negligible or no expansion or change of use beyond that previously existing.” Furthermore, such lease would be exempt under the exemption list for the Division of Boating and Ocean Recreation under Exemption Class 1: "Operations, repairs or maintenance of existing structures, facilities, equipment or topographical features, involving negligible or no expansion or change of use beyond that previously existing."

Discussion:

The Applicant requests a long term lease of a loading dock to be rebuilt by the Department with federal funds if approved by the Board. Currently, there is a dock built by Trilogy. Trilogy built the dock when small boat harbors were under the jurisdiction of the Department of Transportation. The Applicant has used the dock and adjoining waters to conduct tour boat operations at Manele SBH. However, the dock is currently unsafe and must be replaced.

The Applicant requests that it receive a lease by negotiation pursuant to Haw. Rev. Stat. § 171-59(b) based on Applicant's reasoning quoted below as follows:

Haw. Rev. Stat. § 171-59(b) allows the disposition of such lands for marine, maritime, and maritime-related operations by negotiation if such disposition would “encourage competition.” Applicant’s request readily meets these criteria.

First, Trilogy’s long standing use of the dock is a paradigm of maritime commerce. Webster's Third New International Dictionary confirms the common usage of the term “maritime” as “[p]ertaining to the sea or ocean or the navigation thereof; or to commerce conducted by navigation of the sea [.]” *Webster's Third New International Dictionary* page \_\_\_\_\_ (19\_\_ ). \_\_\_/

Second, a lease of the dock and underlying state submerged lands would *encourage competition* for visitors wishing to travel to Lanai by sea.

Section 171-59(b) does not define the italicized words.<sup>1</sup> When a statute does not provide a different definition, Hawaii courts will look to legal or other well accepted dictionaries as one way to determine the ordinary meaning of the words used. *Estate of Roxas v. Marcos*, 121 Hawai'i 59, 66, 214 P.3d 598, 605 (2009); see also HRS § 1-14 (1993) (the words of a law are to be understood in light of their common and generally accepted meaning). *Gillan v. Gov't Employees Ins. Co.*, 119 Hawai'i 109, 115, 194 P.3d 1071, 1077 (2008).

The relevant definition of "encourage" found in Webster's Third New International Dictionary includes "to spur on;" "stimulate;" and "to give help to." *Webster's Third New International Dictionary* page \_\_\_\_ (19\_\_ ). "Competition" is defined in the eighth edition of Black's Law Dictionary as "[t]he struggle for commercial advantage; the effort or action of two or more commercial interests to obtain the same business from third parties." *Black's Law Dictionary* 302 (8th ed. \_\_\_\_).

A long term lease of the loading dock will preserve and promote Trilogy's ability to compete in the market for water transportation services. Applicant's principal competitor at Manele is Hone Heke Corporation dba Expeditions. Expeditions is a certificated common carrier of passengers and property by water between Lahaina and Manele Small Boat Harbors. Under its PUC license, Expeditions markets transportation services and activity packages to the same individuals and groups targeted by Trilogy. Expeditions offers several scheduled sailings daily aboard a ferry that may carry more than 100 passengers.

Trilogy estimates that 85% of its Lanai business involves free independent travelers or FITs; the remaining 15% involves individuals travelling as a group. The same is expected to hold true for Expeditions. Together they transport to Lanai the overwhelming majority of island visitors who arrive by sea.

Trilogy and Expeditions are competitors by any measure. Their advertising targets the same FIT visitor. They advertise using common

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<sup>1</sup>The statute does define the phrase "maritime-related" to mean "a purpose or activity that requires and is directly related to the loading, off-loading, storage, or distribution of goods and services of the maritime industry." Applicant's business centers on transportation services which requires physical facilities to load and disembark passengers.

themes. Trilogy features a “Discover Lanai Excursion,” while Expeditions promotes various tour packages involving a similar range of water sports and terrestrial activities. Both use printed brochures or rack cards; rely on bookings through activity desks; and pay comparable commissions. Both use websites to describe a common range of activities including transportation and land-based activity packages

Apart from differences in price, Expeditions has been afforded distinct competitive advantages. As a certificated water carrier, Expeditions is not subject to the limit on the number of commercial vessels that may be permitted to operate from Manele SBH or the requirement that commercial users pay a use fee equal to three percent of the vessel’s gross receipts. Haw. Rev. Stat. § 200-9(d).<sup>2</sup> Expeditions also enjoys preferential use of publicly financed loading facilities at Manele Small Boat Harbor. Trilogy built and has maintained its loading dock at little or no cost to the public.

