

David Y. Ige  
Governor

Eduardo P. Manglallan  
Chair

## ALOHA TOWER DEVELOPMENT CORPORATION

79 S. Nimitz Highway, Honolulu, Hawai'i 96813-4898 | (808) 587-3651

IN REPLY REFER TO: **ATDC 22-0029**

November 30, 2022

The Honorable Ronald D. Kouchi,  
President and Members of the Senate  
31st State Legislature  
State Capitol, Room 409  
Honolulu, Hawai'i 96813

The Honorable Scott K. Saiki,  
Speaker and Members of the House of  
Representatives  
31st State Legislature  
State Capitol, Room 431  
Honolulu, Hawai'i 96813

Dear President Kouchi, Speaker Saiki, and Members of the Legislature:

For your information and consideration, I am transmitting a copy of the 2022 Aloha Tower Development Corporation's Annual Report as required by Section 206J-19, Hawai'i Revised Statutes. In accordance with Section 93-16, Hawai'i Revised Statutes, I am also informing you that the report may be viewed electronically at <https://hidot.hawaii.gov/library/reports/reports-to-the-legislature/>.

Sincerely,

EDUARDO P. MANGLALLAN  
Chairman, Aloha Tower Development  
Corporation, and Deputy Director, State of  
Hawai'i, Department of Transportation

## **2022 Aloha Tower Development Corporation Annual Report**

This Report is Prepared and Submitted Pursuant to Section 206J-19, Hawai'i Revised Statutes  
Submitted by:

**The Department of Transportation,  
Harbors Division**

**November 30, 2022**

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On behalf of the Aloha Tower Development Corporation (ATDC) Board of Directors and staff, I am pleased to present ATDC's 2022 Annual Report.

2021 was a time of learning to work with the COVID-19 pandemic while still keeping each other safe. By the start of 2022 we were successfully working with the restrictions COVID-19 presented and thus we could start making steps toward the future rather than mitigate the present. In May of 2021 ATDC convened its first public meeting in nearly four years. In 2022 we continued these meetings monthly so that the Board could be better educated and equipped to make decisions for the future of Aloha Tower Marketplace.

The Chairman of the ATDC Board as directed by law is the DOT Harbors Division's Deputy Director Eduardo Manglallan. Board members include: The Department of Business, Economic Development and Tourism Director Mike McCartney; The Department of Land and Natural Resources designee, First Deputy Director Robert Masuda; Hawai'i State Senate appointee, Mr. Anthony Paresa; and Hawai'i State House of Representatives appointee, Ms. Nalani Kealaiki. The five-member Board has met monthly since its first meeting in May 2021 and have heard from entities such as Garden Art, LLC which is interested in commercial development in Piers 10 and 11, Hawai'i Pacific University (HPU) which continues to host special events at the Aloha Tower Marketplace (ATM), and Harbors 808 LLC which expressed interest in the construction of a multi-use commercial facility at Piers 5 and 6, which includes mechanical parking. In 2022 we began to lay the groundwork for these various entities to pursue their visions of the area.

DOT Harbors Division Administration has conducted a wall-to-wall HAZMAT survey of the old DOH Building at Pier 2 with a follow-on design that's ongoing to accommodate the move of Harbors Division Administration from Pier 11. When the current Administration Building is vacated, we can exchange the parking stalls at Irwin Park for the Pier 11 parking stalls to keep the Parking License Agreement intact between ATDC & HPU. The vacated Administration Building can then be leased to interested parties who may then beautify the waterfront area and restore Irwin Park to its original state, with some aesthetic improvement, as a gathering place.

As the economy slowly recovers from COVID-related fiscal constraints, ATDC continues to meet with and consider proposals from parties interested in commercial development within the Pier 10 and 11 structure and new commercial development at Piers 5 and 6, including construction of a new multi-purpose commercial facility that would include mechanical parking. Plans to restore Irwin Park back to a recreational and botanical area have been delayed to an indeterminant time in the future pending the vacating of Pier 11.

Our HPU neighbor has experienced its own setbacks during the pandemic. But after the Governor's Emergency Proclamation was relaxed, with numerous enhanced health and safety measures, HPU can continue where it left off prior to the pandemic with a 10% enrollment increase in 2022. HPU continues to dialogue with the ATDC about future outdoor events that will increase attraction to the Marketplace and once again liven up the area.

As 2022 comes to a close, we at ATDC, like the rest of the State, are optimistic that economic stability will return in the foreseeable future and that developers will resume once again creating a community gathering place at the Aloha Tower Complex.



EDUARDO P. MANGLALLAN  
Chairperson



## **MISSION STATEMENT**

Strengthen the international economic base of the community in trade activities;

Enhance the beautification of the waterfront;

Improve modern maritime uses in concert with the Department of Transportation; and

Provide for public access and use of the waterfront property.

## **BOARD OF DIRECTORS**

**Pursuant to Section 206J-4, Hawai'i Revised Statutes (HRS), the board shall consist of five voting members:**

Chairperson

The Deputy Director of the Department of Transportation, Harbors Division;

The Director of the Department of Business, Economic Development and Tourism, or the director's designee;

The Chairperson of the Board of Land and Natural Resources, or the chairperson's designee;

One member appointed by President of the Senate; and

One member appointed by the Speaker of the House of Representatives.

