

D-20

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

October 14, 2010

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

PSF No: 05MD-230  
MAUI

Amend Prior Board Action of December 9, 2005, Item D-8, Grant of Term, Non-Exclusive Easement to Atlantis Submarines Hawaii, LLC for Offshore Waters and Submerged Land Purposes and Construction Right-of Entry, Lahaina, Maui, Tax Map Key: (2) 4-6-33:Seaward of parcel 1

BACKGROUND:

By Board action of December 9, 2005, under Item D-8, approval was given for the issuance of a 40-year term, non-exclusive easement and Construction right-of entry to the Atlantis Submarines Hawaii, LLC for offshore waters and submerged lands purposes. Inclusive in the board approval were conditions for an annual rent and rental reopenings at the 10<sup>th</sup>, 20<sup>th</sup> and 30<sup>th</sup> years of the easement term.

A July 17, 2006 Appraisal Review recommended \$2760.00 per annum for the initial 10-year period of the term easement, effective the date of July 12, 2006. An amended July 17, 2007 Appraisal Review revised the effective date to December 13, 2005. Refer to Exhibit A.

REMARKS:

Grant of Easement S-5928 documents were drafted by the office of the Attorney General and transmitted to the applicant for review, signature, and notary. Atlantis Submarines Hawaii, LLC responded with a request for change to a one-time payment method instead of \$2760.00 per annum with redeterminations at the 10<sup>th</sup>, 20<sup>th</sup> and 30<sup>th</sup> years.

An In-House Appraisal Recommendation establishing a one-time consideration valuation at \$39,400.00 has been approved by the Chairperson, and accepted by the applicant (Exhibit B).

Pursuant to advisement of the office of the Attorney General, board approval is being requested to amend the rent from an annual payment to a one-time consideration.

RECOMMENDATION: That the Board:

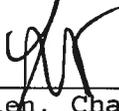
1. Amend its prior Board action of December 9, 2005, under agenda item D-8 by replacing the condition for rent of \$2,760.00 per annum and re-openings at the 10<sup>th</sup>, 20<sup>th</sup> and 30<sup>th</sup> years, with a one-time consideration of \$39,400.00.
2. All terms and conditions listed in its December 9, 2005 approval to remain the same.

Respectfully Submitted,



Larry Pacheco  
Land Agent

APPROVED FOR SUBMITTAL:



Laura H. Thielen, Chairperson



RECEIVED  
MAUI DISTRICT  
LAND DIVISION

2007 MAY 30 PM 12:32

APPRAISAL REVIEW CERTIFICATE

Doc. No.:	05MD-230	Appraiser:	Hastings, Conboy, Braig
Tenant:	Atlantis Submarine	Appraisal Fee:	Gratis
Location:	Lahaina, Maui, Hawaii	Date of Review:	May 23, 2007
Land Area:	1.0 acre of Submerged Land	Valuation Date:	December 13, 2005
Tax Map Keys:	(2) 4-6-33: 1 seaward		

Appraisal:	<input checked="" type="checkbox"/> Lease/Permit Rental	<input type="checkbox"/> New	<input checked="" type="checkbox"/> Reopening
	<input type="checkbox"/> Fee Valuation	<input type="checkbox"/> Easement Valuation	
	<input type="checkbox"/> Land License ( )	<input type="checkbox"/> Other	

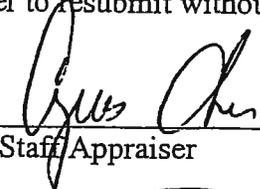
Appraisal Description: Amend prior appraisal which estimated the fair market rent for the initial 10-year period for a proposed Grant of Non-exclusive easement for submarine tour purposes. The amendment letter dated May 21, 2007, revises the effective date to December 13, 2005, the date of sinking of the Carthaginian. The effective date of July 12, 2006 used in the prior appraisal was incorrect.

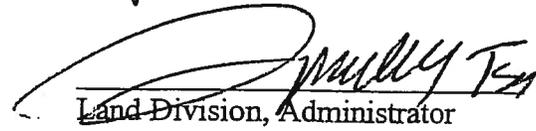
Proposed Market Rent: \$2,760 per annum (unchanged from prior appraisal) ✓

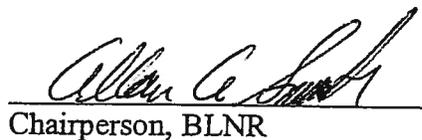
STATEMENT OF THE REVIEWER

I have performed a *technical review* in accordance with Standard 3 of the Uniform Standards of Professional Appraisal Practice (USPAP) to form an opinion as to whether the analysis, opinions, and conclusions of the report under review are appropriate and reasonable. I **did not** personally inspect the subject property. Based upon the attached appraisal review, I recommend the following:

- ( x ) ACCEPTANCE, and payment to the appraiser be made accordingly.
- ( ) REJECTION, appraiser to resubmit without payment for services.

Submitted:  5/23/07  
Staff Appraiser Date

Concur:  5/24/07  
Land Division, Administrator Date

Approved/  
Disapproved:  05/25/07  
Chairperson, BLNR Date

**EXHIBIT A**



LINDA LINGLE  
GOVERNOR OF HAWAII



RECEIVED  
MAUI DISTRICT  
LAND DIVISION

LAURA H. THIELEN  
CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE MANAGEMENT

2008 MAY 12 PM 12:35



STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
LAND DIVISION

POST OFFICE BOX 621  
HONOLULU, HAWAII 96809

May 5, 2008

MEMORANDUM

TO: Laura H. Thielen, Chairperson  
THROUGH: *fa* Morris M. Atta, Acting Administrator *Morris M. Atta*  
FROM: Cyrus C. Chen, Real Estate Appraisal Manager *Cyrus Chen*  
SUBJECT: In-House Valuation Recommendation – Term, non-exclusive easement for submarine purposes

PSF No.: 05MD-230  
Applicant: Atlantis Submarine  
Location: Lahaina Maui, Hawaii  
Land Area: 1 acre  
Tax Map Key: (2) 4-6-33: 1 seaward  
Char. of Use: Submarine tours

On December 9, 2005, the Land Board, under agenda item no. D-8, approved a grant of non-exclusive easement to Atlantis Submarine. The grant of easement contains approximately one acre of submerged land.

