

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

January 22, 2015

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

Hawaii

Approve Mediated Settlement of Rent Dispute in General Lease No. S-3624, 69 Railroad, LLC, a Hawaii Limited Liability Company, Lessee, Relating to a Ten-Year Extension of General Lease No. S-3624, located in Hilo, Hawaii, TMK No. (3) 2-1-012:026

APPLICANTS:

69 Railroad, LLC, a Hawaii Limited Liability Company, and Land Division, Department of Land and Natural Resources.

LEGAL REFERENCE:

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

LOCATION:

Portion of the Government (Crown) Land of Waiakea, Waiakea, South Hilo, Island of Hawaii, TMK No. (3) 2-1-012:026, as shown on the attached map labeled Exhibit A.

AREA:

4.499 acres

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act

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

CHARACTER OF USE:

Industrial

TERM OF LEASE:

This rental dispute relates to a ten-year extension of the lease from March 6, 2016 through March 5, 2026, bringing the entire lease term to 65 years.

ANNUAL RENTAL:

The mediated rent subject to board approval is \$127,384.40 (one hundred twenty seven thousand three hundred eighty four dollars and forty cents) per year.

DCCA VERIFICATION:

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:

General Lease No. S-3624 (GL 3624) was first sold at public auction to Hawaii Equipment Co., Ltd. in 1961. GL 3624 was later assigned to Castle & Cook, Inc. in 1964, then assigned to E.J. Mahoney, III, Leon Stocksdales, and Eliot Merk in 1986, and then assigned to Railroad Avenue Partners in 1987. In 2002, under a foreclosure action, the lease was sold by public auction to GE Capital Hawaii, Inc. and the Board consented to the assignment to GE Capital Hawaii, Inc. at its meeting on September 13, 2002. Subsequently, GE Capital Hawaii, Inc. informed staff that the correct assignee should be GECH Holding, Inc., the real estate holding company for GE Capital Hawaii, Inc. The Board consented to the assignment of lease from GE Capital Hawaii, Inc. to GECH Holding, Inc. at its meeting on February 14, 2003. In the same year, GECH Holding, Inc. sold the lease to 69 Railroad, LLC and the Board consented to the assignment at its meeting on July 25, 2003.

At its meeting on September 27, 2013, under agenda item D-10, the Board approved an extension of ten years to the term of GL 3624 pursuant to Act 207, Session Laws of Hawaii 2011. The total length of the lease term would be 65 years. An immediate appraisal projecting rent for the period of March 6, 2016 through March 5, 2026 was required by the Board.

The current rent is \$74,500 per year until March 5, 2016. DLNR hired an independent real estate appraiser to project the ground lease rent for the ten-year extension from March 6, 2016 through March 5, 2026. DLNR's appraiser concluded this rent to be \$178,360 per year for the first five years and \$201,797 per year for the second five years. Lessee did not accept the department's appraised rent and hired its own real estate

appraiser. Lessee's appraiser determined the rental value to be \$96,400 per year.

Disputes in rent reopenings for leases of public lands are governed by Hawaii Revised Statutes Section 171-17, as amended. Prior to July 1, 2014, rent disputes were generally arbitrated by a three-member arbitration panel. However, the Legislature amended HRS Section 171-17 effective as of July 1, 2014 to require (non-binding) mediation by a single mediator prior to (binding) arbitration.<sup>1</sup> Under this amended provision, the parties agreed to have Esther Price, real estate appraiser, serve as the mediator.

Mediation between the parties was conducted on December 7, 2015 in Honolulu at the office of the mediator. Lessee's representatives were Michael Shewmaker, managing member, and Francis Jung, Esq. The department was represented by Russell Tsuji, Land Division administrator, Pamela Matsukawa, Land Division appraisal and real estate specialist, and deputy attorney general Cindy Young.

At the start of the mediation, the parties agreed that the mediation would be treated as confidential and subject to Rule 408 of the Hawaii Rules of Evidence. In other words, the parties had agreed to confidentiality during mediation to allow for candor and flexibility and in the event mediation was not successful and arbitration proceedings had to be conducted. Therefore, the details of the mediation discussions are not set forth in this submittal. If any board member has any questions on the issues addressed during mediation, staff will ask the deputy attorney general to contact the board member directly.

Mediation was in fact successful. Attached as Exhibit B is the Mediation Settlement Agreement. Subject to the approval of the board, the mediated settlement of rent for the ten-year extension of the term of GL 3624 from March 6, 2016 through March 5, 2026 is **\$127,384.40** (one hundred twenty-seven thousand three hundred eighty-four dollars and forty cents) **per year**. This rent breaks down to 65 cents per square foot, which can be looked at as a rate of return of 6% per year on a fee simple land value of \$10.83 per square foot. Lessee's appraiser had determined the rate of return to be from 4.75% to 5.5% per year, used a 5% rate of return, and determined the prospective fee simple land value to be \$9.57 per square foot. DLNR's appraiser had determined and used a rate of return of 7% per year and determined the prospective fee simple land value to be \$13 per sq. ft.