## ALOHA TOWER COMPLEX AND PROJECT AREA

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*ATDC is statutorily mandated to redevelop, renovate, and/or improve the Aloha Tower Complex and Project Area. The objective is to integrate development components within the area that will stimulate and enhance the commercial aspects and social events in the downtown business district. At the same time, ATDC seeks to transform the waterfront's urban core into a "people place" while being fully aware of and complementary with the demands of Honolulu Harbor's important maritime activities. In addition, new development in the area together with the infusion of capital in construction projects will further stimulate the local economy and provide many new jobs. It is believed that there is great opportunity to revitalize the Marketplace with additional attractions that will help transform the area to a gathering place that it once was and even beyond.*

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A 2050 Honolulu Harbor Master Plan, which was to be completed in 2021, remains under development due to delays created by COVID-19. The final Planning Advisory Committee was held on November 3, 2022 and review/signature by the Governor before December 5, 2022. While the final plan will not be ready for public dissemination for several more months, it will propose revitalization concepts for areas designated for non-maritime use, such as the Aloha Tower Complex and Project Area. More specifically, the plan will consider commercial opportunities, needs of the adjacent business district, and cultural history of the area. Additionally, the plan will provide concepts for a multipurpose commercial facility at Piers 5 and 6. ATDC will work closely with HPU to address opportunities at Piers 5 and 6 to address a pressing need for student housing.

Addressing the parking needs of the Aloha Tower Marketplace is an integral part of developing the property. While the pandemic resulted in a pause to discussions regarding the development of its properties, ATDC has been discussing alternatives in providing parking including transforming parking at Irwin Park into green space to complement the interests of the business entity and HPU's needs for student housing.

Cruise ships are slowly coming back after the lengthy no sail order by the Centers for Disease Control and Prevention. Cruise ships continue to dock at Piers 10 & 11 when Pier 2 is occupied.

In the past year we hired a temporary Engineer III to oversee improvements to Aloha Tower Drive, surrounding parking areas, and roadways. The areas mentioned were in poor condition as roots from the monkey pod tree were uplifting the concrete curbs, gutters and parking pavement creating trip and fall hazards for Marketplace patrons. Per the lease agreement with HLRP/HPU the lessee was given the opportunity to make the necessary improvements themselves, which they accepted, allowing our Engineer to act as a liaison and manager of the project. When steps are made toward the redevelopment of the Marketplace it may be useful to bring on a member to the ATDC team in a similar capacity.

## ALOHA TOWER MARKETPLACE

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*Hawai'i Lifestyle Retail Properties LLC, a wholly owned subsidiary of HPU, assumed the rights to the Marketplace in 2011. The upper levels of the Marketplace are used for student housing. The lower levels are a mixture of classrooms, school activities centers, restaurants, and retail merchants. HPU manages all retail spaces within the Marketplace, which includes securing tenants, executing lease agreements, maintenance, and security.*

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HPU was required to cease all in-person instruction and shifted all its curriculum online. While the university was able to successfully transition its students from the classroom to remote learning, the stay-at-home order mandated the closure of non-essential businesses that were operating at the Marketplace. At that time, this included the closure of nearly all the Marketplace's merchants. As a result of these mandated closures, HPU experienced a decline in rental income and parking revenue. Furthermore, HPU was required to cancel planned events that led to further losses.

As the world learned to better work with the COVID-19 pandemic, HPU saw increases to its student body. From Fall 2021 to Fall 2022, student enrollment increased 10% from 4,596 to 5,070. This trend is encouraging as ATDC discusses possible student housing as a part of the multi-commercial facility at Piers 5 and 6.

In 2022 HLRP/HPU and ATDC worked together to hold events at the Marketplace ranging from concerts to a night market. These events were a collaborative event not just between HLRP/HPU and ATDC but also the third-party event organizers, the Department of Transportation Harbors Division, and HPD. Purposes of these events were to offer recreation to Hawai'i residents with the by-product of increasing foot traffic and providing opportunities for HPU/HLRP and ATM tenants to increase exposure.

## Agreement Regarding Aloha Tower Pier Repairs

### Background

On September 29, 1993, Aloha Tower Development Corporation ("ATDC") and Aloha Tower Associates Pier 7, 8 and 9 Limited Partnership ("ATA 7, 8 and 9"), entered into a 65-year lease for the Aloha Tower Complex. Please see section 2.2., Terms of this Marketplace Lease. (Exhibit "1")

On June 29, 2010, the Department of Transportation ("DOT") and Ahi Aloha Associates ("AHI") entered into an agreement entitled "Agreement Regarding Aloha Tower Pier Repairs." Under this agreement AHI (which was preceded by ATA 7,8 and 9 on the lease) was obligated to pay DOT \$3,500,000.00 for pier repairs DOT performed for AHI. Please see "Pier Apron Repairs" on page 2 (Exhibit "2").

On April 11, 2011, AHI sold its interests and obligations to Hawai'i Lifestyle Retails Properties LLC ("HLRP") the business arm of Hawai'i Pacific University ("HPU"). The sales included the \$3,500,000 that HLRP/HPU was obligated to pay the DOT.

On October 30, 2014, the "Successor Memorandum of Understanding" was entered into by and among HLRP, DOT and the ATDC, wherein the following language is found on Page 7, Line Item 12:

"The parties hereto agree that in consideration of the ATDC undertaking to issue any Renewed Leases, HLRP shall pay to DOT the sum of One Million Seven Hundred Fifty Thousand and No/100 Dollars (\$1,750,000.00) on or before December 31, 2021, to satisfy AHI's obligation under that certain Agreement Regarding Aloha Tower Pier Repairs, dated June 29, 2010. This obligation is binding upon and shall inure to the benefit of the parties hereto and their respective heirs, executors, administrators and successor and assigns... " (Exhibit "3").

The above provision was entered into by the parties to give HLRP/HPU the option of paying DOT \$1,750,000.00 by December 31, 2021, to satisfy the full \$3,500,000.00 that DOT had expended for pier repairs to the benefit of HLRP/HPU. Payment of the \$1,750,000.00 would have obligated ATDC to renew the present lease to HLRP/HPU.