An appraisal effective July 12, 2006 was completed and accepted by DLNR. The appraisal determined rent for the grand of non-exclusive easement to be \$2,760 per annum. Staff is requested to determine the one time payment for a 40-year term. The date of value remains unchanged.

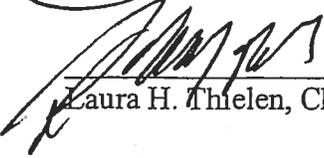
Annual Rent	\$2,760
Present value (factor for 40 yrs at 7%)	<u>x 14.2649</u>
Present Value	\$39,371
Easement Consideration (rounded)	<u>\$39,400</u>

Therefore, as of July 12, 2006, the value of the subject 40-year term non-exclusive easement is recommended to be \$39,400.

Exhibit B

MAY 07 2008

Approved/Disapproved:



Laura H. Thielen, Chairperson



Date

cc: District Branch Files  
Central Files

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

December 9, 2005

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

PSF No.:05MD-230

MAUI

Grant of Term, Non-Exclusive Easement to Atlantis Submarines  
Hawaii, LLC for Offshore Waters and Submerged Lands Purposes  
and Construction Right-of-Entry, Lahaina, Maui, Tax Map Key:  
(2) 4-6-33:seaward of Parcel 1

APPLICANT:

Atlantis Submarines Hawaii, LLC, a Limited Liability Company,  
whose business and mailing address is 658 Front Street, Suite  
#175, Lahaina, Hawaii 96761.

LEGAL REFERENCE:

Section 171-13 and 53(c), Hawaii Revised Statutes, as amended.

LOCATION:

Offshore waters and submerged lands at Lahaina, Maui, identified  
by Tax Map Key: (2) 4-6-33:seaward of Parcel 1, as shown on the  
attached map labeled Exhibit A.

AREA:

1 acre, more or less.

ZONING:

State Land Use District: Conservation  
County of Maui CZO: None

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act

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

CURRENT USE STATUS:

Vacant and unencumbered.

APPROVED BY THE BOARD OF  
LAND AND NATURAL RESOURCES  
AT ITS MEETING HELD ON

December 9, 2005

D-8

BLNR - Issuance of EasementPage 2  
to Atlantis Submarines  
Hawaii, LLC

December 9, 2005

CHARACTER OF USE:

Right, privilege and authority to utilize offshore waters and submerged lands at Lahaina, Maui for dive site for commercial submarine tours.

COMMENCEMENT DATE:

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

EASEMENT TERM:

Forty (40) years.

ANNUAL RENT:

Annual rent to be determined by independent or staff appraisal establishing fair market rent, subject to review and approval by the Chairperson.

PERCENTAGE RENT:

1% percentage of gross revenues from Atlantis Submarines Hawaii Maui operations for the entire term. Submittal of percentage rent report with payment due thirty (30) days after the lease anniversary date.

RENTAL REOPENINGS:

At the 10<sup>th</sup>, 20<sup>th</sup>, and 30<sup>th</sup> years of the lease term, by staff or independent appraisal.

PERFORMANCE BOND:

Twice the annual rental amount.

MUTUAL TERMINATION:

Mutual termination for any reasons, as long as both parties agree.

CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

A finding of no significant impact (FONSI) for the environmental impact statement was published in The Environmental Notice on June 8, 2005.

The Land Board at its meeting of September 23, 2005, under agenda Item K-2, approved the Applicant's conservation district use application to install two (2) artificial reefs offshore of Puamana Beach park, Lahaina, Maui (CDUA #MA-3232).

BLNR - Issuance of EasementPage 3  
to Atlantis Submarines  
Hawaii, LLC

December 9, 2005

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>
Applicant in good standing confirmed:	YES	<u>  x  </u>	NO	<u>      </u>

APPLICANT REQUIREMENTS:

Applicant shall be required to:

- 1) Pay for an appraisal to determine initial annual rent and
- 2) Provide survey maps and descriptions according to State DAGS standards and at Applicant's own cost.

BACKGROUND:

Atlantis currently operates a 48-passenger submarine in the Twin Peaks area; consisting of four (4) reefs (North, South, Keiki, Lost Vegas). Atlantis plans to finish the tour with the sunken Carthaginian. There are two (2) sites located approximately 3,100 feet offshore of Puamana Beach Park and approximately 1 ¼ mile south of Lahaina Harbor. Each site (Drop Zone A or B) is 21,780 square feet. The water depth is approximately 100 feet deep (16 fathoms). Atlantis is proposing to sink the Carthaginian at Drop Zone A. There are currently no plans to sink any artificial reef structures at Drop Zone B. However, future plans and available funding may enable Atlantis to further develop Drop Zones A and B with additional vessels and/or engineered artificial reef structures in the future. This would a) alleviate pressure on existing natural reef systems from overuse; b) promote reef and fish biomass increase for commercial and recreational users, divers; and c) provide educational opportunities to study biomass increase over time. Atlantis will not limit access to the area. Besides Atlantis, users would be non-commercial and commercial scuba tours, divers, and fishermen.

The Land Board at its meeting of September 23, 2005, under agenda Item K-2, approved the Applicant's conservation district use application to install two (2) artificial reefs offshore of Puamana Beach park, Lahaina, Maui (CDUA #MA-3232).

