

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

January 10, 2014

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

Hawai'i

Forfeiture of General Lease No. 3269, Country Club-Hawaii, Inc., Trustee under that Certain Trust Agreement dated September 19, 1987, Lessee, and Issuance of a Month-to-month Revocable Permit to the Association of Apartment Owners of Country Club Hawaii, Inc., Waiakea, South Hilo, Hawaii, Tax Map Key: (3) 2-1-05:20.

PURPOSE:

Forfeiture of General Lease No. 3269, Country Club-Hawaii, Inc., Trustee under that Certain Trust Agreement dated September 19, 1987, Lessee.

LEGAL REFERENCE:

Sections 171-39 and 55, Hawaii Revised Statutes, as amended.

LOCATION:

Portion of Government lands situated at Waiakea, South Hilo, Hawaii, identified by Tax Map Key: (3) 2-1-05:20, as shown on the attached map labeled Exhibit A.

AREA:

0.92 acres, more or less.

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act

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

LEASE CHARACTER OF USE:

Hotel and condominium purposes.

TERM OF LEASE:

Original lease was for 21 years commencing on June 1, 1949 and expiring on May 31, 1970.

Extension of lease dated November 16, 1962 extended the term changing the expiration of lease to March 14, 2015.

ANNUAL LEASE RENTAL:

\$49,000.00 due in semi-annual payments.

REVOCABLE PERMIT CHARACTER OF USE:

Hotel and apartment purposes.

REVOCABLE PERMIT COMMENCEMENT DATE:

The first day of the month to be determined by the Chairperson.

REVOCABLE PERMIT MONTHLY RENTAL:

To be determined by independent appraisal covering land and improvements.

COLLATERAL SECURITY DEPOSIT:

Four times the monthly rental.

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

In accordance with the "Division of Land Management's Environmental Impact Statement Exemption List", approved by the Environmental Council and dated April 28, 1986, the subject request is exempt from the preparation of an environmental assessment pursuant to Exemption Class No. 1, that states "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." (Exhibit B)

DCCA VERIFICATION: Association of Apartment Owners of Country Club Hawaii, Inc.¹

Place of business registration confirmed:	YES <u>X</u>	NO <u>__</u>
Registered business name confirmed:	YES <u>X</u>	NO <u>__</u>
Applicant in good standing confirmed:	YES <u>__</u>	NO <u>X</u>

REMARKS:

Pursuant to the authority granted the Chairperson by the Board of Land and Natural Resources at its meeting of January 11, 1980 and the breach provision contained in General Lease No. 3269, Country Club-Hawaii, Inc., Lessee, was served a Notice of Default by certified mail dated March 1, 2013 for:

X **Failure to keep lease rental payments current**
 (\$24,500.00 for period January 1, 2013 to June 30, 2013)

¹ A dispute is being litigated in the Third Circuit Court between two opposing Associations of Apartment Owners (AOAO). At present, records of the Department of Commerce and Consumer Affairs reflect more than one entity with the AOAO's name, but none is in good standing.

- Failure to post required performance bond
- Failure to post required fire insurance policy
- Failure to post required liability insurance policy

Said notice, accepted by the Lessee on March 7, 2013, offered the Lessee a thirty-day cure period to correct the default. This cure period expired on April 7, 2013. A payment of \$10,000.00 was received on March 1, 2013, leaving an outstanding balance of \$14,500.00.

Lessee was also served a Notice of Default by certified mail dated July 31, 2013 for:

- Failure to keep lease rental payments current**
(\$24,500.00 for period July 1, 2013 to December 30, 2013)
- Failure to post required performance bond
- Failure to post required fire insurance policy
- Failure to post required liability insurance policy

Said notice, accepted by the Lessee on August 2, 2013, offered the Lessee a thirty-day cure period to correct the default. This cure period expired on September 2, 2013. A payment of \$5,000.00 was received on July 22, 2013, leaving an outstanding balance of \$34,000.00. As of November 1, 2013, this breach has not been cured.

As of November 1, 2013, the current status of all lease compliance items is as follows:

RENT: The Lessee has a rental delinquency of **\$34,000.00** for the time period from January 1, 2013 to December 31, 2013.

INSURANCE: The Lessee has posted the required liability and fire insurance policy.

PERFORMANCE BOND:
The Lease does not have a provision for a performance bond.