#### Chronology of Communications

On November 30, 2021, Derek Chow, Deputy Director of DOT and Chairman of the Board of ATDC, emailed Brooke Carroll, HPU's Vice President of Advancement, to inform her that HPU was obligated to pay DOT \$1,750,000.00 by December 31, 2021, if HPU wanted to renew the present lease. (Exhibit "4").

On December 3, 2021, VP Carroll emailed ATDC and DOT, stating that HPU was not obligated to pay the \$1,750,000.00 by December 31, 2021 to renew the lease. No cogent reason was given (Exhibit "4").

On January 13, 2022, Ed Manglallan, Deputy Director of DOT Harbors and Chairman of the Board of ATDC, wrote to VP Carroll, reminding her that HPU was obligated to pay DOT \$1,750,000.00 by December 31, 2021, if HPU wanted to renew the present lease but was extending the payment date to January 31, 2022 (Exhibit "5").

On February 25, 2022, Ronald Amemiya, ATDC Program Specialist, followed up and wrote to VP Carroll, reminding her of HPU's obligation to pay the \$1,750,000.00 in order to renew the present lease. And, further that ATDC was interpreting the non-payment to mean HPU was not intending to renew the lease. Just to be safe, HPU was given until March 11, 2022 to respond. (Exhibit "6").

On April 6, 2022, Mr. Amemiya again wrote to VP Carroll and stated that since HPU did not respond to ATDC's March 11, 2022 deadline to pay the \$1,750,000.00 or repay in any way, ATDC had to assume that HPU did not intend to renew the lease. (Exhibit "7").

On April 12, 2022, VP Carroll still questioned HPU's obligation to pay the \$1,750,000.00 in order to renew the lease. (Exhibit "8").

On April 14, 2022, Mr. Amemiya wrote to VP Carroll, reiterating again that since HLRP/HPU did not pay the \$1,750,000.00 by December 31, 2021, ATDC had to assume that HLRP/HPU was not intending to renew the present lease. Furthermore, that since the \$1,750,000.00 was not paid by December 31, 2021, the entire \$3,500,000.00 would be due and owing for the present lease to be renewed. (Exhibit "9").

On August 22, 2022, Brittany Hopkins, Senior Director of Finance and Risk Management, wrote to Mr. Amemiya, still questioning HLRP/HPU's obligation to pay DOT \$3,500,000.00 if HLRP/HPU wanted to renew the lease. (Exhibit "10").

On August 31, 2022, Mr. Amemiya wrote to Ms. Hopkins, reiterating and confirming that HLRP/HPU was mandated to pay DOT \$3,500,000.00 if it wanted to renew the lease. He went on to further explain that ATDC had the sole discretion whether to give a lease renewal to HLRP, or to instead wait until the expiration of the current lease (September 29, 2058), at which time ATDC could select a new developer through direct negotiations, seek a request for proposals, & enter a competitive bid. (Exhibit "11").

## Conclusion

As stated above, HLRP is obligated to pay DOT \$3,500,000.00 if it wishes to renew the current lease prior to its expiration on September 29, 2058. This \$3,500,000.00 is a certainty and not conditional. Once HLRP makes concrete plans to pay this obligated \$3,500,000.00. DOT could enter into negotiations with HLRP for a new 65-year lease.

## FINANCIAL INFORMATION

### Statement of Appropriations, Expenditures, Encumbrances and Balances for Fiscal Year Ending June 30, 2022

Appropriation Ceiling (Budget)	\$	1,842,173
<b>ALOHA TOWER FUND</b>		
Beginning Cash Balance	\$	0
Revenue	\$	1,011,953
Expenditures	\$	(674,330)
Transfers		
JV-003 dtd 7/07/21	\$	3,239,785
JV-220 dtd 5/03/22	\$	1,002
Ending Cash Balance	\$	3,578,410
Encumbrances	\$	0
<b>END OF YEAR BALANCE</b>	\$	3,578,410

# **Exhibit 1**



# **MARKETPLACE LEASE**

between

**Aloha Tower Development Corporation**

and

**Aloha Tower Associates Piers 7, 8 and 9  
Limited Partnership**

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## **MARKETPLACE LEASE**

THIS MARKETPLACE PROJECT COMPONENT LEASE (the "Marketplace Lease"), made as of the 29<sup>th</sup> day of September, 1993, by and between **ALOHA TOWER DEVELOPMENT CORPORATION**, a public body corporate and politic, a public instrumentality, and an agency of the State of Hawaii, whose principal place of business is located at 33 South King Street, Suite 403, Honolulu, Hawaii 96813 (hereinafter "ATDC"), and **ALOHA TOWER ASSOCIATES PIERS 7, 8 AND 9 LIMITED PARTNERSHIP**, a Hawaii limited partnership, whose principal place of business is 1700 Amfac Tower, 700 Bishop Street, Honolulu, Hawaii 96813 (hereinafter the "Marketplace Lessee").

### **RECITALS:**

1. Pursuant to the terms and provisions of that certain Lease, dated as of September 29, 1993, entered into by the State of Hawaii, by its Director of Transportation, as Lessor and ATDC, as Lessee, ATDC is the lessee of those certain parcels of land (including certain submerged portions thereof) located in the Aloha Tower area of the City and County of Honolulu, State of Hawaii, generally known as Piers 5 through 14 of Honolulu Harbor, (hereinafter, such parcels of land together with any improvements thereon existing as of the date of this Marketplace Lease are collectively referred to as the "Land"). Land specifically excludes: (a) the lands leased to the Hawaii Maritime Center and to the Falls of Clyde; (b) the maritime facilities defined in Exhibit E; (c) Aloha Tower itself; (d) Irwin Park; and (e) portions of the Ala Makai walkway and the pedestrian overpass to be constructed over Nimitz Highway.