By letter dated October 24, 2005, Mr. Jim Walsh, General Manager for Atlantis Submarines Hawaii, LLC is requesting a term, non-exclusive easement for submerged artificial reef purposes. (Exhibit B)

REMARKS:

Atlantis had two (2) term easements with the Department: Non-Exclusive Easement S-5314 (Waikiki) for 5.814 acres and S-5363 (Kailua-Kona) for 2.099 acres. Land Board approval was obtained January 12, 1990 and January 26, 1990, respectively. Both were for a term of forty (40) years. First ten (10) years rent fixed, then the

BLNR - Issuance of Easement Page 4  
to Atlantis Submarines  
Hawaii, LLC

December 9, 2005

next five (5) years the rent will be 1% of defined gross proceeds whichever is greater. Reopening on the day following the expiration of the 15<sup>th</sup>, 25<sup>th</sup> and 35<sup>th</sup> years.

Due to a rental reopening in 2005, staff discovered for Easement S-5363 (Kailua-Kona) Atlantis had not constructed the artificial reefs on the seafloor. Therefore, an easement document was not required. The Land Board at its meeting held on November 19, 2004 (Item D-27), approved and amended staffs recommendation for a mutual termination. Atlantis had argued that the termination date should be 1991 when they lost authority to place an artificial reef under CDUA #HA-5/7/87-2024 and they did not owe the Department any percentage rent since January 12, 2000. (Exhibit C) The Board made the effective date of the termination to be the Board meeting and that Atlantis shall be responsible for rent including any and all additional rent that is due pursuant to the 1% percentage rent requirement of the agreement that commenced on January 12, 2000.

Easement S-5314 (Waikiki) had a rental reopening on January 26, 2005. The Department determined the annual rent should be \$44,320 per annum or 2% of the defined gross receipts, whichever is greater. Atlantis rejected the Departments' rent offer. Arbitration followed. On October 24, 2005, the Arbitrators determined the rent to be \$3,675 per annum or 1% of the gross receipts. (Exhibit D)

In 1990 submarine tours was a very new industry for the State of Hawaii. Substantial upstart expenses had to be incurred by Atlantis. Therefore, it is understandable why Atlantis received favorable terms from the Department. Staff believes that this is no longer the case.

Atlantis requires a construction right-of-entry to sink the Carthaginian on December 14, 2005 or wait until May 16, 2006. The State does not want Atlantis to sink the Carthaginian during whale season and there is concern that the Carthaginian will not make it through another winter in Lahaina harbor.

Applicant has not had a lease, permit, easement or other disposition of State lands terminated within the last five years due to non-compliance with such terms and conditions.

Agency or community comments were addressed by the Applicant in the conservation district use application (MA-3232) which was approved by the Land Board at its meeting of September 23, 2005, under agenda Item K-2.

RECOMMENDATION: That the Board:

1. Subject to the Applicant fulfilling all of the Applicant requirements listed above, authorize the issuance of a term non-exclusive easement to Atlantis Submarines Hawaii, LLC covering the subject area for offshore waters and submerged lands purposes under the terms and conditions cited above,

BLNR - Issuance of Easement Page 5  
to Atlantis Submarines  
Hawaii, LLC

December 9, 2005

which are by this reference incorporated herein and further subject to the following:

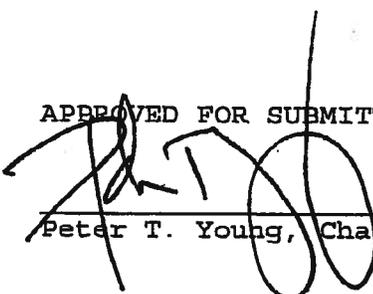
- A. The standard terms and conditions of the most current term easement document form, as may be amended from time to time;
  - B. Review and approval by the Department of the Attorney General; and
  - C. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.
  - D. Compliance with terms and conditions approved by the Land Board at its meeting of September 23, 2005, under agenda Item K-2 for Cдуа #MA-3232.
2. Obtain prior approval of the Governor and the prior authorization of the legislature by concurrent resolution.
  3. Authorize the issuance of a construction right-of-entry to Atlantis Submarines Hawaii, LLC and their contractors covering the subject area 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 right-of-entry permit form, as may be amended from time to time; and
    - B. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