BACKGROUND:

General Lease No. 3269 dated June 1, 1949 was sold at public auction to Mr. A.M.M. Osorio for residential purposes. The original term of the lease was for 21 years at the rate of \$500.00 per year, payable by equal semi-annual payments in advance. On December 18, 1953, the Board of Land and Natural Resources approved the assignment of lease from A.M.M. Osorio to Constantine Roumanis. As a result of damages caused by the tsunami on May 23, 1960, the lease qualified for an extension under Section 87 of Act 32, Session Laws of Hawaii 1962. At its meeting of April 4, 1962 under agenda item F-16, the Board approved the extension of lease term through to March 14, 2015.

At its meeting of November 22, 1967 (supplemental), the Board approved the assignment of lease from Constantine Roumanis, Assignor, to M. & Associates, Inc., Assignee. The assignee submitted plans for the construction of a hotel on the property. This brought about a change in the use of the premises and resulted in the Board action of April 26, 1968, agenda item F-25, modifying the lease extension agreement by establishing a new annual

rental rate of \$9,180.00. The same Board action also approved the gratis conveyance of a 10,890 square foot parcel of private property (Former Parcel 23) fronting the lease land from M. & Associates, Inc. to the State, subject to an estate for years up to and including March 14, 2015 reserved to M. & Associates, Inc., and its successors and assigns.² Then, at its meeting of April 24, 1970 under agenda item F-1-b, the Board consented to the sublease of GL 3269 from M. & Associates, Inc., Sublessor, to Travelodge International, Inc., Sublessee.

Further, at its meeting of February 10, 1984, under agenda item F-1-f, the Board consented to the assignment of lease from M. & Associates, Inc., Assignor, to Richard M. Jitchaku, Assignee. Then at its meeting of February 13, 1987, under agenda item F-2, the Board consented to the assignment of lease and the estate for years from Richard M. Jitchaku, as Assignor, to Country Club-Hawaii, Inc. (Herb Arata principal), as Assignee, and further consented to assignment of lease and the estate for years from Country Club Hawaii, Inc., as Assignor, to Country Club-Hawaii, Inc., as Trustee under the provisions of a certain trust agreement, dated September 19, 1987, as Assignee. The submittal also included a provision for the formation of a horizontal property regime, now known as a condominium property regime (CPR), allowing the individual units on the property to be converted into condominium units and sold, resulting in the creation of the Association of Apartment Owners of Country Club Hawaii, Inc. (AOAO).³

General Lease No. 3269, along with several other leases in the area, is set to expire in March 2015.⁴ The property is located in the Banyan Drive area of Hilo and the Lessee is eligible to apply for an extension of lease term pursuant to Act 219.⁵ However, the Lessee has indicated it will not seek an extension because that would require a change in the current use of the premises (predominantly residential condominium) to hotel/resort use, and the majority of condominium owners are not willing to make the necessary transformation.

Land Division has procured a planning consultant to advise the department as to the options for future uses of the subject premises and other lands in the Banyan Drive area upon termination of the leases.⁶ Additionally, at the close of the 2013 legislative session,

2 This parcel is indicated as dropped parcel 23 on Exhibit A attached. The deed recorded with the Bureau of Conveyances on July 2, 1968, states in part that it is the intent of the Grantor "to continue to maintain complete control over the use and possession of the premises until March 14, 2015." The State will not have control of this property until March 15, 2015. This is problematic because the hotel that was built straddles the property boundary of the State lease land and the fee simple property. According to the Board submittal of April 26, 1968, as many as 30 (of 148) units of the building may be located on the private parcel. The submittal explains that the gratis conveyance with reservation of an estate was given in consideration of a 20-month abatement of the increased rent resulting from the change to hotel use of the property.

3 The building on the property consists of 142 residential units and 6 commercial units.

4 The other leases set to expire are: Reed's Bay Resort Hotel (GL 3029), and Uncle Billy's Hilo Bay Hotel (GL 3265, 3266, 3267).

5 Act 219, Session Laws of Hawaii 2011, authorizes the Board of Land and Natural Resources to extend hotel or resort leases (that have not been sold or assigned within the past five years) up to an additional fifty-five (55) years.

