

LAND COURT SYSTEM

REGULAR SYSTEM

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DEPARTMENT OF AGRICULTURE
AGRICULTURAL RESOURCE MANAGEMENT DIVISION
1428 SO. KING STREET
HONOLULU, HAWAII 96814
No. of Pages:

Tax Map Key No. ____DIV/_-_-____:____

STATE OF HAWAII

DEPARTMENT OF AGRICULTURE

GENERAL LEASE NO. S - ____

between

STATE OF HAWAII

and

TENANCY: _____

LOCATION: _____ covering Lot No. ____

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STATE OF HAWAII
DEPARTMENT OF AGRICULTURE
GENERAL LEASE NO. S-XXXX

THIS INDENTURE OF LEASE, is made and entered into this ____ day of _____, 20____, by and between the STATE OF HAWAII, hereinafter referred to as the "Lessor", by its Board of Agriculture, hereinafter referred to as the "Board", whose business address is 1428 South King Street, Honolulu, Hawaii 96814, and _____, _____, whose business and post office address is _____, _____, HAWAII #####, hereinafter referred to as the "Lessee".

WITNESSETH:

THAT, the Lessor for and in consideration of the rent to be paid and of the terms, covenants, and conditions contained herein, all on the part of the Lessee to be kept, observed, and performed, does hereby demise and lease unto the Lessee, and the Lessee does hereby lease and hire from the Lessor the premises identified as Tax Map Key: _____, containing approximately _____ gross acres, respectively, of land at _____, _____, Hawaii, more particularly described in Exhibit A and on Exhibit B, which are attached hereto and made a part hereof.

TO HAVE AND TO HOLD the demised premises unto the Lessee for the term of THIRTY-FIVE (35) years commencing on the _____ day of _____, 20____, and ending on the _____ day of _____, 20____, unless sooner terminated as provided herein, the Lessor reserving and the Lessee yielding and paying to the Lessor at the office of the Department of Agriculture, Honolulu, Oahu, a base annual rental as provided herein, payable in advance without notice or demand, in semi-annual installments on _____ and _____ of each and every year during the lease term, except as otherwise provided, as follows:

A. Base annual rental. For the first fifteen (15) years, the base annual rental shall be the sum of _____ AND NO/100 DOLLARS (\$_____); as offered and accepted by the Board; except, the Board may, at its sole discretion, permit the Lessee to offset the cost of land clearance and leasehold improvements against not more than two years of base annual rental, the evidence of which shall be submitted to the Lessor within the first year of the lease term.

B. Additional rental. Each year on or before the 30th day of April, the Lessee shall submit to the Lessor a report disclosing the gross proceeds from the sale of commodities produced on the demised premises during the year immediately preceding. Together with the report, the Lessee shall pay to the Lessor any additional rental due,

which amount shall be determined in the manner described below:

From the report, determine a value representing 1.5 per cent (%) of the gross proceeds, which includes revenues from consignment sales and subletting. Any excess of the value so derived over the base annual rental constitutes the additional rental.

C. Reopening of annual rental. The annual rental shall be reopened and redetermined at the expiration of the 10th, 20th, and 30th, years of the term herein.

D. Determination of annual rental upon reopening. The base annual rental and additional rental for any ensuing period shall be the fair market rental at the time of reopening. At least six months prior to the time of reopening, the fair market rental of the land in the specific use or uses for which the disposition was made shall be determined by an appraiser whose services shall be contracted for by the Lessor, and the Lessee shall be notified promptly of the determination; provided that should the Lessee disagree with the fair market rental as determined by the Lessor's appraiser, the Lessee may appoint its own appraiser, within thirty days after written notice of the fair market rental, to prepare an independent appraisal report.

The two appraisers shall review each other's reports and make every effort to resolve whatever differences they

may have. Should differences still exist fourteen days after the exchange, the two appraisers, within fourteen days thereafter, shall appoint a third appraiser who shall also prepare an independent appraisal report and shall furnish copies thereof to the first two appraisers within forty-five days of the appointment. Within twenty days after receiving the third appraisal report, all three appraisers shall meet to determine the fair market rental. The fair market rental, as determined by a majority of the appraisers, shall be in writing and shall be final and binding upon both the Lessor and the Lessee, subject to chapter 658A, Hawaii Revised Statutes ("HRS"). The Lessee shall pay for its own appraiser. The cost of the services of the third appraiser shall be borne equally by the Lessor and the Lessee. All appraisal reports shall become part of the public record of the Lessor.

In rendering such decision, the appraisers shall assume that neither Lessor or Lessee is under a compulsion to rent and both are typically motivated, well-informed, well-advised and each is acting in what it considers its own best interest and the premises are fit for immediate occupancy and use "as is".

In the event that the appraisers are unable to determine the fair market rental before the reopening date, the Lessee shall continue to pay the rent at the rate effective for the previous rental period, but the Lessee shall make up any deficiency within thirty days

after the new rental has been determined. The Lessee's or its appraiser's failure to comply with the procedures set forth herein shall constitute a waiver of the Lessee's right to contest the new fair market rental, and the Lessee shall pay the rental as determined by the Lessor's appraiser without adjustment. Alternatively, the Board may, at its option, treat the failure as a breach of this lease and terminate this lease.

E. Facilities capital recovery fee. Where applicable, the facilities capital recovery ("FCR") fee is payable annually and shall be for the full term of this lease, commencing on the date the Lessor installs improvements as described herein in support of the Lessee's operations, or the commencement of the term of this lease, whichever is later. The FCR fee is based on the Lessor's expenditures to install the improvements and is calculated on one-tenth of one per cent of the Lessor's expenditures and will be added to the base annual rental, except that Capital Improvement Projects, as may be authorized by the State of Hawaii Legislature, which are constructed to repair or remedy defects to the physical facility and are not used to expand operations shall not be included as the Lessor's expenditure upon which the FCR fee is based.

F. Interest on delinquent rental. Interest at the rate of one per cent (1%) per month shall be charged to any delinquent rentals.

G. Holdover. Upon expiration of the lease term, if the land is not otherwise disposed of, the Lessor may allow the lessee to continue to hold the land for a period not exceeding one year upon such rent, terms and conditions as the Lessor may prescribe, and further as provided in section 4-158-31, Hawaii Administrative Rules ("HAR").

RESERVING UNTO THE LESSOR THE FOLLOWING:

1. Minerals and water rights. (a) All minerals as hereafter defined, in, on, or under the demised premises and the right, on its own behalf or through persons authorized by it, to prospect for, mine, and remove the minerals and to occupy and use so much of the surface of the ground as may be required for all purposes reasonably extending to the mining and removal of the minerals by any means, including strip mining, shall be reserved to the Lessor. "Minerals", as used herein, means any and all oil, gas, coal, phosphate, sodium, sulfur, iron, titanium, gold, silver, bauxite, bauxitic clay, diaspore, boehmite, laterite, gibbsite, alumina, all ores of aluminum, and all other mineral substances and ore deposits, whether solid, gaseous, or liquid, including all geothermal resources in, on, or under the demised premises, fast or submerged; provided that "minerals" shall not include sand, gravel, rock, or other material suitable for use and when used in general construction in furtherance of the Lessee's

permitted activities on the demised premises and not for sale to others.

(b) All surface and ground waters appurtenant to the demised premises and the right on its own behalf; or through persons authorized by it, to capture, divert, or impound the same and to occupy and use so much of the demised premises as may be required in the exercise of this right shall be reserved to the Lessor; provided that as a condition precedent to the exercise by the Lessor of the rights reserved in this paragraph, just compensation shall be paid to the Lessee for any of the Lessee's improvements taken.

2. Prehistoric and historic remains. All prehistoric and historic remains found in, on, or under the demised premises shall be reserved to the Lessor.

3. Ownership of fixed improvements. The ownership of all fixed improvements, including but not limited to farm dwellings, barns, maintenance sheds, shadehouses, fences, irrigation and stockwater systems located on the demised premises prior to or on the commencement date of this lease, excluding the improvements constructed during the term of this lease, unless provided otherwise, shall be reserved to the Lessor.