Respectfully Submitted,

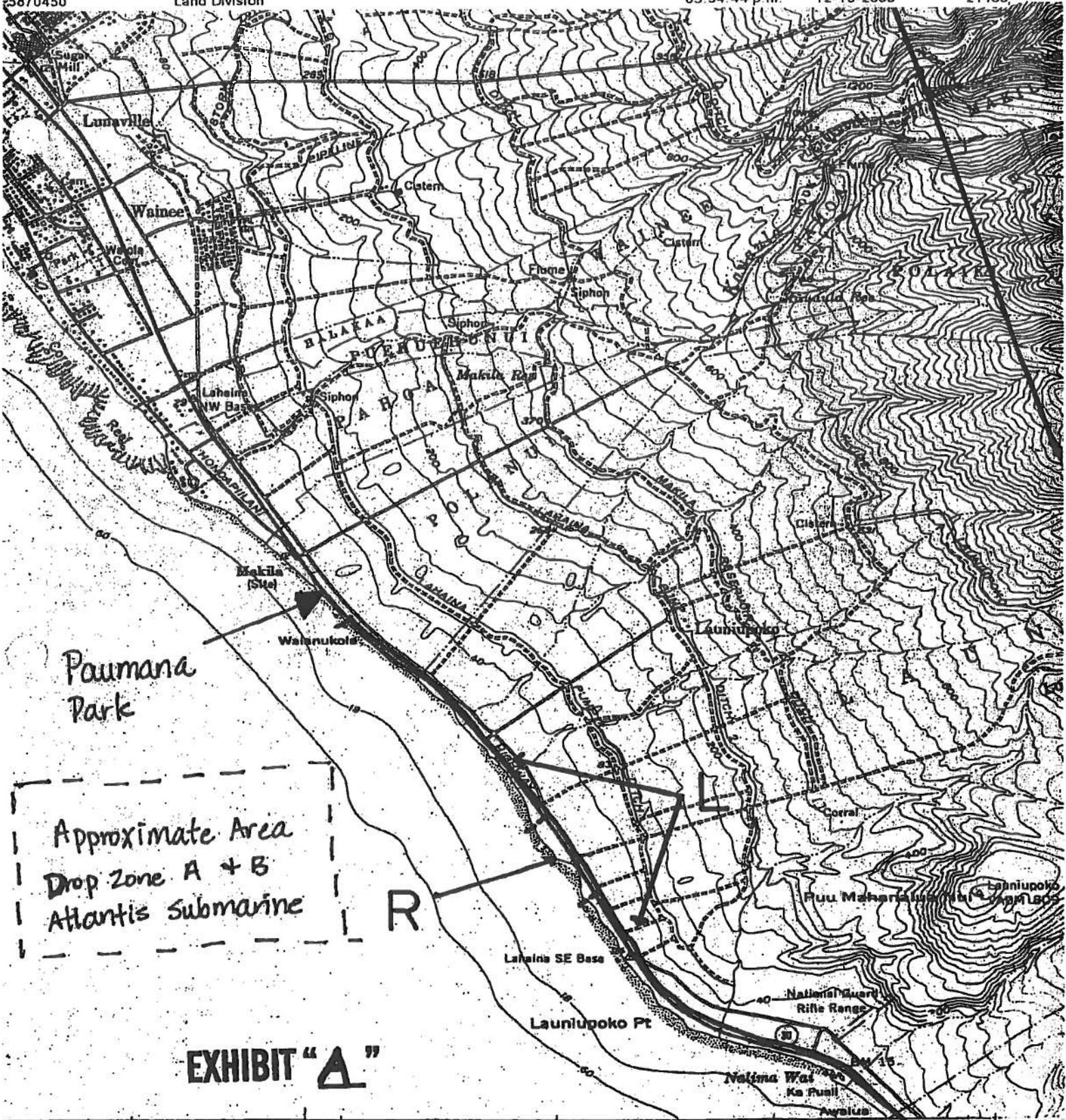


*CH* Charlene E. Unoki  
Assistant Administrator

APPROVED FOR SUBMITTAL:

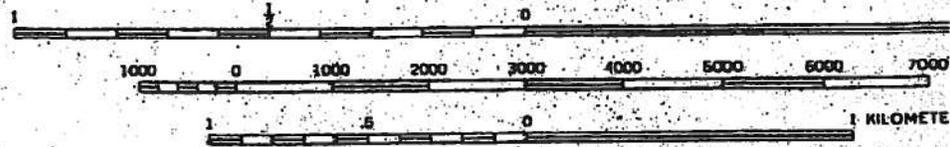


\_\_\_\_\_  
Peter T. Young, Chairperson



Approximate Area  
Drop Zone A + B  
Atlantis Submarine

**EXHIBIT "A"**



SCALE 1:24000

CONTOUR INTERVAL 40 FEET





RECEIVED  
MAUI DISTRICT  
LAND DIVISION

2005 OCT 31 PM 1:38

October 24, 2005

Mr. Daniel Ornellas  
Department of Land and Natural Resources Land Division  
54 High Street, Rm #101  
Wailuku, HI. 96793

Re: Ref. No.: 05MD-230

Subject: Request to Term, Non-Exclusive Easement for Atlantis Submarines Hawaii, LLC for  
Submerged Artificial Reef Purposes; Lahaina, Maui, Fronting Tax Key: (2) 4-6-033; Parcel 001

Dear Mr. Ornellas,

Thank you for your letter dated October 11, 2005. As I understand it, you are in the process of reviewing my application. I have a request that I would like for you to consider in regards to my long term, non-exclusive easement application. Atlantis is seeking a long term non-exclusive easement; whereby, we would be granted the same 10 year exemption as was done on Atlantis' other two locations in Kona, and Waikiki. After that, we would follow the agreements set forth in the recent Atlantis Waikiki mediation resolution.

There is a sense of urgency on this project, as the vessel that we are seeking to sink will not make it through another winter in Lahaina harbor. My deadline to sink her this year is December 14, 2005. The state does not want me to sink her during the whale season, so if I miss this opportunity, I will have to wait until May 16, 2006.

I would be happy to meet with you and Mr. Molmen if needed to help expedite this process.

Thank you in advance for your help in resolving this matter as quickly as possible.

Best regards,

A handwritten signature in black ink that reads "Jim Walsh".

Jim Walsh  
Atlantis Adventures - Maui  
General Manager  
658 Front Street, Suite # 175  
Lahaina, HI. 96761  
Tel (808) 667-6604  
Fax (808) 661-1210  
[www.atlantisadventures.com](http://www.atlantisadventures.com)

**EXHIBIT "B"**

*GL5363 V-27*

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

November 19, 2004

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

Doc No.: GL 5363

Island of Hawaii

Mutual Termination of Non-Exclusive, Term Easement Bearing GL No. S-5363  
to Atlantis Submarines Hawaii, L.P., Offshore Waters, Kailua-Kona, North Kona,  
Hawaii; Tax Map Key: 3<sup>rd</sup>/ 7-5: Offshore Waters

APPLICANT:

Atlantis Submarines Hawaii, L.P.

LEGAL REFERENCE:

Section 171-13, Hawaii Revised Statutes, as amended.

LOCATION:

Offshore waters situated at Kailua-Kona, North Kona, Hawaii, as shown on the attached  
map labeled Exhibit A.

AREA:

2.099 acres, more or less.

EASEMENT PURPOSE:

Right, privilege, and authority to utilize offshore waters and submerged lands at Kailua-  
Kona, Hawaii, for dive site for commercial submarine tours.