6 The scope of work provided to the consultant is as follows: i) Determine the remaining useful life of the improvements on the parcels with leases expiring in 2015; ii) Provide current and forecasted data on Hawaii's tourism industry, inclusive of lodging and visitor statistics for the Island of Hawaii and specifically the Hilo area, for a period of ten to twenty years from the date of inspection, and provide an analysis and forecast of the market demand for and supply of hotel

Representatives Mark Nakashima and Cynthia Evans requested the Governor to authorize the establishment of a five-member Banyan Drive Task Force to provide recommendations to the Land Board on issues relating to Banyan Drive. The task force has met three times with the department and has informally advised staff that it does not want to see long-term residential use of this area continue.

DEFAULT:

The Lessee has been served notices of default on several occasions in the past five years.

DEFAULT	DATE	CURED
Rent	1/30/09	3/27/09 SIA
Rent	8/09/11	8/18/11
Rent	2/03/12	2/02/12
Rent	8/03/12	8/02/12
Rent	3/01/13	Partial payment
Rent	7/31/13	outstanding

For the past several years, the Lessee has been making payments through fees collected by its management company, Property Professionals Hawaii, LLC. These fees were to have provided payments for the lease rent, taxes and utilities. Recently however, as the lease is nearing its expiration, several condo owners have been withholding their payments to the management company resulting in the current default in lease rent.

There are currently two separate entities presenting themselves as the AOA, causing confusion among the condo owners. Without a clear understanding of who is managing the property, First Hawaiian Bank, in a letter dated April 16, 2013, advised both parties that it has placed a hold on the AOA's accounts. This has caused a legal tie-up of funds resulting in the current default situation. The dispute regarding the management of the property is currently being adjudicated in the Third Circuit Court.

In the event the Board cancels the lease, staff's understanding is that the CPR for the Country Club Hawaii condominium project terminates. The Consent to Horizontal Property Regime dated February 24, 1988 and signed by the Board provides at paragraph 2 on page 2 as follows:

The interests to be conveyed by the Condominium Conveyance Documents shall terminate at midnight March 14, 2015, unless terminated sooner as provided in the Condominium Conveyance Document.

Similarly, the form of Condominium Conveyance Document that was included with the submission of materials to the Department of Commerce and Consumer Affairs for the creation of the condominium project, provides in part at paragraph 12 on page 7:

rooms in the Banyan Drive area of Hilo during the same period. Include information on the current and forecasted/planned visitor plant inventory and the types of accommodations that visitors will likely be seeking (class type and cost, low-end, four-star, etc.); iii) Assess the potential effects of sea level rise on the use of the properties over the next fifty years utilizing current publicly available data; iv) Assess the feasibility and desirability of placing management of the Banyan Drive properties under a master lease from the State for hotel, resort, commercial or other uses permitted by applicable zoning.

Surrender. At the end of said term or upon sooner termination the Apartment Owner will peaceably deliver up to the State of Hawaii the undivided interest in the premises demised hereunder, and shall join with all the other apartment owners in delivering or in causing the Association of Apartment Owners to deliver up to the State of Hawaii possession of the building in good order, repair and condition, reasonable wear and tear excepted....

While these documents contemplate the termination of the CPR on March 14, 2015, the early termination of the lease results in the early termination of the CPR (at least as to the State parcel). As a result, the portion of the premises on State land will essentially become an apartment building.

Staff is recommending the legitimate AOA (as determined in the Third Circuit Court proceedings) undertake the management of the property by means of a month-to-month revocable permit.⁷ The rent for the revocable permit will be established by independent appraisal and will include land value as well as the value of the portion of the existing improvements located on the State land.⁸ The character of use under the revocable permit will be for hotel and apartment purposes, similar to the current use under GL 3269 (hotel and condominium purposes.) The revocable permit will only cover the subject State lands (with the portion of the improvements located thereon) and not Former Parcel 23, which is privately held. The AOA will need to work with the legal owner of Former Parcel 23 to secure the right to use Former Parcel 23 and the improvements on it, or otherwise cooperate with the owner of that parcel in managing the building.

As a result of the ongoing litigation and the reluctance of the Lessee to cure the rental default, staff is recommending the forfeiture of the existing lease and further recommending the Board issue a month-to-month revocable permit to the legal AOA. The month-to-month revocable permit would provide time for Land Division's planning consultant to advise on the options for utilizing the premises (e.g., is a long-term hotel/resort lease a viable option for this property).⁹

In addition to the past due lease rent, there is an outstanding delinquent billing from the County Department of Environmental Management for wastewater services as well as real property taxes owed to the County Real Property Tax Office. All rent, utility and tax billings must be current before a revocable permit can be issued. If the delinquencies are not cured and a revocable permit is not issued, then the building will have to be shut down and all residents will need to relocate.