#### RECOMMENDATION:

That the Board approve the mediated settlement for the rent reopening in General Lease No. S-3624 for the period of March 6, 2016 through March 5, 2026, as set forth hereinabove and in Exhibit B.

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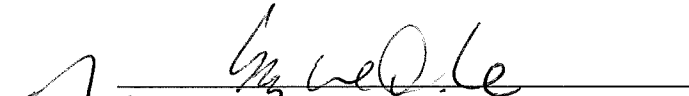
<sup>1</sup> Additionally, under the amended law, arbitrations are now submitted to a single arbitrator for determination, rather than to a three-member panel. The amending act is Act 168, Session Laws of Hawaii 2014.

Respectfully Submitted,



Russell Y. Tsuji  
Land Division Administrator

APPROVED FOR SUBMITTAL:

  
Suzanne D. Case, Chairperson

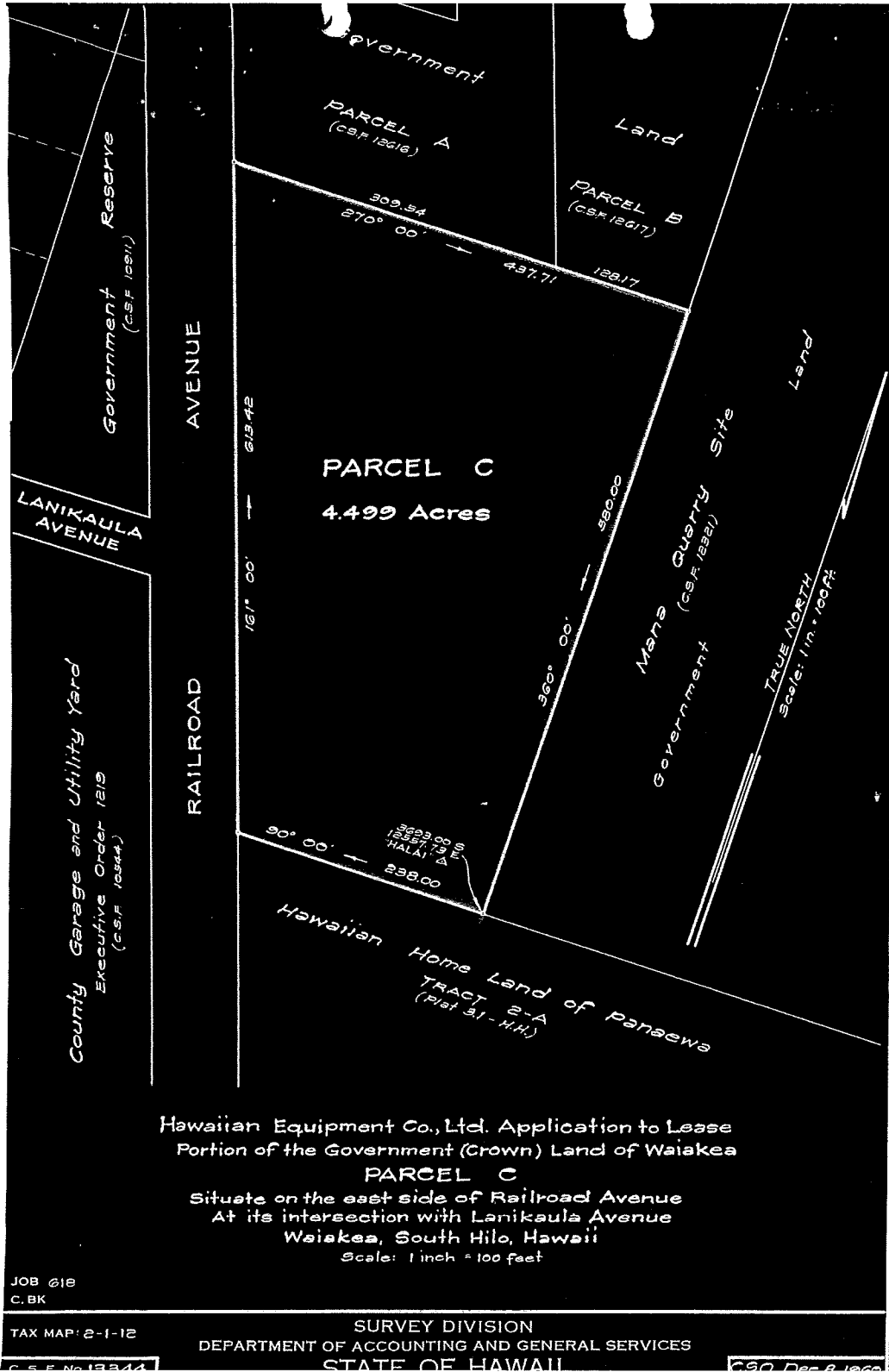


EXHIBIT A

## **MEDIATION SETTLEMENT AGREEMENT**

Re: State of Hawaii General Lease No. S-3624  
69 Railroad Avenue, Hilo, Hawaii 96720  
Third Division Tax Map Key 2-1-12, Parcel 26