Finally, Trilogy pays Lanai Company \$8.33 per person to defray the cost of maintaining Hulopoe Beach Park; Expeditions pays nothing. As a result, ferry passengers as members of the “general public” enjoy free access to Hulopoe seven days a week; in contrast, Trilogy abides by the Unilateral Agreement and limits visits to the beach to weekdays.

The financial viability of Applicant requires continued use of its loading dock on terms no less favorable than those enjoyed by Expeditions. A negotiated long term lease of that facility will level the playing field and foster competition based on quality of service and ultimately stability in the marketplace. Trilogy’s long-term presence will secure employment of as many as 60 island residents, and also provide

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<sup>2</sup> Section 200-9(d) provides in part: “Notwithstanding any limitations on commercial permits for Maui county small boat facilities, vessels engaging in inter-island ferry service within Maui county shall be afforded preferential consideration for ferry landings, including the issuance of a commercial operating permit and the waiver of any applicable fees, at Maui county small boat facilities; provided that:

- (1) The vessel operator has been issued a certificate of public convenience and necessity for the purpose of engaging in inter-island ferry service that includes a route within Maui county;

\* \* \*

- (3) The vessel operations will not result in unreasonable interference with the use of Maui county small boat facilities by other vessels; . . .”

second tier commercial operators with competition on price and quality of experience, factors that are vital to a robust tourism based economy.

Lastly, phase two of the Federal Transit Authority's ferry pier improvement project is currently in the design phase. A condition of the current project states that the loading dock currently used by the Applicant must be made available to the ferry should the ferry operator need to engage in repairs, maintenance, docking during inclement weather, or increase operations by adding additional vessels. These terms can be addressed in the proposed lease to the Applicant should the Board support the leasing of the loading dock and submerged lands.

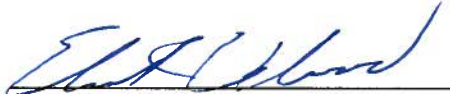
**RECOMMENDATION:**

1. That the Board find that the subject request is exempt from the requirement of an environmental assessment as explained above.
2. If the Board agrees with the Applicant that the lease to Applicant would encourage competition within maritime or maritime-related operations, approve the negotiation of a lease by the Chairperson for the rebuilt loading dock, submerged land, and any necessary adjoining land, as described above and incorporated herein, subject to the following:
  - a. Issuance of the lease is subject to prior approval of the Governor and authorization of the Legislature by concurrent resolution in accordance with Haw. Rev. Stat. § 171-53(c).
  - b. Issuance of the lease is dependent upon reconstruction of the loading dock with federal funding as approved by the Board and the successful completion of the new loading dock.
  - c. The lease shall incorporate all federal funding requirements and applicable federal and state laws.
  - d. Rent will be based on fair market value determined in accordance with Haw. Rev. Stat. § 171-17.
  - e. The term of the lease shall run concurrently with the term of boating lease no. B-93-02 issued to Trilogy Corporation.
  - f. The most current standard form of the Board's lease, including all terms and conditions, shall be used.

g. Other terms and conditions as prescribed by the Chairperson to serve the best interests of the State shall be applicable.

h. All recommendations above and the terms and conditions of the lease shall be subject to review and approval by the Department of the Attorney General.