⁷ Although technically the AOA may no longer have reason to exist after termination of the CPR, it may want to continue to operate for purposes of securing the revocable permit staff is proposing.

⁸ The current lease rent for GL-3269 (land only) is \$49,000 per year or \$4,083 per month. However, ownership of the improvements on the property passes to the State at lease termination. Accordingly, rent under the revocable permit should cover improvements and land.

⁹ In the event the Lessee cures the default and the Board allows the lease to continue, staff is recommending the Board require a performance bond in an amount equal to two times the annual rent.

RECOMMENDATION: That the Board:

FORFEITURE OF LEASE:

1. Authorize the forfeiture of General Lease No. 3269 in the manner specified by law, and further authorize:
 - a. The retention of all sums heretofore paid or pledged under General Lease No. 3269 to be applied to any past due amounts;
 - b. The termination of the lease and all rights of Lessee and all obligations of the Lessor effective as of January 10, 2014, provided that any and all obligations of the Lessee which have accrued up to said effective date or which are stated in the lease to survive termination shall endure past such termination date until duly fulfilled, and further provided that Lessor reserves all other rights and claims allowed by law; and
 - c. The Department of the Attorney General, the Department of Land and Natural Resources, or their agents to collect all monies due the State of Hawaii under General Lease No. 3269 and to pursue all other rights and remedies as appropriate.

REVOCABLE PERMIT:

2. Declare that, after considering the potential effects of the proposed disposition as provided by Chapter 343, HRS, and Chapter 11-200, HAR, this project will probably have minimal or no significant effect on the environment and is therefore exempt from the preparation of an environmental assessment.
3. Authorize the issuance of a month-to-month revocable permit to the Association of Apartment Owners determined by the Third Circuit Court to be lawfully constituted and representative of the residents (or former owners of condominium units) on the property, covering the subject area for hotel and apartment purposes under the terms and conditions cited above, which are by this reference incorporated herein and further subject to the following:
 - a. The standard terms and conditions of the most current revocable permit form, as may be amended from time to time;
 - b. The permittee shall be required to bring all rent under General Lease No. 3269 and utilities and tax billings due for the subject property current, prior to issuance of the permit;
 - c. The permittee shall be required to submit proof of the existence and authority of the association, as well as any court order confirming the same, and to come into good standing with the Department of Commerce and Consumer Affairs, prior to issuance of the permit;
 - d. Review and approval by the Department of the Attorney General; and

- e. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

Respectfully Submitted,



Gordon C. Heit
District Land Agent

APPROVED FOR SUBMITTAL:



William J. Aila, Jr., Chairperson



GL 3269 Country Club-Hawaii, Inc.