2. On October 3, 1989, Aloha Tower Associates, a Hawaii general partnership (hereinafter "ATA"), submitted to ATDC a proposal, a model, conceptual drawings and other supporting information for the redevelopment of the Land.

3. On December 21, 1989, ATDC selected ATA to be the prospective developer for redevelopment of the Land.

4. On June 19, 1990, ATDC and ATA entered into a Development Agreement which was completely amended by the Amended and Restated Development Agreement dated March 9, 1993, (the "Development Agreement"). The Development Agreement was executed by ATA and five (5) "Development Partnerships," jointly and severally. ATA and the five (5) Development Partnerships are sometimes referred to herein as the "Developer."

5. Pursuant to the terms and provisions of the Development Agreement, ATDC agreed, inter alia, to execute Project Component Leases with ATA or an affiliate of ATA approved by ATDC for the Land in the event ATA and ATDC were able to satisfy certain conditions within certain time periods set forth in the Development Agreement.

6. Developer and ATDC have satisfied the aforesaid conditions set forth in the Development Agreement within the applicable time periods set forth therein to enable the parties to enter into this Marketplace Lease, and ATDC has approved the Marketplace Lessee as an affiliate of ATA. The Developer and ATDC entered into the Development Agreement in order that the Developer might effectuate the development, construction and operation upon the Land of a mixed-use complex (the "Project") to include a residential condominium complex, a festival marketplace, an office tower complex, a hotel, maritime buildings, terminals, offices and related maritime facilities, promenade shops, parking facilities and public improvements.

7. It is the intent of ATDC and the Developer that the Project be developed, constructed and operated in separate components (hereinafter each such

component is referred to as a "Project Component"), and that each such Project Component be developed, constructed and operated by a Project Component Lessee (as defined in section 1.3.) pursuant to the terms and provisions of a Project Component Lease (as defined in section 1.3.).

8. ATDC has consented to the issuance of the Marketplace Lease to the Marketplace Lessee.

NOW, THEREFORE, in consideration of the premises and of the payment of the sum of ONE DOLLAR (\$1.00) paid by each of the parties hereto to the other, and other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged by each of the parties hereto, ATDC and the Marketplace Lessee, for themselves, their successors and assigns, hereby covenant and agree as follows:

## **ARTICLE I**

### **MARKETPLACE PROJECT COMPONENT;**

#### **EXHIBITS AND DEFINITIONS**

**Section 1.1. Marketplace Project Component.** This Marketplace Lease relates to the development, construction and operation of the component of the Project located at Piers 8 and 9 and a portion of 10 (the "Marketplace").

**Section 1.2. Exhibits.** Attached hereto and forming a part of this Marketplace Lease are the Exhibits listed on Schedule I hereto.

**Section 1.3. Defined Terms.** As used in this Marketplace Lease, the following terms shall have the following respective meanings:

"ATA" has the meaning set forth in Recital 2.

"ATDC" has the meaning set forth in the opening paragraph of this Marketplace Lease.

"ATDC Agreement" means the agreement entered into by ATDC pursuant to which ATDC acquired a leasehold estate in the Land.

"ATDC First Sale Participation" has the meaning set forth in section 2.9.1.

"ATDC Refinancing Participation" has the meaning set forth in section 2.8.

"ATEHLP" means Aloha Tower Enterprise Hawaii Limited Partnership, a Maryland limited partnership and a venturer in ATA.

"ATHP" means Aloha Tower Hawaiian Partners, a Hawaii limited partnership and a venturer in ATA.

"Additional Lease Rent - Profit Participation" has the meaning set forth in section 2.7.2.5.

"Affiliate" means a Person directly or indirectly, through one or more intermediaries, Controlling, Controlled by, or under common Control with the Person in question.

"Allocated Share" means that share of costs incurred by or for the benefit of the whole Project allocated to the Marketplace Lessee.

"Annual Additional Rent" has the meaning set forth in section 2.7.2.4.

"Auditor" means an independent certified public accountant as may be used from time to time for the purpose of certifying the annual reports or financial statements required herein.

"Change" means a change in the scope of, and/or revision in, the design or construction of the Public Improvements or Marketplace Improvements, as the case may be, consisting of additions, deletions or other revisions thereto, requiring a design or planning change to a design or planning arrangement previously approved by ATDC.

"City" means the City and County of Honolulu, State of Hawaii.

"Commencement Date" has the meaning set forth in section 2.2.

"Common Area" means those areas and facilities which may be furnished by the Marketplace Lessee from time to time as a part of the Marketplace for mechanical equipment penthouses, management offices, promotion offices, mezzanine storage areas and management storage areas, and for the non-exclusive general common

use of itself, its tenants and subtenants and other occupants of the Marketplace, their officers, agents, employees, customers and other invitees, including, but not limited to, all malls, terraces, courts, ramps, landscaped and planted areas, eating or picnic areas, retaining walls, stairways, escalators, elevators, fire corridors and stairs, bus stops, first-aid stations, comfort stations or restrooms, civic facilities, meeting rooms, truck docks and truck loading docks and areas (including covered receiving areas adjacent thereto), delivery passages, package pick-up stations, sidewalks, walkways, roadways, parking and loading areas, and other similar areas, facilities and improvements.

"Component First Sale" has the meaning set forth in section 2.9.1.