4. Withdrawal. The Lessor shall have the right to withdraw the demised premises, or any portion thereof, at any time during the term of this lease with reasonable notice and without compensation, except as provided

herein, for public uses or purposes, for constructing new roads or extensions, or changes in line or grade of existing roads, for rights-of-way and easements of all kinds, and shall be subject to the right of the Lessor to remove soil, rock, or gravel as may be necessary for the construction of roads and rights-of-way within or without the demised premises; provided that upon the withdrawal or taking which causes any portion of the land originally demised to become unusable for the specific use or uses for which it was demised, the base annual rental shall be reduced in proportion to the value of the land withdrawn or made unusable. If any permanent improvement constructed upon the demised premises by the Lessee is destroyed or made unusable in the process of the withdrawal or taking, the proportionate value thereof shall be paid based upon the unexpired term of this lease; provided that upon withdrawal the Lessee shall be compensated for the present value of all permanent improvements in place at the time of withdrawal that were legally constructed upon the demised premises by the Lessee of the leased land being withdrawn.

In the case of tree-crops, as defined 171-37, the board shall pay to the lessee the residual value of the trees taken and, if there are unharvested crops, the value of the crops.

In addition to compensation received under subsection (a) or section 171-38, a lessee shall be entitled to compensation for costs attributable to the diminished use of the leased land, including reimbursement for the cost of any insurance required by the board to be maintained, or property tax paid, by the lessee on the portion of the leased land withdrawn or taken; provided that a lessee of land subject to easements shall be entitled to compensation under this subsection only if the easements are placed upon the land subsequent to the original lease and prevent the lessee from using the land for the original intended use.

THE LESSEE COVENANTS AND AGREES WITH THE LESSOR AS FOLLOWS:

1. Payment of rent. The Lessee shall pay the required rent in legal tender of the United States of America to the Lessor at the times, in the manner and form, and at the place specified above, or at any other place designated by the Lessor, without any deduction and without any notice or demand.

2. Taxes, assessments, etc. The Lessee shall pay or cause to be paid when due the amount of all taxes, rates, assessments, and other outgoings of every description as to which the demised premises or any part thereof, or any improvements thereon, or the Lessor or the Lessee in respect thereof, are now or may be assessed or become liable by authority of law during the term of this lease;

provided that with respect to any assessment made under any betterment or improvement law which may be payable in installments, the Lessee shall be required to pay only such installments, together with interest, as shall become due and payable during the lease term.

3. Utility services. The Lessee shall pay when due all charges, duties, and rates of every description, including water, sewer, gas, refuse collection, or any other charges, as to which the demised premises, any part thereof, any improvements thereon, or the Lessor or the Lessee in respect thereof may become liable during the lease term, whether assessed to or payable by the Lessor or the Lessee.

4. Irrigation costs. Without limiting the provisions of the proceeding section, the Lessee shall be responsible for its share of operating and maintenance costs associated with the irrigation system, if any, which provides irrigation water to the demised premises. The Lessee agrees not to oppose the establishment of an irrigation project under Chapter 167, HRS, under which assessments, tolls, fees, and charges for water usage and irrigation system operation and maintenance shall be set; and the Lessee agrees to abide by and to pay when due all rates and charges set by such irrigation project.

The Lessee shall use due care to protect the ditches, flumes, pipelines, gates, valves, and all other property

and appurtenances of the irrigation system and shall not cause or suffer any damage or destruction thereof.

5. Character of use. (a) The Lessee shall use the premises hereby demised solely for Diversified Agriculture purposes. No other use shall be permitted except as provided in sections 4-153-24 and 4-153-33, HAR.

(b) No cesspools shall be constructed on the premises. However, the Lessee may use alternative wastewater treatment and disposal systems, which do not pose a threat to the groundwater and provided the Lessee obtains the prior written approval from the Department of Health.

(c) Disposal of all solid and liquid animal waste must be by a means acceptable to the Department of Health.

(d) The covenants, conditions, and restrictions contained in this section shall run with the land until the time that the land is reclassified to a land use district other than an agricultural district, provided that if less than all the premises is reclassified, then the covenants, conditions, and restrictions shall terminate only as to the portion of the premises which is reclassified to a land use district other than an agricultural district. Any transfer, assignment, sublease, mortgage, or other instrument of conveyance of the premises shall expressly contain the restrictions on uses and the conditions in this section.

6. Dwelling restrictions. Residential use and residential dwellings shall not be permitted on the

premises. The Board may permit a farm dwelling on the premises if the need is clearly demonstrated. The farm dwelling shall be used in direct connection with the agricultural activities on the premises and shall not be used for rental purposes. The dwelling shall be subject to such additional terms and conditions as the Board may require including, but not limited to, an adjustment of lease rental. All construction on the premises shall be in accordance with plans approved by the Lessor and shall be in accordance with all applicable federal, state and county laws, ordinances, regulations and rules, including, but not limited to, laws regarding environmental quality control.

7. Utilization and development of the demised premises. The development of the demised premises shall be completed in accordance with, a schedule set forth in the Plan of Utilization and Development (P.U.D.) which shall be prepared by the Lessee and approved by the Lessor before the execution of this lease. Any modification or deviation from the plan, without the prior written approval of the Lessor, may constitute a breach of this lease and cause for the termination thereof. Agricultural activity modifications and deviations from the plan may be made by the Lessee provided that such modifications and deviations are within the definition of Diversified Agriculture and in compliance with provisions of the Lease.

8. Good husbandry and conservation practices. The Lessee shall at all times practice good husbandry with regard to the use of the demised premises for the use permitted and shall carry out a program of conservation based upon a Conservation Plan (CP) developed by the Lessee in cooperation with the appropriate Soil and Water Conservation District. In the event the activities of the Lessee are determined to be contrary to the Conservation Plan, the Lessor shall notify the Lessee of the discrepancy and the Lessee shall be required, within sixty days of the notice, to cure the discrepancy and to submit proof thereof satisfactory to the Lessor.

9. Invasive species. Lessee shall immediately notify Lessor of any suspected or known presence of invasive species on the Premises and/or adjoining or nearby lots. Lessee shall allow Lessor access to the Premises to evaluate the situation pursuant to chapters 4-68 and 4-69, HAR. It shall be the Lessee's responsibility to take action to eradicate and/or prevent the spread of invasive species on the premises, which may include administering pesticides or other methods of remediation approved and accepted by the Department of Agriculture. In the event Lessee fails to take appropriate action to eradicate or control a known presence of invasive species on the Premises within a reasonably expedient amount of time (as determined by the nature of the invasive species), Lessor may perform such action to exterminate or control the

invasive species and shall not be responsible to Lessee for any loss or damage that may occur by reason thereof, and Lessee agrees to pay Lessor on demand the cost of such remedial action made or caused to be made by Lessor together with interest thereon at the rate of two percent per month or at the maximum rate allowed by Hawaii law, whichever is less.

10. Major portion of income. The Lessee shall attain and maintain throughout the lease term a level of agricultural operation that generates more than fifty per cent (50%) of the Lessee's total annual income; except, that this requirement shall not apply if failure to meet the requirement results from mental or physical disability or the loss of a spouse, or if the premises are fully utilized in accordance with the approved P.U.D in the production, marketing, and sale of crops or products for which this lease was granted. If the lease is not being fully utilized in accordance with the P.U.D and no other exceptions apply, then, to provide verification that the lessee derives a major portion of the lessee's total annual income earned from the lessee's activities on the premises, each year on or before April 30th following the third year of the lease term, the Lessee shall submit a copy of its federal or state income tax return for the year immediately preceding. The submitted tax return shall be subject to audit and verification by the Lessor,

who may impose additional requirements to carry out the requirements of this section.

11. Sanitation, etc. The Lessee shall keep the demised premises and improvements in a strictly clean, sanitary, and orderly condition.