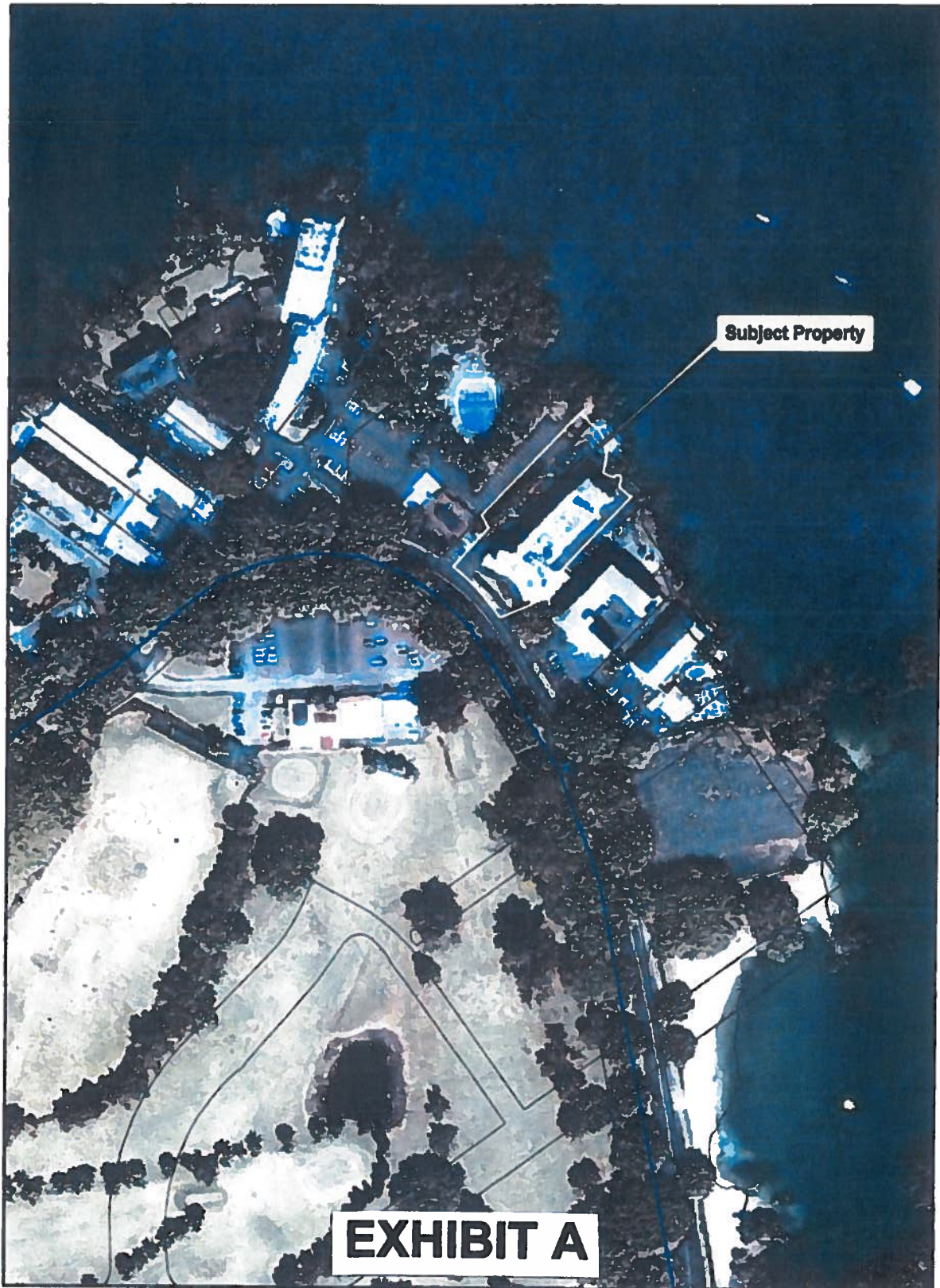
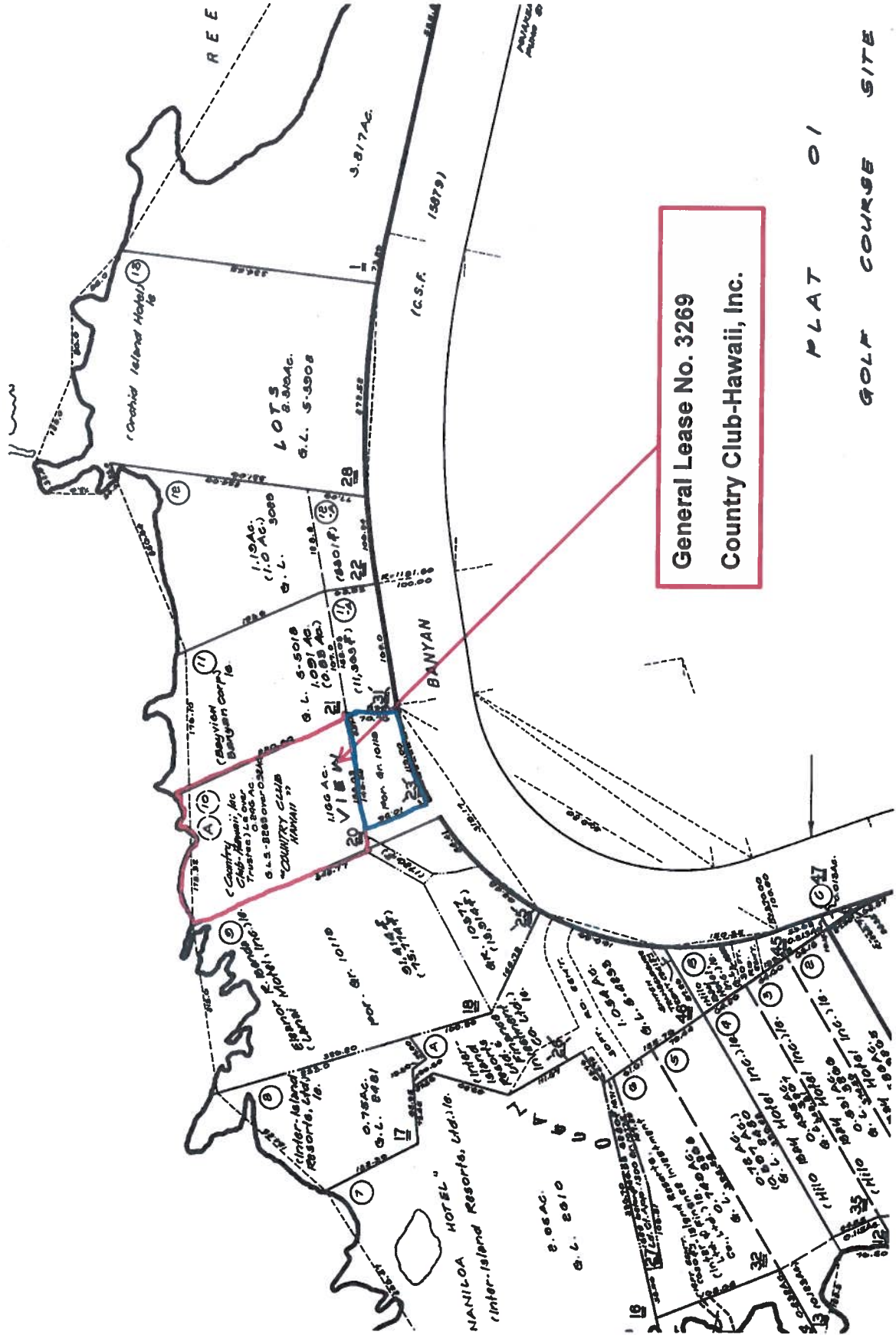