"Component First Sale Proceeds" means the proceeds, including cash and other consideration, received by the Marketplace Lessee as a result of any Component First Sale after deduction of (1) all costs and expenses associated with the negotiation and closing or consummation of such Component First Sale, (2) all amounts required to repay the then existing debt secured by all Leasehold Mortgages or to repurchase or re-lease the Marketplace Lessee's estate in the Marketplace if previously conveyed in a sale-leaseback or lease-leaseback financing transaction, (3) all amounts required to repay any other existing Marketplace Financing, (4) all amounts required to repay any unpaid Service and Equity Fee and any Unpaid Return on the Service and Equity Fee, (5) all amounts required to pay the Housing Foundation First Sale Participation, if not previously deducted, and (6) all amounts required to repay any then existing Marketplace Lessee Equity to the extent such is not included in Marketplace Financing and any unpaid Equity Financing Return.

"Construction Plans" has the meaning set forth in section 3.1.2.3.

"Construction Schedule" has the meaning set forth in section 3.5.3.

"Consumer Price Index" means the Revised Consumer Price Index for All Urban Consumers, Honolulu, Hawaii (All Items 1982-84=100), published by the Bureau of Labor Statistics of the United States Department of Labor; provided,

however, that if the Consumer Price Index hereafter uses a different standard reference base or is otherwise revised, an adjustment shall be made therein for purposes of the provisions of this Marketplace Lease, using such conversion factor, formula or table for making such adjustment as is published by the Bureau of Labor Statistics, or if the Bureau of Labor Statistics discontinues to publish the same, then the index as is published by Prentice-Hall, Inc., the Bureau of National Affairs, Commerce Clearing House or any other nationally recognized publisher of similar statistical information, as mutually agreed to by the Marketplace Lessee and ATDC, shall be used.

"Contractor" means any construction manager, general contractor, subcontractor or any other contractor retained by the Marketplace Lessee in connection with the construction of the Marketplace.

"Control" means the power, in law or in fact, to direct the management and policies of an entity, directly or indirectly, whether through the ownership of voting securities, by contract or otherwise; and the terms "Controlled," "Controlling" and "Controls" have meanings correlative to the foregoing.

"Current Consumer Price Index" means the Consumer Price Index so published for the calendar month immediately preceding that calendar month during which each Rent Year commences.

"DCCR" has the meaning set forth in section 2.4.

"DLNR" means the Department of Land and Natural Resources of the State of Hawaii.

"DOT" means the Department of Transportation of the State of Hawaii.

"DOT Expenses and Losses in Revenues" has the meaning set forth in section 16.2.

"DOT Relocation Expenses" has the meaning set forth in section 16.3.

"Debt Service Payments" means, without duplication, all principal except principal of the Initial Marketplace Debt Financing, interest, and other sums and

amounts paid or payable by the Marketplace Lessee for or during the applicable or pertinent period or in connection with any Leasehold Mortgage, or rent or other sums and amounts paid by the Marketplace Lessee in connection with any sale-leaseback or any lease-leaseback of the Marketplace Lessee's estate in the Marketplace Property and/or Marketplace Improvements.

In the event of a foreclosure of any Leasehold Mortgage or the conveyance of the Marketplace Lessee's estate in the Marketplace Property and/or Marketplace Improvements, to the holder of any Leasehold Mortgage (or the nominee of any such holder) by assignment of lease or other instrument in lieu of foreclosure, or in the event of the termination of any lease or sublease arising out of a sale-leaseback or lease-leaseback of any such estate, the term "Debt Service Payments" shall thereafter include all principal except principal of the Initial Marketplace Debt Financing, interest, rent and other sums and amounts which would have become payable pursuant to or in connection with such Leasehold Mortgage, sale-leaseback or lease-leaseback but for such foreclosure, assignment of lease or other instrument in lieu of foreclosure, or lease or sublease termination.

"Default Rate" means an annual rate of interest equal to twelve percent (12%).

"Design Development Plans" has the meaning set forth in section 3.1.2.2.

"Developer" has the meaning set forth in Recital 4 and means all partnerships so designated in the Development Agreement.

"Development Agreement" has the meaning set forth in Recital 4.

"Development Period" has the meaning set forth in section 2.7.2.2.

"Development Period Rent" has the meaning set forth in section 2.7.2.2.

"Development Period Rent Accrual Date" has the meaning set forth in section 2.7.2.2.

"Development Period Year" means (1) the period commencing on the Development Period Rent Accrual Date and terminating on the day immediately preceding the first (1st) anniversary of the Development Period Rent Accrual Date, and (2) each successive period of twelve (12) calendar months thereafter during the Development Period. Any period during the Development Period after the last full Development Period Year shall be considered a partial Development Period Year and any financial obligations appertaining thereto shall be appropriately apportioned as to the number of days in such partial Development Period Year.

"Equity Financing Return" means an equity financing return of eight percent (8%) non-compounded (no interest on interest) cumulative annual return on the Marketplace Lessee Equity which shall be paid to all providers of equity funds prior to distribution to ATA, ATDC or the Housing Foundation of Additional Lease Rent - Profit Participation, Component First Sale Proceeds, ATDC Refinancing Participation, the Housing Foundation First Sale Participation and the five percent (5%) of annual Net Operating Income referred to in section 14.1.(b)(i).

"Event of ATDC's Default" has the meaning set forth in section 7.3.1.

"Event of Default" has the meaning set forth in the definition of "Material Default" in this section 1.3.

"Events of the Marketplace Lessee's Default" has the meaning set forth in section 7.1.

"Fixed Rent" has the meaning set forth in section 2.7.1.

"Gross Leaseable Area" means the aggregate of the actual number of square feet of enclosed or exterior leaseable area in the Marketplace Property (and/or within the Marketplace Improvements) designed for the exclusive use and occupancy of rent paying Marketplace Subtenants, excluding Common Area.