12. Waste and unlawful, improper, or offensive use of the premises. The Lessee shall not commit, suffer, or permit to be committed any waste, nuisance, strip or unlawful, improper, or offensive use of the demised premises or any part thereof, nor cut down, remove, or destroy, or suffer to be cut down, removed, or destroyed, any trees now growing on the premises unless this activity is part of an approved conservation plan or with the prior written approval of the Lessor.

13. Inspection of premises. The Lessee shall permit the Lessor and its representatives, at all reasonable times during the lease term, to enter the demised premises and examine the state of repair and condition thereof and the improvements, equipment, agricultural chattels, books, and records of the Lessee in connection with the administration of this lease.

14. Improvements. At any time during the lease term, the Lessee shall not construct, place, maintain, or install on the premises any building, structure, sign, or improvement, except with the prior written approval of the Lessor and upon such conditions as the Lessor may impose. All buildings, structures, signs, or improvements shall be

in accordance with all applicable federal, state, and county laws, ordinances, and rules. The ownership thereof shall be in the Lessee until the expiration or sooner termination of this lease, at which time the ownership thereof shall, at the option of the Lessor, vest in the Lessor or shall be removed by the Lessee, at the Lessee's sole cost and expense.

15. Repairs to improvements. The Lessee shall, at the Lessee's own expense, keep, repair, and maintain all buildings, structures, and improvements now existing or hereafter constructed or installed on the demised premises in good order, condition, and repair, reasonable wear and tear excepted.

16. Insurance. At all times during the term of this lease, the Lessee shall keep insured all insurable buildings and improvements erected on the demised premises in the joint names of the Lessor, the Lessee, and any mortgagee, as their interests may appear, against loss or damage by fire, including perils specified in the extended coverage endorsement and in an amount equal to the maximum insurable value thereof, and shall pay the premiums thereon at the time and place the same are payable; the policy or policies of insurance shall be made payable in case of loss to the Lessor, the Lessee, and any mortgagee, as their interests may appear, and any proceeds derived therefrom in the event of total or partial loss shall be immediately available, and as soon as reasonably possible,

to be used by the Lessee for rebuilding, repairing, or otherwise reinstating the same buildings or improvements in a good and substantial manner according to the plans and specifications approved in writing by the Board; except, that with the approval of the Lessor, the Lessee may surrender this lease and pay the balance owing on any mortgage and forfeiting all interest in the proceeds of insurance and in any remaining improvements, with the Lessor to retain the balance of the proceeds; any policy or current certificate of insurance certifying that such policy has been issued and is in effect shall be delivered to Lessor upon commencement of the term of the Lease and Lessor may, at any time and from time to time, inspect and/or copy any and all insurance policies required to be procured by Lessee hereunder.

17. Right of first refusal. A lease or any interest therein, including stock of a corporation holding the lease or an interest in a partnership or association holding the lease, shall not be transferred or assigned unless the lease and improvements, or any interest therein, are first surrendered to the Board, as follows:

- (1) The Board shall have the option to re-purchase the lease for the price paid by the current lessee, including closing costs, or the fair market value, less appreciated value, at the time of re-purchase, as determined in paragraph (3), whichever is the

lower but not less than zero. For the purposes of this section, "price paid by the current lessee" means the consideration paid for the lease exclusive of improvements and "appreciated value" means the replacement cost for developing the leased premises.

- (2) Any improvements affixed to the realty, including trade fixtures and growing crops, shall be re-purchased at their fair market value.
- (3) At the time of the re-purchase, the fair market value of the lease less appreciated value and the fair market value of any improvements shall be determined by a qualified appraiser whose services shall be contracted for by the Lessor; provided that should the Lessee disagree with the values, the Lessee may appoint the Lessee's own appraiser who together with the Lessor's appraiser shall appoint a third appraiser, and the fair market value shall be determined by arbitration as provided in chapter 658A, HRS. In this event, the Lessee shall pay for the Lessee's own appraiser, the Lessor shall pay for its appraiser, and the cost of the third appraiser shall be borne equally by the Lessee and the Lessor.

- (4) The Board may re-purchase the lease and improvements with funds from the non-agricultural park lands special fund or may accept a surrender of the lease subject to the offer by a qualified applicant to purchase the lease and improvements, including any encumbrances, for not less than the amount to be paid therefor by the Board; provided that the purchase by a qualified applicant shall be subject to sections 4-153-19 and 4-153-22, HAR.
- (5) Notwithstanding the conditions herein, the consideration for the applicant's purchase of the lease as provided in paragraph (4) shall not be less than the total of all encumbrances that have been approved by the Lessor at the time of the re-purchase.
- (6) This section shall not apply to a holder of record having security interest upon foreclosure pursuant to section 4-153-35, HAR.

18. Assignments of lease, lease interest, etc.

(a) Any transferee, assignee, or sublessee of a agricultural park lease shall satisfy applicant qualification requirements. No lease or any interest therein, including corporate stock or an interest in a partnership or association, shall be transferred or

assigned without the consent of the Board, except by devise, bequest, or intestate succession and upon the further condition that there is a dwelling on the property in which the devisee or heir resides or that more than fifty per cent (50%) of the devisee's or heir's income is derived from the productive use of the demised premises. In the absence of or upon cessation of these conditions, the devisee or heir shall surrender the lease and improvements, or any interest therein, to the Board pursuant to its right of first refusal.

(b) With the approval of the Board, and subject to its right of first refusal, the assignment and transfer of a lease or any interest therein, including stock of a corporation holding the lease or an interest in a partnership or association holding the lease, may be made if:

- (1) The Lessee becomes mentally or physically disabled;
- (2) Extreme economic hardship is demonstrated to the satisfaction of the Board; or
- (3) The assignment is to the corporate successor of the Lessee;

provided that with the prior written approval of the board the assignment and transfer of this lease or any portion may be made in accordance with current industry standards, as determined by the Board; provided further, that prior to the approval of any assignment of lease, the board

shall have the right to review and approve the consideration paid by the assignee and may condition its consent to the assignment of the lease on payment by the Lessee of a premium based on the amount by which the consideration for assignment, whether by cash, credit, or otherwise, exceeds the straight-line depreciated cost of improvements and trade fixtures being transferred to the assignee pursuant to the Assignment of Lease Evaluation Policy adopted by the board on October 23, 2007; as amended, a copy of which is attached hereto as Exhibit "C." The premium on any subsequent assignments shall be based on the difference in the selling and purchase price plus the straight-line depreciated cost of any improvements constructed by the then assignor, pursuant to the above-mentioned Evaluation Policy. With respect to state agricultural leases, in the event of foreclosure or sale, the above described premium shall be assessed only after the encumbrances of record and any other advances made by the holder of a security interest are paid; and provided further that the Lessor may adjust the base annual rental and additional rental pursuant to section 4-153-18, HAR.

19. Subletting. The Lessee shall not rent or sublet the whole or any portion of the demised premises without the prior written approval of the Board; provided that before approval, the Board shall have the right to review and approve the rental to be charged to the sublessee;

provided further that where the Lessee is required to pay rent based on a percentage of its gross receipts, the rents paid to the Lessee by the sublessee shall be included as part of the Lessee's gross receipts; provided further that the Board shall have the right to review and, if necessary, revise the rental of the demised premises based upon the rent charged to the sublessee; and provided further that the rental may not be revised downward.

20. Mortgage. Except as provided, the Lessee shall not mortgage, hypothecate, or pledge the premises or any portion thereof, or this lease or any interest herein, without the prior written approval of the Chairperson, on behalf of the Lessor, and any mortgage, hypothecation, or pledge without such approval shall be void. That upon application and with the prior written consent of the Lessor, the Lessee may mortgage this lease or any interest herein or create a security interest in the leasehold of the public land demised. If the mortgage or security interest is to a recognized lending institution authorized to do business in the State of Hawaii, consent shall extend to foreclosure and sale at the foreclosure to any purchaser, provided that the purchaser is qualified to lease and hold the land or any interest therein.