EASEMENT TERM:

The term of the easement is for forty (40) years, commencing on January 12, 1990 and  
ending January 11, 2030.

*as amended*  
APPROVED BY THE BOARD OF  
LAND AND NATURAL RESOURCES  
AT ITS MEETING HELD ON  
*November 19, 2004* *RJK*

ITEM D-27

EXHIBIT "C" *mo*  
*11-24-04*

BLNR -Termination/Cancellation  
Of Easement, Atlantis  
Submarines, Kailua-Kona,  
North Kona, Hawaii

Page 2

November 19, 2004

#### ANNUAL RENT:

For the first ten (10) years, a minimum annual guaranty of Six Hundred Sixty (\$660.00)  
For the next five (5) years, the rent will be one (1%) per cent of the defined gross  
proceeds or the said minimum annual guaranty amount, whichever is greater.

#### RENTAL REOPENINGS:

The minimum annual guaranty and the percentage rental shall be reopened and  
redetermined as of the 15<sup>th</sup>, 25<sup>th</sup> and 35<sup>th</sup> years of the term.

A reopening appraisal was recently completed for the period commencing January 12,  
2005. The independent appraiser's conclusion was \$6,400 per year and or 2% of gross  
proceeds whichever is greater.

#### CHAPTER 343 - ENVIRONMENTAL ASSESSMENT:

Applicant received a CDUA approval (CDUA-HA-2024), approved by the Board at its  
meeting of January 18, 1987, under Agenda Item H-12 and as amended under Agenda  
Item H-6 at its meeting of January 13, 1989.

#### REMARKS:

At its meeting of December 18, 1987, the Board approved CDUA No. HA-5/7/87-2024,  
that would allow for the location of a 52 foot steel ketch named the "C'est La Vie" within  
the proposed dive site as an attraction for the submarine tour as well as an artificial reef  
for potential fish habitat. At its meeting of January 13, 1989, the Board approved an  
amendment to it's prior action extending the dates requiring that construction be initiated  
by November 26, 1989 and be completed by November 26, 1992.

At its meeting of January 12, 1990, the Board approved a term, non-exclusive easement  
to Atlantis Submarine Hawaii, L.P. for a dive site for submarine tours. Non-Exclusive  
Easement bearing GL No. S-5363 was issued on May 12, 1997 for a term of 40 years  
commencing on January 12, 1990 and ending on January 11, 2030. The easement was  
issued 5 years after the CDUA deadline for completion of construction. However, while  
submarine tours have been occurring within the easement area, no construction of the  
artificial reef ever took place. The Grantee did not alert staff to the non-construction nor  
did staff question it while processing the easement document.

In informal discussions with the AG's Office, staff learned that a non-exclusive easement  
for submerged lands is required only when structures are placed on the seafloor. If  
submarine companies merely run their tours without installing improvements, no  
easement is needed.

**EXHIBIT "C"**

BLNR -Termination/Cancellation  
Of Easement, Atlantis  
Submarines, Kailua-Kona,  
North Kona, Hawaii

Page 3

November 19, 2004

As a result, we have a lease on a term easement that was executed in 1997, commenced in 1990, requires that the Grantee complete construction by 1992, and includes an abandonment clause that reads:

“These easement rights shall cease and terminate, and the easement area shall revert to the Grantor, in the event of non-use or abandonment by the Grantee of the easement area, or any portion thereof, for a consecutive period of one (1) year.”.

Due to the upcoming rental reopening in 2005, the staff appraiser contracted an independent appraiser that concluded a new fair market rental of \$6,400 per year and a new percentage rent of 2% per year, whichever is greater, the new rent to begin January 12, 2005. Due to the reopening appraisal, staff discovered that the percentage rent should have been imposed as of January 12, 2000, but no gross receipt reports were ever filed by the Grantee and due to the lack of ability to track such changes in the lease prior to SLIMS, no defaults were ever issued. The Grantee did submit a record of gross proceeds dating back to 2000, and if the percentage rent were to be imposed, the additional rent owed dating back to 2000 and up until June 30, 2004, would amount to over \$47,000+.

Upon inquiry with the Grantee, the Grantee indicated that no artificial reef was ever placed within the easement area and they were only maintaining the easement as a “placeholder” to somehow retain the right to the easement for the minimum rent of \$660 per year. Although the easement was maintained, the Grantee no longer had any authority to place an artificial reef on the site due to the expiration of the CDUA deadline back in 1992. If not for the initial intent to placing an artificial reef on the ocean floor, Atlantis would not need an easement for the purpose of simply traversing the ocean waters as they do today.

Given the percentage rent amount that should have been imposed as of January 12, 2000 and the new rental reopening determination of \$6,400 per year or 2% of gross proceeds, the Grantee has now taken the position that the easement was tied to the sinking of an artificial reef, and should have been declared abandoned as January 12, 2001. The Grantee submitted two letters dated August 31, 2004 and September 30, 2004 (copies attached as Exhibits B & C), expressing their position that the easement should be tied to their placement of an artificial reef and they should not be obligated to pay the percentage rent.

In summarizing the situation, staff would offer the following:

- A mutual termination of the easement would appear to be in order as the authority under the CDUA to place an artificial reef on the site expired in 1992. Should the Grantee wish to pursue the placement of an artificial reef in the future, it would

**EXHIBIT “C”**

BLNR -Termination/Cancellation  
Of Easement, Atlantis  
Submarines, Kailua-Kona,  
North Kona, Hawaii

Page 4

November 19, 2004

require another CDUA permit and a continuation of the easement would appear to presume approval.