RESPECTFULLY SUBMITTED,



ED UNDERWOOD  
Administrator

APPROVED FOR SUBMITTAL



WILLIAM J. AILA, JR.  
Chairperson

MANELE SMALL  
BOAT HARBOR

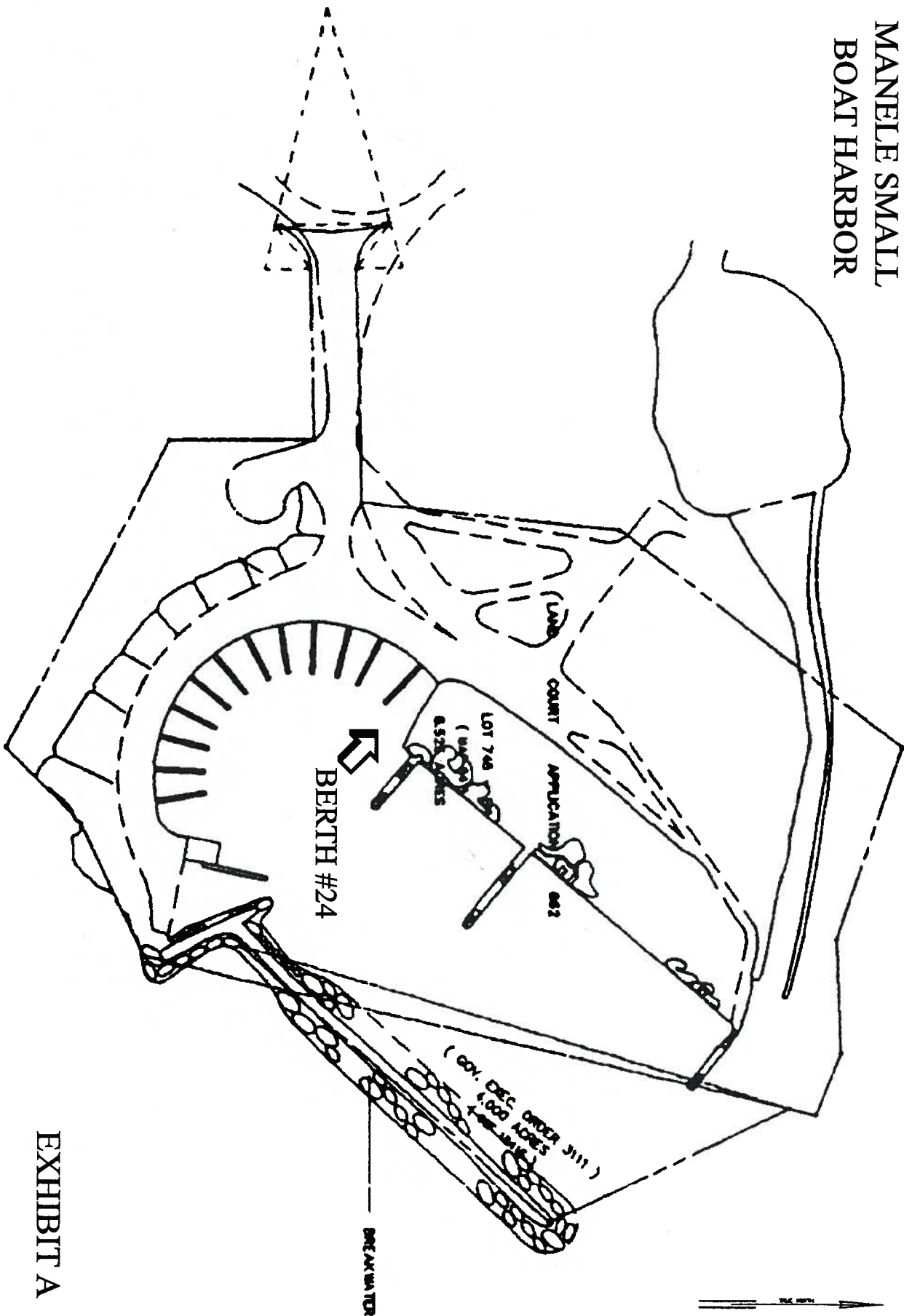


EXHIBIT A