21. Breach. Except as otherwise provided, in the event of a breach or default of any term, covenant, restriction, or condition of this lease, the Board shall

deliver a written notice of the breach or default by personal service or by registered or certified mail to the Lessee and to each holder of record having any security interest in the land covered by or subject to this lease, making demand upon the Lessee to cure or remedy the breach or default within sixty days from the date of receipt of the notice; provided that where the breach involves a failure to make timely rental payments, including payment of any additional rent, the written notice shall include a demand upon the Lessee to cure the breach within thirty days after the receipt of the notice. Upon failure of the Lessee to cure or remedy the breach or default within the time period provided, or within such additional period as the Board may allow for good cause, the Board may exercise the rights it may have, subject to the rights of a holder of a security interest. Without limiting the foregoing, the Board, after due notice of default shall terminate this lease or tenancy and take possession of the premises together with all improvements placed thereon, without demand or previous entry and without legal process, and shall retain all rental paid in advance as damages for the violations. The retention of advance rental as liquidated damages shall be in addition to any other rights and remedies available to the Lessor.

22. Rights of holder of record of security interest.

(a) Prior board action shall be required when an institutional lender acquires the Lessee's interest

through a foreclosure sale, judicial or nonjudicial, or by way of assignment in lieu of foreclosure, or when the institutional lender sells or causes the sale of the Lessee's interest in a lease by way of a foreclosure sale, judicial or nonjudicial. The institutional lender shall convey a copy of the sale or assignment as recorded in the bureau of conveyances.

(b) Notwithstanding any provisions of this lease, if any lease is subject to a security interest held by an institutional lender and if the institutional lender has given to the Board a copy of the encumbrance as recorded in the bureau of conveyances:

(1) If the lease is canceled for violation of any non-monetary lease term or condition, or if the lease is deemed terminated or rejected under bankruptcy laws, the institutional lender shall be entitled to issuance of a new lease in its name for a term equal to the term of the lease remaining immediately prior to the cancellation, termination, or rejection, with all terms and conditions being the same as in the canceled, terminated, or rejected lease, except only for the liens, claims, and encumbrances, if any, that were superior to the institutional lender before cancellation, termination, or rejection. If a lease is rejected or deemed rejected under bankruptcy law, the lease shall be deemed canceled and terminated for all purposes under state law;

(2) If the Lessee's interest under a lease is transferred to an institutional lender, including by reason of the provisions of paragraph (1), by reason of acquisition of the Lessee's interest pursuant to a foreclosure sale, judicial or nonjudicial, and by reason of an assignment in lieu of foreclosure:

(A) The institutional lender shall be liable for the Obligations of the Lessee under the lease for the period of time during which the institutional lender is the holder of the Lessee's interest but shall not be liable for any obligations of the lessee arising after the institutional lender has assigned the lease; and

(B) The provisions of section 166-6(a)(1) and (2) shall not apply to the lease or the demised land during such time as the institutional lender holds the lease; provided that:

- (i) For non-monetary lease violations, the institutional lender shall first remedy the lease terms that caused the cancellation, termination, or rejection to the satisfaction of the Board; and
- (ii) The new lease issued to the institutional lender shall terminate one hundred twenty days from the effective date of issuance, when the institutional lender shall either sell or assign the lease, after which date

section 166-6(a)(1) and (2) shall apply to
the new lease;

(3) As long as there is a delinquent loan balance secured by a security interest, the lease may not be canceled or terminated, except for cancellation by reason of default of the lessee, and no increase over and above the fair market rent, based upon the actual use of the land demised and subject to the use restrictions imposed by the lease and applicable laws, may be imposed or become payable, and no lands may be withdrawn from the lease, except by eminent domain proceedings beyond the control of the Board, except with the prior written consent by the institutional lender and that consent shall not be unreasonably withheld; and

(4) If the lease contains any provision requiring the payment of a premium to the Lessor on assignment of the lease, any premium shall be assessed only after all amounts owing by any debt secured by a security interest held by an institutional lender shall have been paid in full.

(c) Ownership of both the lease and security interest by an institutional lender shall not effect or cause a merger thereof, and both interests shall remain distinct and in full force and effect unless the institutional lender elects in writing to merge the estates with the consent of the Board.

(d) The Board may include in any consent form or document provisions consistent with the intent of this section as may be required to make a lease mortgageable or more acceptable for mortgageability by an institutional lender.

(e) The rights of a purchaser, assignee, or transferee of an institutional lender's security interest, including a junior lien holder, shall be exercisable by the purchaser, assignee, or transferee as successor in interest to the institutional lender; provided that:

(1) The purchase, assignment, or transfer shall conform with subsection (b)(4); and

(2) The purchase, assignment, or transfer of such rights shall be reserved for and exercisable only by an institutional lender. Other purchasers may not be precluded from acquiring the institutional lender's security interest but shall not have rights as successor interest to the original institutional lender.

23. Acceptance of rent not a waiver; no accord and satisfaction; no waiver. The acceptance of rent by the Lessor shall not be deemed a waiver of any breach by the Lessee of any term, covenant, or condition of this lease, of the Lessor's right to re-entry for breach of covenant, nor of the Lessor's right to declare and enforce a forfeiture for any breach. Further, no acceptance by Lessor of a lesser sum of rent or any other charge then due shall be deemed to be other than an account of the

earliest installment of such rent or charge due, nor shall any endorsement or statement on any check or letter accompanying said payment be deemed an accord and satisfaction, and Lessor may accept such payment without prejudice to its right to recover the balance of such installment or pursue any other remedy as provided by the Lease.

The failure of the Lessor to insist upon strict performance of any term, covenant, or condition, or to exercise any option conferred herein shall not be construed as a waiver or relinquishment of any term, covenant, condition, or option. Any consent or permission by Lessor to any act or omission by Lessee shall not be deemed to be consent or permission by Landlord to any other similar or dissimilar act or omission and any such consent or permission in one instance shall not be deemed to be consent or permission in any other instance.

24. Liability insurance. The Lessee shall procure and maintain during the entire period of this lease, a policy or policies of commercial general liability insurance, in an amount to be determined by the Lessor and approved by the Board, subject to periodic review and adjustment every two years, insuring the Lessor and the Lessee against all claims for personal injury, death and property damage. The policy or policies shall cover the entire premises, including all buildings, improvements, and grounds and all roadways or sidewalks on or adjacent to the demised

premises in the control or use of the Lessee. The Lessee shall furnish the Lessor with a certificate verifying the policy and shall furnish a certificate upon each renewal of the policy, each certificate to contain or be accompanied by an assurance of the insurer to notify the Lessor of any intention to cancel any policy prior to actual cancellation. The certificate of insurance shall name the Lessor as an additional insured and shall require a thirty day notice to the Lessor of any policy change or cancellation. The procuring of this policy shall not release or relieve the Lessee of its responsibility under this lease or limit the amount of its liability under this lease.

25. Performance bond. The Lessee shall procure and deposit with the Lessor and thereafter keep in full force and effect during the term of this lease, a good and sufficient surety bond in an amount equal to two times the annual base rental, conditioned upon the full and faithful observance and performance by the Lessee of the lease terms, conditions, and covenants of this lease. The bond shall provide that in case of a breach or default of any of the terms, conditions, and covenants contained herein, the full amount of the bond shall be paid to the Lessor as liquidated and ascertained damages and not as a penalty.

The Lessor may waive or suspend the performance bond requirement at its discretion; provided that the Lessee has substantially complied with the terms, conditions, and

covenants of this lease; and provided further that the Lessor reserves the right to reinstate the performance bond requirement at any time throughout the term of this lease.

26. Justification of sureties. The bonds that are required herein shall be supported by the obligation of a corporate surety organized for the purpose of being a surety and qualified to do business as a surety in the State of Hawaii, or by no less than two personal sureties, corporate or individual, for which justifications shall be filed as provided in section 78-20, HRS; provided that the Lessee may furnish a written bond in the same amount and with the same conditions, executed by it alone as obligor, if, in lieu of any surety or sureties, the Lessee shall furnish and at all times thereafter keep and maintain any of the forms of financial guarantee of performance that is approved by the Lessor.