"Gross Receipts" means the aggregate of all Gross Rental Income, other payments (including, without limitation, buyouts of Marketplace Subleases) received by

the Marketplace Lessee from Marketplace Subtenants, all receipts from operation of spaces in the Piers 10-11 structure for which ATDC has granted separate leases to the Marketplace Lessee, and all payments received by the Marketplace Lessee from business interruption insurance proceeds, parking operations (less validations and other customer discounts), vending machines, telephones and other income and concession sources located in the Marketplace and within the Marketplace Parking Range shown in Exhibit B, provided, however, that Gross Receipts shall not include any Operating Contributions.

"Gross Rental Income" means the aggregate of all amounts actually received by the Marketplace Lessee, as minimum rent and rent dependent on volumes of sales or business transacted, but does not include the amount of any Operating Contributions, whether characterized in Marketplace Subleases as rent or not. If the Marketplace Lessee has leased more than ten thousand (10,000) square feet of space in the Marketplace to an Affiliate or Affiliates, the rent attributable to the space over ten thousand (10,000) square feet shall be included in Gross Rental Income at the fair market value of rent received for comparable space.

"Hazardous Substances" has the meaning set forth in section 15.9.

"Holding Period Rent" has the meaning set forth in section 2.7.2.1.

"Housing Foundation" has the meaning set forth in section 14.1.

"Housing Foundation Component First Sale Proceeds" means the proceeds, including cash and other consideration, received by the Marketplace Lessee as a result of any Component First Sale after deduction of (1) all costs and expenses associated with the negotiation and closing or consummation of such Component First Sale, (2) all amounts required to repay the then existing debt secured by all Leasehold Mortgages or to repurchase or re-lease the Marketplace Lessee's estate in the Marketplace if previously conveyed in a sale-leaseback or lease-leaseback financing transaction, (3) all amounts required to repay any other existing Marketplace Financing, (4) all amounts



required to repay any unpaid Service and Equity Fee and any Unpaid Return on the Service and Equity Fee, and (5) all amounts required to repay any then existing Marketplace Lessee Equity to the extent such is not included in Marketplace Financing and any unpaid Equity Financing Return.

"Housing Foundation First Sale Participation" has the meaning set forth in section 14.1.(b).

"Improvements" has the meaning set forth in section 3.1.(b).

"Initial Consumer Price Index" means the Consumer Price Index so published for the calendar month in which the Commencement Date occurs.

"Initial Marketplace Debt Financing" means the \$60,000,000.00 provided to the Marketplace Lessee by The Mitsui Trust and Banking Co., Ltd. under a Leasehold Mortgage as part of the Marketplace Financing for the initial development of the Marketplace.

"Insurance Trustee" has the meaning set forth in section 9.2.8.1.(b).

"Interim Office" has the meaning set forth in section 16.3.

"Land" has the meaning set forth in Recital 1.

"Land Records" means the real estate recording and filing systems of the State of Hawaii being the Bureau of Conveyances ("Regular System"), the Office of the Assistant Registrar of the Land Court ("Torrens System") or the Board of Land and Natural Resources, as appropriate.

"Leased Property" has the meaning set forth in section 2.1.

"Leasehold Mortgage" means any one or more mortgages, deeds of trust, deeds to secure debt, assignments, loan deeds, trust indentures, security agreements, or any similar security title retention device which shall, from time to time, create a lien or encumbrance upon the leasehold estate created by this Marketplace Lease and/or the Marketplace Improvements, and which shall be security for one or more notes, bonds or

other evidences of indebtedness issued by the Marketplace Lessee to a Lender or held by a Lender.

"Leasehold Mortgagee" means the Lender, or the designee thereof, in whose favor a Leasehold Mortgage shall have been created (or if such Leasehold Mortgage is a deed of trust or trust indenture, the holder of any note, bond or other evidence of indebtedness secured thereby), or, if such Leasehold Mortgage has been transferred or assigned, the transferee or assignee of such Lender.

"Lender" means a domestic or foreign commercial bank, trust company, mutual savings bank, savings and loan association, insurance company, pension trust fund, college or university endowment fund, health or welfare fund, mortgage or other financial institution or Person providing debt financing for the Marketplace.

"Maritime Relocation Costs" shall have the meaning set forth in section 3.1.10.

"Marketplace" has the meaning set forth in section 1.1.

"Marketplace - DOT Capital Improvements, Maintenance, Operations and Security Agreement" has the meaning set forth in section 16.7.

"Marketplace Development and General Management Personnel" shall mean those individuals employed by the Marketplace Lessee, or an Affiliate thereof, who perform functions related to the overall development process with respect to the Marketplace and/or to the general operations of the Marketplace Lessee. By way of example, Marketplace Development and General Management Personnel shall include senior development personnel, development directors, assistant development directors, office managers, financial and accounting personnel, personnel and administrative staff members and coordinators who work on a general and supervisory basis with various governmental agencies and other bodies and firms to obtain permits and otherwise to facilitate the development process. Marketplace Development and General Management Personnel shall not include individuals primarily performing specific

functions in specialty areas of development, such as planning and design, engineering, construction, tenant coordination, leasing, sales, marketing and property management. With respect to any individual, there shall be no allocation of costs between the Marketplace Development and General Management Personnel cost category and any other cost category. George Hutton, Glenn Okada, U. J. Rainalter, Jr., Peter Smith, Robert Gerell, James W. Rouse and Robert F. Barron, Jr. shall not be considered as Marketplace Development and General Management Personnel and any costs related to such persons shall not be a part of Marketplace Development Cost, except for their out-of-pocket expenses and direct office and other support expenses related to the Marketplace.