### PARTIES

The State of Hawaii Department of Land and Natural Resources is the Lessor and 69 Railroad, LLC is the Lessee under the above-referenced lease which commenced on March 6, 1961 and ends on March 5, 2016. The Lessor and Lessee, within the body of this document, are referred to as "DLNR" and "69 Railroad", and in plural as "Parties".

### BACKGROUND INFORMATION

The total term of the lease is 55 years; the subject land area is 195,976 square feet (4.499 acres). On September 27, 2013, a "Consent to Extension of Lease Term Pursuant to Act 207, Session Laws of Hawaii 2011, General Lease No. S-3624, 69 Railroad, LLC, Lessee, Waiakea, South Hilo, Hawaii, Tax Map Key: (3) 2-1-12:26" was granted to the Lessee which extends the lease for ten years, from March 6, 2016 to March 5, 2026.

The rent for the extended term was to be determined by "an immediate appraisal that will project rent for the period of March 6, 2016 through March 5, 2026. The appraiser shall be selected by the State but paid for by Lessee". According to the terms of Lease No. S-3624, new rentals are to be based "upon the then market value of the land at the then current rate of return for similar properties".

DLNR and 69 Railroad independently commissioned appraisals of the ground rent for the ten-year term commencing March 6, 2016 but, based on the market value estimates of three different appraisers, could not mutually agree on rent for the next ten-year term.

### LEGAL REFERENCE

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

### MEDIATION SETTLEMENT

Fair market rental was conceptually but tentatively settled by mediation on December 7, 2015, subject only to the review and approval by the Board of Land and Natural Resources (BLNR) after a presentation by staff. The mediation was held at the CBRE office, located at 1003 Bishop Street, Suite 1800, Honolulu, Hawaii 96813. DLNR was represented by Russell Y. Tsuji, DLNR Land Division Administrator; Pamela K. Matsukawa, DLNR Appraisal and Real Estate Specialist; and Cindy Y. Young, Esq., Deputy Attorney General. 69 Railroad, LLC was represented by Michael Shewmaker and its legal counsel, Francis L. Jung, Esq. Esther H.C. Price served as the mediator.

*Exhibit B*

The Parties agreed to the following Fair Market Rent per annum for the ten-year term beginning March 6, 2016.

**ONE HUNDRED TWENTY-SEVEN THOUSAND  
THREE HUNDRED EIGHTY FOUR DOLLARS AND FORTY CENTS**  
**(\$127,384.40)**

ADDITIONAL AGREEMENTS

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

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

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

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

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

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



\_\_\_\_\_  
Esther H.C. Price, MAI  
Mediator

**APPROVED AND ACCEPTED:**

Lessor: STATE OF HAWAII  
Department of Land & Natural Resources

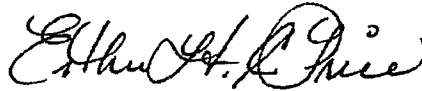
By \_\_\_\_\_  
Name: Russell Y. Tsuji  
Title: Land Division Administrator

Lessee: 69 RAILROAD, LLC

By \_\_\_\_\_  
Name: Michael Shewmaker  
Title: Lessee



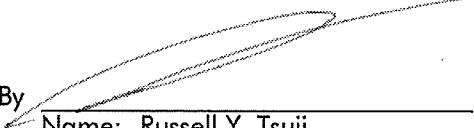
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\_\_\_\_\_  
Esther H.C. Price, MAI  
Mediator

**APPROVED AND ACCEPTED:**

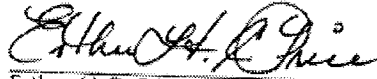
Lessor: STATE OF HAWAII  
Department of Land & Natural Resources

By   
\_\_\_\_\_  
Name: Russell Y. Tsuji  
Title: Land Division Administrator

Lessee: 69 RAILROAD, LLC

By \_\_\_\_\_  
Name: Michael Shewmaker  
Title: Lessee

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



Esther H.C. Price, MAI  
Mediator

**APPROVED AND ACCEPTED:**

Lessor: STATE OF HAWAII  
Department of Land & Natural Resources

By \_\_\_\_\_  
Name: Russell Y. Tsuji  
Title: Land Division Administrator

Lessee: 69 RAILROAD, LLC

By  \_\_\_\_\_  
Name: Michael Shewmaker  
Title: ~~Lessee~~ Managing Member