27. Indemnity. The Lessee shall indemnify, defend, and hold harmless the Lessor from and against any claim or demand for loss, liability, or damage, including claims for property damage, personal injury, or death, arising out of any occurrence on the demised premises or on sidewalks, parking areas, and roadways adjacent thereto resulting from any act or omission of the Lessee, or occasioned by any act or nuisance made or suffered on the premises, or by any accident or fire thereon, or growing out of or caused by any failure on the part of the Lessee

to maintain the premises in a safe condition, or by any act or omission of the Lessee, and from and against all actions, suits, damages, and claims brought or made by reason of the non-observance or non-performance of any of the terms, covenants and conditions herein or the laws, ordinances, and rules of the federal, state, or county governments. This provision shall survive the expiration or earlier termination of this lease.

28. Costs of litigation. If the Lessor shall be made a party to any litigation commenced by or against the Lessee (other than condemnation proceedings), without any fault on the Lessor's part, the Lessee shall pay all costs and expenses incurred by or imposed on the Lessor, including, but not limited to, attorney's fees; furthermore, the Lessee shall pay all costs and expenses which may be incurred by or paid by the Lessor in enforcing the covenants and agreements of this lease, in recovering possession of the demised premises, or in the collection of delinquent rental, taxes, and any and all other charges.

29. Liens. The Lessee will not commit or suffer any act or neglect whereby the demised premises or any improvement thereon or the estate of the Lessee in the same shall become subject to any attachment, lien, charge, or encumbrance, except as provided herein, and shall indemnify, defend, and hold harmless Lessor from and

against all attachments, liens, charges, and encumbrances and all expenses resulting therefrom.

30. Lessor's lien. The Lessor shall have a lien on all the buildings and improvements placed on the premises by the Lessee, on all property kept or used on the demised premises, whether the same is exempt from execution or not, and on the rents of all improvements and buildings situated on the premises for all costs, attorney's fees, and rent reserved, for all taxes and assessments paid by the Lessor on behalf of the Lessee, and for the payment of all moneys as provided in this lease to be paid by the Lessee, and the lien shall continue until the amounts due are paid.

31. Condemnation. If any portion of the demised premises shall be condemned for public purposes by the State of Hawaii, a county, or any other governmental agency, the base annual rental shall be reduced in proportion to the value of the portion of the premises condemned. The Lessee shall be entitled to receive from the condemning authority:

- (1) The value of growing crops which the Lessee is not permitted to harvest; and
- (2) The proportionate value of the Lessee's permanent improvements so taken in the proportion that it bears to the unexpired term of the lease;

provided that in the alternative, the Lessee may remove and relocate its improvements to the remainder of the lands occupied by the Lessee. The Lessee shall not by reason of the condemnation be entitled to any claim against the Lessor for compensation or indemnity for the leasehold interest, and all compensation payable or to be paid for or on account of the leasehold interest by reason of the condemnation shall be payable to and be the sole property of the Lessor. The foregoing rights of the Lessee shall not be exclusive of any other to which the Lessee may be entitled by law. Where the portion so taken renders the remainder unsuitable for the use or uses for which the land was demised, the Lessee shall have the option to surrender this lease and be discharged and relieved from any further liability therefor; provided that the Lessee may remove the permanent improvements constructed, erected, and placed by the Lessee within such reasonable period as may be allowed by the Lessor.

32. Right to enter. The Lessor, the County of _____, or their representatives shall have the right at all reasonable times to enter and cross any portion of the demised premises for the purpose of performing any public or official duties; provided that in the exercise of the rights, the Lessor, County of _____, or their representatives shall not interfere unreasonably with the Lessee or the Lessee's use and enjoyment of the premises.

33. Extension of time. Notwithstanding any provision to the contrary, wherever applicable, the Lessor, for good cause shown, may allow additional time beyond the time or times specified herein to the Lessee, in which to comply, observe and perform any of the terms, conditions, and covenants contained in this lease.

34. Quiet enjoyment. The Lessor covenants and agrees with the Lessee that upon payment of rent at the times and in the manner specified and the observance and performance of the covenants, terms, and conditions hereof on the part of the Lessee to be observed and performed, the Lessee shall have, hold, possess, and enjoy the demised premises for the term demised, without hindrance or interruption by the Lessor or any other person or persons lawfully claiming by, through, or under it.

35. Surrender. At the end of the term or other sooner termination of this lease, the Lessee may remove all Lessee constructed or installed improvements and property shall peaceably deliver unto the Lessor possession of the demised premises, together with all other improvements existing or constructed thereon unless provided otherwise in this lease. All costs of removing such improvements will be borne solely by the Lessee. Furthermore, upon the expiration, termination, or revocation of this lease, should the Lessee fail to remove any and all of the Lessee's personal property from the premises, the Lessor may remove any and all personal property from the premises

and either deem the property abandoned and dispose of the property or place the property in storage at the cost and expense of the Lessee, and the Lessee shall pay all costs and expenses for the disposal, removal, or storage of the personal property. This provision shall survive the expiration or earlier termination of this lease.

36. Non-warranty. The Lessor does not warrant the conditions of the leased premises, as the same is being leased as is.

37. Covenant against discrimination. Lessee shall not use the Premises, nor permit the Premises to be used in support of, any policy that unlawfully discriminates against anyone based upon race, color, national origin, sex, age, or disability, or any other class as protected under applicable federal or state law. Lessee shall not practice any unlawful discrimination based upon race, color, national origin, sex, age, or disability, or any other class as protected under applicable federal or state law.

38. Hunting. No hunting shall be allowed on the demised premises during the term of this lease, provided however, the lessee may employ management practices in accordance with any applicable laws, rules, regulations, and ordinances to eliminate, manage and control invasive species. Lessee shall not charge any fees to implement or receive payment in connection with said management practices.

39. Boundary stakeout. The Lessor shall not be responsible or liable for surveying and boundary stakeout of the demised premises; the Lessee shall be solely responsible for any survey and boundary stakeout of the demised premises.

40. Setback requirements. Building setback lines shall be in accordance with applicable county ordinances and rules.

41. Drainage easements. The demised premises shall be subject to drainage and flowage easements as applicable. An easement area shall not be altered or used for any purposes which may obstruct flow or reduce the effectiveness of the drainageway. The Lessee shall accept the storm runoff draining into and through the easement area and shall be responsible for the maintenance and protection of the drainage easements against deterioration or loss of functional effectiveness.

42. Roadway and utility easements. The demised premises shall be subject to roadway and utility easements as applicable, which easements shall be in favor of property owners served by the easements; provided that the Lessee may cross the easements at any point; provided further that the Lessee shall be responsible for maintenance of the easements.

43. Compliance with laws. The Lessee shall comply with the requirements of all federal, state, and county authorities and observe all federal, state, and county

laws, ordinances, and rules pertaining to the premises which are now in force or later may be in force.

44. Interpretation. The use of any gender shall include all genders. If there is more than one Lessee, all words used in the singular shall extend to all Lessees. The paragraph headings in this lease are for convenience and are not intended to construe the intent or the meaning of any of the provisions.

45. Hazardous materials. (a) The Lessee shall not use, generate, manufacture, treat, handle, refine, produce, process, store, discharge, release, dispose of, or allow to exist on, within, under, or about the premises any hazardous materials, except in full compliance with all applicable hazardous materials laws. If the Lessee at any time becomes aware of any past, present, or contemplated hazardous discharge or of any hazardous materials claims with respect to the premises which could subject the Lessor, the Lessee, any mortgagee, or the premises to any liability or restrictions on ownership, occupancy, transferability, or use of the premises under any hazardous materials laws, the Lessee shall immediately advise the Lessor thereof in writing and provide to the Lessor such detailed reports thereof as may be reasonably requested by the Lessor. The Lessor shall have the right, in its sole discretion, to join and participate in, any settlements, remedial actions, or legal proceedings or

actions initiated with respect to any hazardous materials claims.