- As noted earlier, the lease was executed in 1997, commenced retroactively from 1990, contained a condition that the Grantee comply with the CDUA permit conditions which required that the reef be placed by 1992, and contained an abandonment clause that indicates that all easement rights shall cease and terminate and the easement area shall revert to the grantor without any action in event of non-use for a consecutive period of one year. The Grantee's most recent position is that the easement ceased in 1991, a year after the commencement of the easement due to the non-use/abandonment clause.

While the Grantee lost its authority to place an artificial reef under the CDUP due to the lapsing of the permit, staff believes the non-use and abandonment clause within the easement document does not apply in this case. Black's Law Dictionary states that, "abandonment" includes both the intention to abandon and the external act by which the intention is carried into effect. In determining whether one has abandoned his property or rights, the intention is the first and paramount object of inquiry, for there can be no abandonment without the intention to abandon." The Grantee has been operating commercial submarine tours in the area since the commencement of the easement, has been paying rent to date and was providing liability insurance. If the Grantee had intended to abandon the easement back in 1991, then there should have been some evidence of such intention. Only when the issue of percentage rents was raised in 2004 did the Grantee express its desire to abandon the easement back to 1991.

- Staff would point out that the Board does not have the authority under the law to waive any rent. The fair market rental for the easement rights were determined by independent appraisal.
- Notwithstanding the foregoing, staff would recommend that the Grantee be required to reimburse the State for its cost associated with the independent reopening appraisal. If not for the Grantee's decision to maintain the easement as a "placeholder", the State would not have incurred the expense of such a reopening appraisal. According to the staff appraiser, the appraisal was bid out as a package with other appraisals and the prorated cost is approximately \$1,633. Staff is recommending that the Grantee be required to reimburse the State an amount of \$1,800 for the administrative time and independent appraisal costs.

**RECOMMENDATION:** That the Board:

1. Authorize a mutual termination or cancellation of the Lease of Non-Exclusive Easement S-5363, subject to the following terms and conditions:

**EXHIBIT "c"**

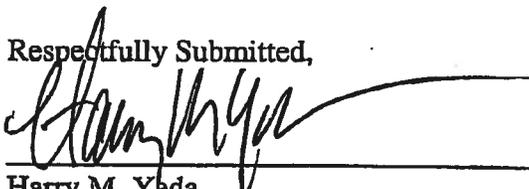
BLNR -Termination/Cancellation  
Of Easement, Atlantis  
Submarines, Kailua-Kona,  
North Kona, Hawaii

Page 5

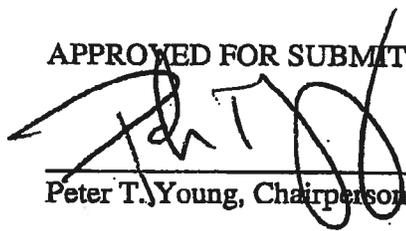
November 19, 2004

- a. The appropriate document form for the mutual termination or cancellation shall be subject to the determination and review of the Department of the Attorney General;
- b. The effective date of the termination or cancellation shall be the date of the Board meeting and Atlantis Submarines Hawaii, L.P. shall be responsible for rent including any and all additional rent that is due pursuant to the 1% percentage rent requirement of the agreement that commenced on January 12, 2000. The actual amount due the State shall be determined upon the receipt of updated gross proceeds report up to and including the date of the Board meeting;
- c. In consideration of the State's agreement to terminate or cancel the Lease of Non-Exclusive Easement, Atlantis Submarines Hawaii, L.P. shall pay the State an additional amount of \$1,800 that shall represent a reimbursement of costs associated with the independent appraisal that was done for the re-opening of rental scheduled to take effect on January 12, 2005;
- 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,

  
 Harry M. Yada  
 District Land Agent

APPROVED FOR SUBMITTAL:

  
 Peter T. Young, Chairperson
**EXHIBIT "C"**

Approved as amended. The Board amended the Recommendation Section by amending paragraph 1.b. to read as follows:

- "1.b. The effective date of the termination or cancellation shall be the date of the Board meeting and Atlantis Submarines Hawaii, L.P. shall be responsible for rent including any and all additional rent that is due pursuant to the 1% percentage rent requirement of the agreement that commenced on January 12, 2000. The actual amount due the State shall be determined upon the receipt of updated gross proceeds report up to and including the date of the Board meeting. Collection shall be referred to the Department of the Attorney General;"

REDUCED/NOT TO SCALE

THIS DISTRICT	7
ZONE	5
CONTAINING PLATS	
SCALE 1/4" = 100 FT.	

ADVANCE SHEET SUBJECT TO CHANGE

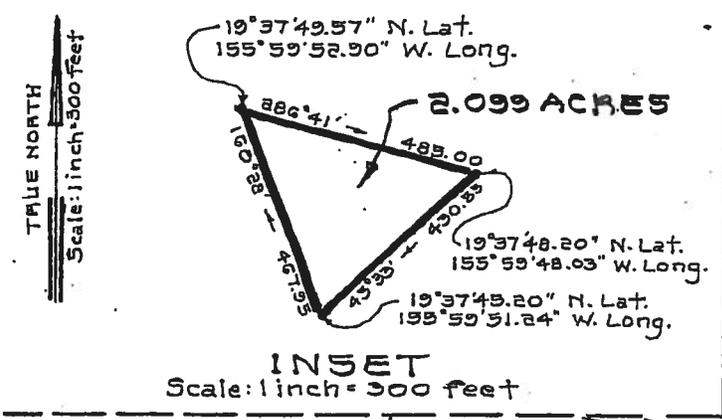


EXHIBIT "C"