"Marketplace Development Cost" means an amount, certified in reasonable detail to ATDC by an appropriate, authorized representative of the Marketplace Lessee, equal to the aggregate of all costs, expenses and fees incurred for the purpose of and properly allocated to the development and construction of the Marketplace in accordance with generally accepted accounting principles, including (without limitation except as set forth herein):

(1) design, planning, architectural and engineering costs, expenses and fees;

(2) the costs, expenses and fees of developing, constructing and furnishing the Marketplace Property and the Marketplace Improvements, including, but not limited to, (a) construction labor, equipment, materials and supplies, (b) furnishing and equipping the Common Area, tenant spaces, service areas, and sales, leasing, management and promotion offices, (c) landscaping and similar activities with respect to the Marketplace Property and the Marketplace Improvements, (d) signs and exhibits, (e) unreimbursed tenant allowances, (f) fees and expenses paid to contractors and subcontractors;

(3) the costs, expenses and fees of permits, licenses, surveys, tests and all Public Charges;

(4) the costs, expenses and fees of property, liability, workers' compensation, title and other insurance;

(5) utility costs and expenses and tap-in fees or other fees for connection to utility systems;

(6) the costs, expenses and fees paid in connection with the leasing of tenant spaces through such time when any such tenant space is available for occupancy;

(7) the costs, expenses and fees paid for initial feasibility and marketing studies and advertising and promotion, including, but not limited to, media advertising, preparation and printing of brochures and pamphlets, preparation and printing of audio-visual promotions and the equipment required for such promotions, public relations, leasing, opening and other celebrations in connection with the Marketplace Property and the Marketplace Improvements, and the Marketplace Lessee's pre-opening contributions to any merchants' association administered by the Marketplace Lessee;

(8) legal and accounting fees, costs and expenses, including, but not limited to, the fees, costs and expenses of negotiation and execution of any agreements related to the Marketplace;

(9) the costs, expenses and fees of insurance, utilities, interest and Common Area operating expenses of unoccupied lease space in the Marketplace Property and the Marketplace Improvements through such period of time as is no later than twelve (12) months after any such space is available for occupancy;

(10) the salaries, fringe benefits, occupancy costs, payroll taxes, travel and moving expenses, other costs of support and employment, and other costs, expenses and fees incurred by the Marketplace Lessee and properly allocated to the

development and general management, planning and design, engineering, construction, tenant coordination, leasing, sales, marketing and property management of the Marketplace, all without profit to the Marketplace Lessee;

(11) the costs, expenses and fees (including, but not limited to, Debt Service Payments, commitment fees, loan origination fees and other arrangement fees paid by the Marketplace Lessee) related to any Leasehold Mortgage due and paid during the Development Period;

(12) the costs, expenses and arrangement fees for obtaining equity funds, not including any portion of the Marketplace Equity Arrangement Fee;

(13) Rent and Holding Period Rent paid by the Marketplace Lessee hereunder which is properly allocated to the period of development and the Marketplace Lessee's Allocated Share of rents paid to ATDC (including the Fixed Rent, Development Period Rent and Holding Period Rent) and DOT Expenses and Losses in Revenues;

(14) the Marketplace Lessee's Allocated Share of the Housing Foundation payment which is the sum of ONE HUNDRED THOUSAND AND NO/100 DOLLARS (\$100,000.00); and

(15) a fee paid to the Marketplace Lessee based on a percentage of all other elements of Marketplace Development Cost (the "Marketplace Lessee's Fee"), not including any portion of the Marketplace Lessee's Service Fee.

In calculating Marketplace Development Cost, funds paid by the Marketplace Lessee to the Developer for the Marketplace Lessee's Allocated Share of any development and construction costs by the Developer shall be included.

"Marketplace Equity Arrangement Fee" means the \$2,000,000.00 portion of the Service and Equity Fee to be paid from Net Operating Income for the costs, expenses and arrangement fees for obtaining equity funds.

"Marketplace Financing" means any debt or equity financing (or any hybrid combination thereof) to be obtained by the Marketplace Lessee for the Marketplace.

"Marketplace Improvements" means those improvements to be developed and constructed under this Marketplace Lease on the Marketplace Property and leased to the Marketplace Lessee, other than the Marketplace Public Improvements.

"Marketplace Lease" means this lease by which ATDC demises and leases to the Marketplace Lessee the Leased Property.

"Marketplace Lessee" has the meaning set forth in the opening paragraph of this Marketplace Lease.

"Marketplace Lessee Equity" means (a) Marketplace Development Cost, including any part of the Work Product Cost which has not been sold or recovered by the Marketplace Lessee, but not including payments of the Service and Equity Fee or the Return on Service and Equity Fee; plus (b) the cost to the Marketplace Lessee of any capital improvements to the Marketplace and Improvements not included in Marketplace Development Cost which are (1) not Operating Expenses and (2) not covered by Net Operating Income and/or reserves therefor established by the Marketplace Lessee from time to time (which reserves have been funded as an Operating Expenses at the time such reserves were created or as part of the Special Interest and Operating Expense Reserve); plus (c) that portion of the excess, if any, of Operating Expenses over Operating Income for prior years which was funded by the Marketplace Lessee by direct contributions; plus (d) payments of principal in connection with the Initial Marketplace Debt Financing which are not a part of Debt Service Payments or Operating Expenses; minus (e) any funds advanced to the Marketplace Lessee under any Leasehold Mortgage or other Marketplace Financing; and minus (f) amounts received by the Marketplace Lessee as a repayment of the Marketplace Lessee Equity, including amounts received from any distributions of

Refinancing Proceeds, any sale or partial sale of the Marketplace, any Work Product Cost, or any other contribution for this purpose.

"Marketplace Lessee's Fee" has the meaning set forth in section 1.3. in item (15) of the definition of "Marketplace Development Cost."