(b) The Lessee shall be responsible for and shall indemnify, defend, and hold harmless the Lessor and its employees, agents, successors, and assigns from and against any loss, damage, cost, expense, or liability directly or indirectly arising out of or attributable to the past, present, or future use, generation, manufacture, treatment, handling, refining, production, processing, storage, release, threatened release, discharge, disposal, or presence of hazardous materials on, under, or about the premises, including, without limitation: (1) all foreseeable and unforeseeable consequential damages; (2) the costs of any required or necessary repair, clean-up, or detoxification of the premises and of the preparation and implementation of any closure, remedial, or other required plans; (3) the costs of the Lessor's investigation and handling of any hazardous materials claims, whether or not any lawsuit or other formal legal proceeding shall have been commenced with respect thereto; (4) the costs of the Lessor's enforcement of this covenant, whether or not a lawsuit is brought therefor; and (5) all reasonable costs and expenses incurred by the Lessor in connection with clauses (1), (2), (3), and (4) including, without limitation, reasonable attorney's fees. Nothing in this section shall waive any rights of the

Lessee against any prior Lessee in possession of the demised premises, should any hazardous waste be found.

(c) The provisions of this paragraph shall survive the expiration or earlier termination of this lease.

46. Hazardous waste evaluation. Prior to the termination of the lease, Lessee, at its sole cost and expense, shall conduct a Level One (1) Hazardous Waste Evaluation and conduct a complete abatement and disposal, if necessary, satisfactory to the standards required by the federal Environmental Protection Agency and the Department of Agriculture. The termination will not be approved by the Board of Agriculture or Department of Agriculture unless this evaluation and abatement provision has been executed.

47. Commercial operations. The board has the sole discretion to allow commercial agricultural operations for the processing, marketing, and displaying of agricultural crops or commodities, which may include any product created through value-added processes. The commercial activity may sell to the general public provided that the operations shall be owned and operated by a Lessee in good standing with the department, provided that: (1) The demised premises shall be developed and development previously approved by the department; (2) The Lessee shall derive the majority of the lessee's annual gross income from the cultivation of agricultural commodities on

the demised premises; and (3) All products for sale from the premises must have at least fifty percent of its contents made from commodities cultivated, grown, or produced on the demised premises.

48. Abandoned vehicles. Lessee shall take all steps necessary to prevent the placing or storing of abandoned vehicles within the premises. Any and all abandoned vehicles within the premises shall be removed by Lessee at Lessee's cost and expense.

49. Boundary fences. The Lessee shall, install stockproof fence in accordance with the schedule set forth in the approved P.U.D. The Lessee shall maintain these fences in good order and condition throughout the term of this lease and those now existing on the premises. The Lessee shall, wholly at its own cost and expense, stake out the boundaries wherever necessary in conformance with the legal descriptions provided in this lease.

50. Partial invalidity. If any term, provision, covenant or condition of this lease should be held to be invalid, void or unenforceable, the remainder of this lease shall continue in full force and effect and shall in no way be affected, impaired or invalidated thereby.

51. Incorporation; amendments. Lessee expressly acknowledges and agrees that Landlord has not made and is not making, and Lessee, in executing and delivering this Lease, is not relying upon, any warranties, representations, promises or statements, except to the

extent that the same are expressly set forth in this Lease. All understandings and agreements heretofore made between the parties are merged in this Lease, which alone fully and completely express the agreement of the parties and which are entered into after full investigation, neither party relying upon any statement or representation not embodied in this Lease.

This Lease may be amended and the provisions modified only by instruments in writing executed by Lessor and Lessee.

52. Hawaii law. This lease shall be construed, interpreted, and governed by the laws of the State of Hawaii.

DEFINITIONS

As used in this lease, unless the context otherwise requires:

"Chairperson" means the Chairperson of the Board of Agriculture.

"Corporate successor" means a solely owned corporation which, through an assignment of lease, succeeds a non-agricultural park lessee who shall own all of the stock issued by and be the principal officer of the corporation.

"Diversified agriculture" means the conduct of activities concerned with the production and marketing of nursery products and horticultural crops such as vegetables, melons, orchards, flowers, foliage, and

others, including activities related thereto, and shall include aquaculture, but shall not include any livestock or poultry operations.

"Drainage easements" and "flowage easements" mean natural or improved drainage courses that serve to convey stream flows or run-off from one point to another.

"Hazardous discharge" means any event involving the use, deposit, disposal, spill, release, or discharge of any hazardous materials on, within, or under the premises.

"Hazardous materials" means and includes any and all flammable explosives, radioactive materials, asbestos, petroleum and oil and their products, organic compounds known as polychlorinated biphenyls, chemicals known to cause cancer or reproductive toxicity, pollutants, contaminants, hazardous wastes, toxic substances or related materials, and any and all other substances or materials defined as or included in the definition of "hazardous substances," "hazardous wastes," "hazardous materials," and/or "toxic substances" under or for the purposes of the hazardous materials laws.

"Hazardous materials claims" means and includes: (i) any and all enforcement, clean-up, removal, mitigation, or other governmental or regulatory actions instituted or, to the best of the Lessee's knowledge, contemplated or threatened, with respect to the premises pursuant to any hazardous materials laws, and (ii) any and all claims made or, to the best of the Lessee's knowledge, contemplated or

threatened by any third party against the Lessee or the premises seeking damages, contribution, cost recovery, compensation, injunctive relief, or other relief resulting from any hazardous discharge or from the existence of any hazardous materials on, within, or under the premises.

"Hazardous materials laws" means and includes all federal, state, and local laws, ordinances, and regulations now or hereafter in effect relating to environmental conditions, industrial hygiene and/or hazardous materials on, within, under, or about the premises, including, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. §9601, et seq., the Resource Conservation and Recovery Act, 42 U.S.C. §6901, et seq., the Hazardous Materials Transportation Act 49 U.S.C. §1801, et seq., the Clean Water Act, 33 U.S.C. §1251, et seq., the Clean Air Act, 42 U.S.C. §7401, et seq., the Toxic Substances Control Act, 15 U.S.C. §§2601 through 2629, the Safe Drinking Water Act, 42 U.S.C. §§300f through 300j, the Emergency Planning and Community Right-To-Know Act, 42 U.S.C. §§11011 through 11050, the Environmental Response Law, Chapter 128D, Hawaii Revised Statutes, and any similar state or local laws, ordinances, and the regulations now or hereafter adopted, published, and/or promulgated pursuant thereto.

"Holder of record of a security interest" means a person who is the owner or possessor of a security

interest in the land demised and who has filed a copy of the interest with the Department of Agriculture and with the Bureau of Conveyances.

"Institutional lender" means a federal, state, or private lending institution licensed to do business in the State and that make loans to qualified applicants under this lease on the basis of a lease awarded pursuant to Chapter 166, Hawaii revised Statutes for security, in whole or in part, together with any other entity that acquires all or substantially all of an institutional lender's loan portfolio.

"Invasive species" means any organism which may include (but not limited to) plant, animal, fungus, or bacterium, that has negative effects that threaten biodiversity by causing disease, acting as predators or parasites, acting as competitors, altering habitat, and/or hybridizing with local species, likely causing harm to the economy, environment and/or human health thereby affecting the agricultural industries of the State of Hawaii, as determined and so designated from time to time by the Department of Agriculture. The term shall also include any and all noxious weeds, as that term is defined herein, regardless of whether the noxious weed is native to Hawaii or not.

"Lessee" includes the Lessee, its heirs, personal representatives, executors, administrators, successors, or permitted assigns.

"Making a loan" means lending of new money or the renewal or extension of indebtedness owing by a qualified applicant to an institutional lender, after June 30, 2006.

"Noxious weed" means any plant species which is injurious, harmful, or deleterious or which may be likely to become so to the agricultural industries of the State of Hawaii, as determined and so designated from time to time by rule of the Department of Agriculture.