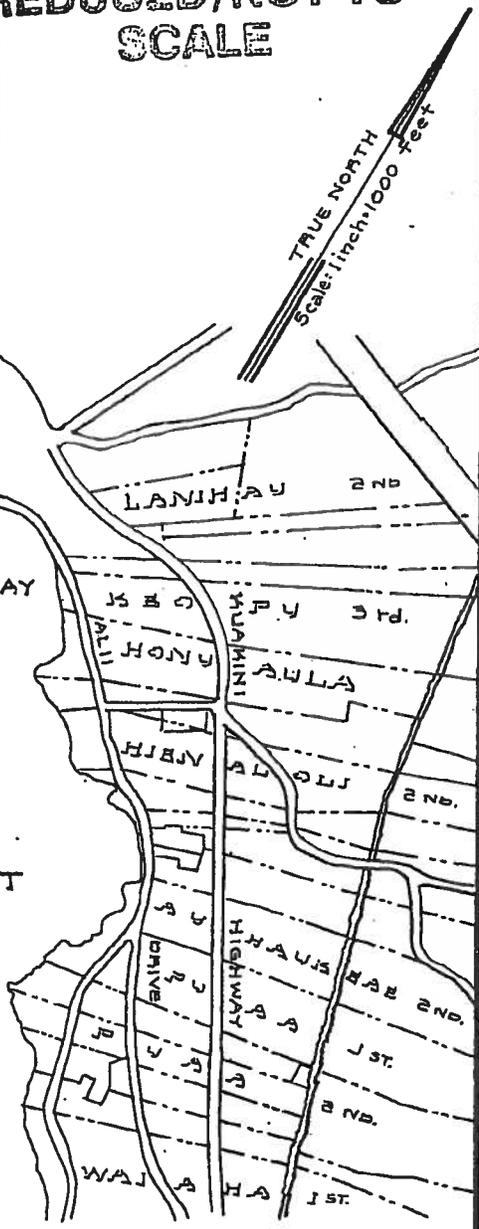
EXHIBIT A

Map No. 10000  
Source: S.M. ENGINEERING  
BY: V.K.C. & B.R.C. - March, 1994

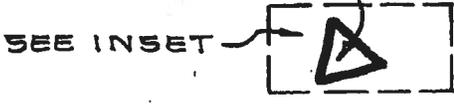
**REDUCED/NOT TO SCALE**



**INSET**  
Scale: 1 inch = 300 feet



**NON-EXCLUSIVE EASEMENT FOR SUBMARINE TOURS DIVE SITE 2.099 ACRES**



**NON-EXCLUSIVE EASEMENT FOR SUBMARINE TOURS DIVE SITE**  
 Situated in the Offshore Waters of Kailua-Kona  
 Island of Hawaii, Hawaii  
 Scale: 1 inch = 1000 feet

DB H-157 (99)  
R

AS MAP: T-5  
SR. NO. 21,949

**SURVEY DIVISION**  
 DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES  
**STATE OF HAWAII**

**EXHIBIT "B"**  
 R.S.N. May 27, 1993

**EXHIBIT "C"**

**EXHIBIT A**



# Atlantis

ADVENTURES

August 31, 2004

2004 SEP -1 P 1:55

Mr. Harry Yada  
 District Land Agent  
 State of Hawaii  
 Department of Land and Natural Resources  
 Land Division  
 P.O. Box 936  
 Hilo, Hawaii 96721-0936

RECEIVED  
 LAND DIVISION  
 HILO, HAWAII

RE: Lease of Non-Exclusive Easement S-5363 dated May 12, 1997

Dear Mr. Yada,

In response to your letter dated July 23, 2004, requesting a record of the monthly gross receipts derived by Atlantis Submarines Hawaii, LLC, formerly Atlantis Submarines Hawaii, L.P. ("Atlantis"), from our Kailua-Kona submarine tour operation, for the period January 1, 2000 to present, and per our phone conversation today, please find enclosed the requested monthly gross receipts for this period. We would like to discuss further the applicability of the percentage fee under the Lease, since Atlantis has never "occupied" the easement area by the creation of an artificial reef at the site.

Atlantis Submarines Hawaii, L.P. opened its first dive site in Hawaii in Kona in 1988, and in conjunction with that operation, we requested the referenced Lease for a non-exclusive easement to allow us to place an artificial reef in the easement area in the future. There are, and have been other commercial operators who utilize the ocean resources for tourism activities; however, we were probably the first commercial operation requesting to use the ocean floor for this purpose, and consequently this unusual request came under the jurisdiction of your office.

Since the commencement of this agreement on January 12, 1990, Atlantis has agreed and paid the minimum annual guaranty of \$660 per year as a "placeholder" should we decide to utilize the easement area for an artificial reef.

It is our position that since we have not proceeded under the Lease to use the dive site by placing an artificial reef, we believe the dive site easement has no greater value to our operation than to a similar commercial operator who views the ocean bottom floor, like a commercial scuba operator, glass bottom boat operator (Nautilus used to operate out of Kailua-Kona pier); or a parasailing operation, or dinner cruise operator who uses the ocean surface, and who are not subject to a similar percentage rent agreement. We feel that the use envisioned under the Lease was based on the placement of an artificial reef, as is the case in Waikiki where we operate a submarine tour under a similar easement agreement, and have placed an artificial reef for which we are paying the percentage rent.

**EXHIBIT "C"**

**EXHIBIT B**

Further in support of both parties' intention of the agreement, our submarine operation in Maui, similar to other commercial ocean users, and without an artificial reef, is not subject to any fees associated with a "non-exclusive easement agreement".

Although Atlantis has never improved the dive site by placing an artificial reef as envisioned by the Lease, the State has not taken any action to take back the easement area, and we have continued to pay the annual minimum guaranty. We understand by not sinking an artificial reef, this could be considered a "non-use or abandonment by Atlantis of the easement area" as discussed in Paragraph 9 of the agreement, and if DLNR intends to revoke our future easement rights, we would wish to be so informed, so that we can respond accordingly. However, we recognize the value of maintaining our future "easement rights" to sink an artificial reef in the easement area in Kailua-Kona, and wish to continue to pay the annual minimum guaranty of \$660.