EXHIBIT A



TMK: (3) 2-1-05:20

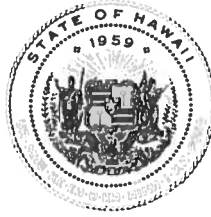


General Lease No. 3269
Country Club-Hawaii, Inc.

PLAT 01
GOLF COURSE SITE

EXHIBIT A

NEIL ABERCROMBIE
GOVERNOR OF HAWAII



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES

POST OFFICE BOX 621
HONOLULU, HAWAII 96809

WILLIAM J. AH A, JR.
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

ESTHER KIA'AINA
FIRST DEPUTY

WILLIAM M. TAM
DEPUTY DIRECTOR WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

EXEMPTION NOTIFICATION

From the preparation of an environmental assessment under the authority of Chapter 343, HRS and Chapter 11-200, HAR

Project Title: Request for Revocable Permit to the Association of Apartment Owners of Country Club Hawaii, for Hotel and Apartment Purposes.

Project Number: General Lease No. 3269

Project Location: Waiakea, South Hilo, Hawaii, Tax Map Key: (3) 2-1-005:020

Project Description: The subject parcel (2-1-005:020) is currently encumbered under GL 3269 to Country Club-Hawaii, Inc. Trustee, for hotel and condominium purposes. In the event the lease is cancelled by the Land Board, Staff is recommending the legitimate AOA (as determined in the Third Circuit Court proceedings) undertake the management of the property by means of a month-to-month revocable permit. The character of use under the revocable permit will be for hotel and apartment purposes, similar to the current use under GL 3269 (hotel and condominium purposes.) The revocable permit will only cover the subject State lands (with the portion of the improvements located thereon) and not Former Parcel 23, which is privately held. The AOA will need to work with the legal owner of Former Parcel 23 to secure the right to use Former Parcel 23 and the improvements on it, or otherwise cooperate with the owner of that parcel in managing the building.

The month-to-month revocable permit would provide time for Land Division's planning consultant to advise on the options for utilizing the premises (e.g., is a long-term hotel/resort lease a viable option for this property).

EXHIBIT B

Consulted Parties: None


Exemption Class No.: In accordance with the "Division of Land Management's Environmental Impact Statement Exemption List", approved by the Environmental Council and dated April 28, 1986, the subject request is exempt from the preparation of an environmental assessment under the following:

Exemption Class No. 1, which states, "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."

Recommendation: It is anticipated this project will probably have minimal or no significant effect on the environment and is presumed to be exempt from the preparation of an environmental assessment.



William J. Aila, Jr., Chairperson



Date 12/28/13