"Premises" or "demised premises" includes the land hereby demised and all buildings and improvements now or hereinafter constructed and installed thereon.

"Security interest" means any interest created or perfected by a mortgage, assignment by way of mortgage, or by a financing statement and encumbering a lease, land demised by the lease, or personal property located at, affixed or to be affixed to, or growing or to be grown upon the demised land.

"Special Equestrian Activities" shall mean the raising, keeping, care, breeding, training buying, selling and showing of equine animals.

"Waste" includes (1) permitting the premises or any portion thereof to become unduly eroded or failure to take proper precautions or make reasonable effort to prevent or correct same; (2) permitting any material increase in noxious weeds in uncultivated portions thereof; (3) failure to employ all of the usable portions of the

demised premises; and (4) abandonment of the demised premises.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed this _____ day of _____, 20____.

APPROVED AS TO FORM: STATE OF HAWAII
DEPARTMENT OF AGRICULTURE

Deputy Attorney General

Chairperson, Board of Agriculture
LESSOR

"NAME"

"NAME"

LESSEE

STATE OF HAWAII

)

) SS.

COUNTY OF _____

)

On _____, before me personally
appeared _____, to me known to
be the person described in and who executed the foregoing
instrument and acknowledged that he executed the same as
his free act and deed, in his capacities set forth herein.
By my signature below, I further certify that the above-
named executed this _____ page document dated _____
entitled General Lease No. _____ in the _____ Circuit of
the State of Hawaii and that this acknowledgement is
deemed to include my Notary Certification.

(PRINT/TYPE NAME OF NOTARY PUBLIC AS REQUIRED UNDER HAWAII LAW)

Notary Public, State of Hawaii

My commission expires: _____

EXHIBIT "A"

GENERAL LEASE NO.

Lessor: STATE OF HAWAII, by its BOARD OF AGRICULTURE

Lessee:

Term: Thirty-five (35 years commencing _____ and ending on _____)

The real property in the foregoing Lease demised, being more particularly described as follows:

EXHIBIT "B"

EXHIBIT "C"

**DEPARTMENT OF AGRICULTURE
ASSIGNMENT OF LEASE EVALUATION POLICY**

1. Reference

§4-153-33(a)(6), effective February 22, 1999, reads in part:

“Prior to the approval of any assignment of lease permitted by this section, the board shall have the right to review and approve the consideration to be paid by the assignee and may condition its consent to the assignment of lease on payment by the lessee of a premium based on the amount by which the consideration for assignment, whether by cash, credit or otherwise, exceeds the depreciated cost of improvements and trade fixtures being transferred to the assignee; provided further that in the event of foreclosure or sale, the premium, if any, shall be assessed only after the encumbrances of record and any other advances made by the holder of a security interest are paid; provided further that the board may adjust the base and additional rental pursuant to the method outlined in section 4-153-18(d);”

2. Qualifying Leases

This policy shall be applicable to the subject lease.

3. Prior Approval

Prior to giving its consent to an assignment, the Department of Agriculture (DOA) must receive (i) the name, legal composition and address of any proposed assignee, (ii) a complete copy of the purchase agreement and the proposed assignment agreement, including the total consideration to be paid by the assignee for the assignment whether by cash, credit or otherwise, and (iii) the best available financial statement or balance sheet no older than 1 year prior to date of purchase agreement of the proposed assignee or any other such statement, audited or certified as correct by a financial officer of the proposed assignee.

Assignments of lease shall not be entered into until the Attorney General has reviewed the proposed assignment and the Board of Agriculture (Board) has given its approval. Such assignments shall be entertained only if they meet the criteria set forth in §§4-153-33(a)(5) and (6), HAR.

4. Qualifications of Assignee

If qualification was required of a lessee as a pre-condition of the lease, the prospective assignee must also be qualified to assume the lease.

5. Consideration to be Paid

Prior to review by the Attorney General and approval by the Board, the lessee (assignor) must present with written evidence of the consideration to be paid by the assignee and any other cost data that the state may require.

6. Payment of Premium

The rule permits the state to receive from the lessee (assignor) a premium based on the amount by which the consideration for the assignment, whether by cash, credit, or otherwise, exceeds the depreciated cost of improvements and trade fixtures being transferred to the assignee. The value of the inventory of merchandise and any other tangible assets in the sale of a business shall be deducted from the consideration paid. The appropriate cost index is then applied to determine the adjusted depreciated cost.

All lessees shall be required to furnish the state with the actual costs of construction of all improvements and renovations within 30 days after its completion as well as the purchase costs of all trade fixtures acquired for the lessee's operation on the premises within 30 days after evidence of the actual costs by copy of the construction contract, receipts or otherwise. Lessees shall also be required to furnish an inventory of all personal property placed on the premises. Records of all costs incurred by the lessee for construction of improvements or renovations as well as trade fixtures submitted by the lessee shall be maintained in the lease file and shall include the Construction Cost Index for Apartments, Hotels, Office Buildings (CCI) and the Honolulu Consumer Price Index for All Urban Consumers (CPI) as published by the U.S. Department of Labor, Bureau of Labor Statistics for the year construction is completed.

The replacement cost for improvements or renovations is calculated by using the CCI for the evaluation year divided by the CCI for the year in which the improvements or renovations were completed (base year). The result is then multiplied by the original cost of the improvements or renovations. For trade fixtures, the cost is similarly calculated by using the CPI for the purchase year (base year) and the evaluation year.

Depreciation of improvements and trade fixtures will be determined on a straight line basis. Depreciation of improvements or renovations will be determined in the same proportion that the expired term of the improvements or renovations bear to the whole term. The whole term will be from the date the construction of the improvements or renovations are completed until the termination date of the lease. Depreciation of trade fixtures will be determined in the same manner, except that the whole term will be the anticipated life of the trade fixture.

The premium will be a maximum of 50% of the excess. The percentage will decrease by 5% after every 5 years of the term has elapsed in accordance with Schedule C. The sliding scale will encourage long term occupancy and prevent speculation as well as recognize the investment, effort, and risk of the lessee. Only in cases where the lessee has essentially constructed or directed the construction of its own improvements, may the lessee be given the option of paying for an appraiser, but to be selected by the state, to determine the valuation of the improvements. Schedule D attached provides a typical example of the evaluation calculations using Schedule A to calculate the replacement cost for improvements or renovations and depreciation, Schedule B to calculate the cost and depreciation for trade fixtures, and Schedule C to obtain the premium percentage.

7. Non-qualifying Deductions

The statute only recognizes tangible items. Intangibles such as “goodwill,” business name recognition, etc., are not deductible.

8. Subsequent Assignments

If the consideration for any subsequent assignment includes the purchase of existing tenant owned improvements, the evaluation will be conducted in a similar manner as the first assignment. An example is shown on Schedule E.

Using Schedule E, the consideration the assignor paid less included inventory and any premiums will be used to obtain the adjusted depreciated cost of improvements and trade fixtures. Also, the base year is redefined to be the date the assignor received the Consent of the Board to occupy the premises. The holding period (redefined base year to assignment date), or actual occupancy of the assignor, is used in place of the “expired term” when calculating depreciation. Depreciation will be calculated by dividing the holding period by the whole term of the lease (the whole term will remain unchanged).

The change in the CCI will be reflected by comparing the CCI for the redefined base year to the most current CCI.

The holding period will be the basis for determining the appropriate premium percentage. Subtracting the included inventory and any premiums from the consideration the assignor paid will result in a reassessment of the market value of the improvements. If additional improvements were constructed by the assignor, they will be treated in the same manner as improvements constructed by an original lessee.

The excess of subtracting the adjusted depreciated consideration the assignor paid and the adjusted depreciated cost of additional improvements, if any, from the

consideration the assignor received will be used against the appropriate premium percentage to determine the amount payable to the state.