If you have any questions, please contact me at 808-973-9837. I look forward to your response, and as I mentioned on the phone, it is my hope that we can resolve these issues without further involving legal counsel, and incurring additional expenditures.

Sincerely,



John Kojima  
Chief Financial Officer

CC: Ronald Williams, President, CEO  
Michael Stanton, General Manager, Atlantis Kona

**EXHIBIT "C"**

# Atlantis.

ADVENTURES

September 30, 2004

2004 OCT -1 P 1:20  
RECEIVED  
LAND DIVISION  
HILO, HAWAII

Ms. Dierdre S. Mamiya  
Land Division Administrator  
State of Hawaii  
Department of Land and Natural Resources, Land Division  
Post Office Box 621  
Honolulu, Hawaii 96809

Dear Ms. Mamiya,

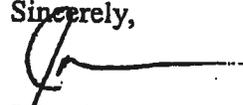
Please find enclosed our response to the Reopening Offer Letter for the Ground Rent for General Lease No. S-5363, Kailua-Kona, Hawaii. I have been in various discussions and conversations with Mr. Harry Yada of your Hilo Office and Mr. Cyrus Chen here in Honolulu as to why we cannot accept the new lease rent proposal, and our position that we believe the lease is tied to the sinking of an artificial reef, which does not exist.

Accordingly, as per Par. 9 of the lease agreement, "the easement rights shall cease and terminate, and the easement area shall revert to the Grantor without any action on the part of the Grantor, in the event of non-use or abandonment by the Grantee of the easement area, or any portion thereof, for a consecutive period of one (1) year". Therefore, for purposes of discussion, this lease could be argued as being effectively terminated on January 12, 1991, and that past rents paid by Atlantis from 1991 to present deemed to be not appropriate. Additionally, I understand from speaking with Mr. Yada that under the CDUA-HA-2024 permit, we needed to exercise our rights to sink an artificial reef within a restricted time period, which has lapsed, and if we desired to sink an artificial reef we would have to go through the permitting process again, which is unlikely.

If the easement rights have not already been automatically terminated or ceased as per Par. 9, then this letter will serve as our written notification that we wish to terminate the lease agreement, retroactively back to January 12, 1991, as there is no intent to renew the CDUA permit, nor sink an artificial reef in Kailua-Kona.

Please advise.

Sincerely,

  
John A. Kojima  
Chief Financial Officer

Cc: Ronald Williams, President, CEO  
Harry Yada, District Land Agent, Hilo

**EXHIBIT "C"** **EXHIBIT C**

October 24, 2005

Mr. Steve Molmen  
 Mr. Cyrus Chen  
 State of Hawaii  
 Department of Land and Natural Resources  
 Land Division  
 P.O. Box 621  
 Honolulu, Hawaii 96809-0621

C. Michael Heihre, Esq.  
 Cades Schutte  
 Attorney for Atlantis Submarines Hawaii, L.P.  
 Cades Schutte Building, Suite 1200  
 1000 Bishop Street  
 Honolulu, Hawaii 96813

Re: Determination of Fair Market Rental Pursuant to Grant of Non-Exclusive Easement S-5314

Gentlemen:

The State of Hawaii, by its Board of Land and Natural Resources, is the Grantor (the "Grantor"), and Atlantis Submarines Hawaii, L.P. is the Grantee (the "Grantee") under the Indenture, dated March 14, 1994 ("Grant of Non-Exclusive Easement S-5314"). Grant of Non-Exclusive Easement S-5314 provides for the reopening and redetermination of the minimum annual guaranty and the percentage rental for the ten year period commencing January 26, 2005.

In accordance with Grant of Non-Exclusive Easement S-5314 and the provisions in Hawaii Revised Statutes, Chapter 658A, Alan J. Conboy, MAI, SRA, the appraiser appointed by the Grantor, Jan R. Medusky, MAI, CRE, the appraiser appointed by the Grantee, and Sanford D. Goto, MAI, the third appraiser appointed by Messrs. Conboy and Medusky, have been duly appointed to perform the function of a board of arbitration in determining the fair market rental for the ten year period commencing January 26, 2005.

The Arbitrators have reviewed Grant of Non-Exclusive Easement S-5314, analyzed relevant market and other data, prepared independent appraisal reports, conducted a hearing, considered all documents and other written and oral communications submitted by or on behalf of the Grantor and Grantee, and have discussed and shared findings and conclusions.

In accordance with Grant of Non-Exclusive Easement S-5314 and applicable laws of the State of Hawaii, the majority of the Arbitrators have determined, one member dissenting:

The fair market rental for the subject non-exclusive and term easement rights (Grant of Non-Exclusive Easement S-5314) for the ten (10) year period commencing January 26, 2005, is:

- \* Minimum Annual Guaranty Rental: \$3,675.00 per annum
- \* Percentage Rental: One Percent (1.0%) of Gross Receipts

**EXHIBIT "D"**

Mr. Steve Molmen  
Mr. Cyrus Chen  
C. Michael Heihre, Esq.  
October 24, 2005  
Page 2

IN WITNESS WHEREOF, the undersigned Arbitrators have executed these presents as of the 24th day of October, 2005.

Concurs

Does Not Concur

Jan R. Medusky  
Jan R. Medusky, MAI, CRE

Alan J. Conboy  
Alan J. Conboy, MAI, SRA

Sanford D. Goto  
Sanford D. Goto, MAI

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

On this 24 th day of October, 2005, before me personally appeared Alan J. Conboy, Jan R. Medusky, and Sanford D. Goto, to me known to be the persons described in and who executed the foregoing instrument and acknowledged that they executed the same as their free act and deed.



Phyllis S. N. Muraoka  
Name: Phyllis S. N. Muraoka  
Notary Public, State of Hawaii  
My commission expires: 6-6-06

EXHIBIT "D"