9. Rights of Holders of Security Interest

In the event of foreclosure or sale, the premium, if any shall be assessed only after the encumbrances of record and any other advances made by the holder of a security interest are paid. In the event of foreclosure or sale, the premium, if any shall be assessed only after the encumbrances of record and any other advances made by the holder of a security interest are paid.

10. State-owned Improvements

When state-owned improvements are included in the leased premises, improvement renovation requirements shall be recognized as being tenant-owned improvements for evaluation in the policy.

In other words, the total expenditure of the lessee to fulfill the requirement would be treated as though a new improvement was constructed.

SCHEDULE A. Adjusted Depreciated Cost of Improvements or Renovations

1. Adjusted Cost of Improvements or Renovations.
Multiply the actual cost of the improvements or renovations by the most recent U.S. Construction Cost Index for Apartments, Hotels, Office Buildings (CCI)* and divide the result by the CCI of the year construction was completed (Base Year) to get the adjusted cost of improvements or renovations.
2. Depreciation.
Determine the depreciation percentage on a straight-line basis by dividing the expired term of the improvements or renovations by the whole term of the improvements or renovations, the whole term beginning on the date the improvements or renovations are completed to the expiration date of the lease. Multiply the adjusted cost of the improvements or renovations by the depreciation percentage to determine the depreciation.
3. Depreciated Cost of Improvements or Renovations.
Subtract the depreciation from the adjusted cost of improvements or renovations. The balance is the depreciated cost of improvements or renovations.

*As published by the U.S. Department of Labor, Bureau of Labor Statistics

Example:	Actual cost:	\$500,000
	CCI (most recent):	121.1
	CCI (base):	102.3
	Expired term:	57 mos.
	Whole term:	408 mos.

1. Adjusted Cost of Improvements or Renovations:

$$\text{Actual Cost} \times \text{CCI (most recent)} / \text{CCI (base)}$$
$$\$500,000 \times 121.1 / 102.3 = \$591,887$$
2. Depreciation:

$$\$591,887 / 408 \text{ mos.} \times 57 \text{ mos.} = \$82,690$$
3. Adjusted Depreciated Cost of Improvements or Renovations:

$$\$591,887 - \$82,690 = \underline{\$509,197}$$

SCHEDULE B.**Adjusted Depreciated Cost of Trade Fixtures****1. Adjusted Cost of Trade Fixture.**

Multiply the actual cost of the improvements or renovations by the most recent Honolulu Consumer Price Index for All Urban Consumers (CPI)* and divide the result by the CPI of the year in which the purchase was made (base year).

2. Depreciation.

Determine the depreciation percentage on a straight-line basis by dividing the expired term of the trade fixture by its anticipated life. Multiply the adjusted cost of the trade fixture by the depreciation percentage to determine the depreciation.

3. Depreciated Cost of Trade Fixtures.

Subtract the depreciation from the adjusted cost of the trade fixture. The balance is the depreciated cost of the trade fixture.

*As published by the U.S. Department of Labor, Bureau of Labor Statistics

Example:**Refrigerator**

Actual cost:	\$1,510
CPI (most recent):	118.1
CPI (base):	104.6
Expired term:	57 mos.
Whole term (Anticipated Life)	96 mos.

1. Adjusted Cost of Trade Fixture:

Actual Cost x CPI (most recent) / CPI (Base Year)

$$\$1,510 \times 118.1 / 104.6 = \$1,705$$

2. Depreciation:

$$\$1,705 / 96 \text{ mos.} \times 57 \text{ mos.} = \$1,012$$

3. Adjusted Depreciated Cost of Trade Fixture:

$$\$1,705 - \$1,012 = \$693$$

SCHEDULE C.**Premium Percentages**

1. For the first 5 years, the premium is 50% of the amount by which the consideration for the assignment, whether by cash, credit, or otherwise, exceeds the depreciated cost of improvements and trade fixtures being transferred to the assignee. The percentage will decrease by 5% after every 5 years of the total term has elapsed.

<u>Years</u>	<u>Percentage</u>
1 - 5	50%
6 - 10	45%
11 - 15	40%
16 - 20	35%
21 - 25	30%
26 - 30	25%
31 - 35	20%
36 - 40	15%
41 - 45	10%
46 - 50	5%
51 and over	0%

As an example, if a 55 year lease was assigned after 57 months, the premium percentage would be 50%. If the assignment occurs after 130 months (10+ years), the percentage would be 40%.

2. The Board may impose a ten percent (10%) surcharge if the assignor has not performed lease covenants to improve or use the property.

SCHEDULE D. Assignment of Lease Calculations

1. Subtract from the consideration for the assignment that amount, if any, that is attributable to inventory.
2. Calculate the Adjusted Depreciated Cost of Improvements or Renovations (see Schedule A)
3. Calculate the Adjusted Depreciated Cost of Trade Fixtures (see Schedule B).
4. Calculate the amount by which the consideration for the assignment, whether by cash, credit, or otherwise, exceeds the depreciated cost of improvements and trade fixtures being transferred to the assignee by subtracting the amounts derived by nos. 2 and 3 from the amount in no. 1 above.
5. Determine the appropriate premium percentage (see Schedule C). multiply by the excess, if any, derived by no. 4.

Example:

A lease is being assigned 57 months after completion of the improvements at a consideration of \$600,000.

The initial cost of the improvements was \$500,000 while the current year CCI and base year CCI were 121.1 and 102.3, respectively. The whole term for the improvements is 408 months.

For the trade fixtures, the initial cost was \$1,510 with the current year CPI and base year CPI being 118.1 and 102.3, respectively. The total life expectancy is 96 months.

1.	Net Consideration:		\$600,000
2.	Adj. Cost Imp/Ren:	\$591,887	
	Depreciation:	<u>- 82,690</u>	
3.	Adj. Cost Imp/Ren:		-509,197
	Adj. Cost Trade Fixture:	1,705	
	Depreciation:	<u>- 1,012</u>	
	Adj. Dep Cost Trade Fixtures:		<u>- 693</u>
4.	Excess:		90,110
5.	Premium:	Percentage: 50%	\$45,055

SCHEDULE E. Subsequent Assignment of Lease Calculations

1. Subtract from the consideration the assignor received for the assignment that amount, if any, that is attributable to inventory to derive the net consideration received.
2. Subtract from the consideration the assignor previously paid for the assignment that amount, if any, that was attributable to inventory. Also, subtract from the consideration the assignor previously paid for the assignment that amount, if any, that was attributable to premiums. The net consideration paid is now defined to be the value of improvements as of the date of the occupancy by the assignor.
3. Using the result from no. 2, calculate the Adjusted Depreciated Value of Improvements or Renovations (see Schedule A).
4. Subtract the amount derived by no. 3 from the amount in no. 1 to determine the amount by which the consideration received for the assignment, whether by cash, credit, or otherwise, exceeds the adjusted depreciated value of improvements being transferred to the assignee.
5. Determine the appropriate premium percentage (see Schedule C). Multiply by the excess, if any, derived by no. 4.

Example:

An assignor is assigning a lease 107 months after receiving the consent of the Board. Occupancy or the holding period is defined to be 107 months. The consideration received is \$1,000,000.

The consideration paid by the assignor was \$600,000 while the current year CCI and redefined base year CCI were 156.4 and 121.1, respectively. The whole term was 408 months.

No inventory was included in either consideration. However, a premium of \$45,055 was paid to the state by the previous occupant from the \$600,000 consideration.

1.	Net Consideration Received:		\$1,000,000
2.	Consideration Paid:	\$600,000	
	Premium:	<u>- 45,055</u>	
	Net Consideration <u>Paid</u> :		\$554,945
3.	Adj. Value Consideration (improvements):		
	\$554,945 x (156.4 / 121.1):		\$716,708
	Depreciation:		
	\$716,708 x (107 mos. / 408 mos.):	<u>- 187,960</u>	
	Adj. Depreciated Value Consideration:		<u>- 528,748</u>
4.	Excess:		471,252
5.	Premium:	Percentage: 45%	\$212,063