"Marketplace Lessee's Public Expenditures" has the meaning set forth in section 10.1.1.

"Marketplace Lessee's Service Fee" means the \$2,400,000.00 portion of the Service and Equity Fee to be paid from Net Operating Income for management services rendered by the Marketplace Lessee

"Marketplace Parking Range" means the land designated as the Marketplace Parking Range in Exhibit B hereto.

"Marketplace Property" means that portion of the Land which is the subject of the Marketplace Lease.

"Marketplace Public Improvements" has the meaning set forth in section 3.1.(b).

"Marketplace Sublease" means any sublease, license or other agreement by which the Marketplace Lessee or any Person claiming under the Marketplace Lessee (including, but not limited to, a subtenant or sublicensee) demises, leases, subleases, licenses or sublicenses to or permits the use or occupancy by another Person of any part of Marketplace Property and/or Marketplace Improvements or DOT or ATDC property on Piers 10 and 11.

"Marketplace Subtenant" means any Person using or occupying or entitled to use or occupy any part of Marketplace Property and/or Marketplace Improvements or DOT or ATDC property on Piers 10 and 11 under a Marketplace Sublease.

"Material Default" means any Event of ATDC's Default or Events of the Marketplace Lessee's Default (either of which is hereinafter sometimes referred to as an "Event of Default") involving (1) failure to pay any Rent or other amounts due

hereunder, (2) failure to design or construct any of the Improvements in the manner or within the times required, (3) failure to perform an obligation imposed under Article III, (4) attachment of any lien or encumbrance to any of the Leased Property, (5) a Transfer prohibited under Article V, (6) failure to maintain any insurance required under Article IX, (7) interference with or obstruction of the operations or functioning of DOT, (8) opening of the Marketplace for business before completion of the maritime improvements, (9) abandonment of any portion of the Leased Property, (10) repudiation of this Marketplace Lease or refusal to perform hereunder, (11) the intentional commission of any act which renders further performance of this Marketplace Lease impossible, or (12) substantial impairment or diminution of the value of this Marketplace Lease to either party.

"Net Cash Flow" means Net Cash Flow Before Payments to the Housing Foundation less the contribution of five percent (5%) of Net Cash Flow Before Payments to the Housing Fund to be made to the Housing Foundation by the Marketplace Lessee pursuant to section 14.1.(b).

"Net Cash Flow Before Payments to the Housing Foundation" means Net Operating Income less the Return on the Service and Equity Fee, payments on the Service and Equity Fee, if any, contributions to the Special Interest and Operating Expense Reserve, and the Equity Financing Return.

"Net Insurance Proceeds" means the sum actually paid by the insurer or insurers in respect of the claim in question, less all costs and expenses incurred by the Marketplace Lessee or the Insurance Trustee in the collection, holding and disbursement of same, including, but not limited to, the Insurance Trustee's fees, reasonable attorneys' fees, court costs and other necessary disbursements.

"Net Operating Income" means Operating Income for any period minus Operating Expenses for such period.



"Operating Contributions" means any and all payments made to the Marketplace Lessee by any Marketplace Subtenant or other Person as a contribution toward the cost of cleaning, maintaining, operating, repairing and providing security for any Common Areas or public facilities situated in, on or about the Marketplace and/or the Improvements, or the cost of providing, maintaining, repairing and operating electrical, heating, ventilating or air-conditioning equipment (including, but not limited to, the cost of energy therefor), or as a contribution to any promotion fund, advertising fund or merchant's association administered by the Marketplace Lessee, or in consideration of the furnishing of utility services by the Marketplace Lessee, or in consideration of the furnishing of sprinkler or fire protection systems and devices, or as a reimbursement or contribution toward the payment of any Public Charges or any other payment by a Marketplace Subtenant or other Person, which such Marketplace Subtenant or other Person is required to pay to the Marketplace Lessee in the nature of a reimbursement of, or as a contribution to, any cost incurred by the Marketplace Lessee in connection with the ownership or operation of the Marketplace and/or the Improvements, plus any gross income or other tax collected by the Marketplace Lessee in connection therewith.

"Operating Expenses" means: (1) all expenditures made by the Marketplace Lessee or which the Marketplace Lessee is obligated to make in its normal course of operation, ownership or management of the Marketplace and/or the Improvements or any part thereof, including, but not limited to, Standard Annual Base Rent, Annual Additional Rent, payroll and payroll expenses, business taxes and Public Charges, supplies, license and permit fees, repair and maintenance expenses, costs and expenses of cleaning, operating, maintaining, repairing and providing security for the Common Area or any part of the Marketplace and/or the Improvements, the cost of refurbishing the Marketplace and/or the Improvements or of capital improvements (but only to the extent such cost exceeds reserves established therefor and the proceeds of

any financing thereof), utility charges, insurance premiums, Debt Service Payments, payments related to indebtedness and/or contingent liabilities of the Marketplace Lessee incurred by the Marketplace Lessee in the Marketplace Lessee's normal course of the operation, ownership or management of the Marketplace and/or the Improvements or any part of either, auditing and professional fees and expenses, publicity costs and expenses; (2) decreases in the amount of accounts payable and accrued expenses from the total accounts payable and accrued expenses on the last day of the period prior to the period being accounted for to the last day of the current period less any increases in the amount of accounts payable and accrued expenses from the total accounts payable and accrued expenses on the last day of the period prior to the period being accounted for to the last day of the current period; (3) amounts set aside by the Marketplace Lessee which the Marketplace Lessee deems necessary or appropriate to maintain as reserves for the operation of the Marketplace and/or the Improvements; (4) reasonable allowances for doubtful accounts; (5) reasonable reserves for replacement of heating, ventilating and air-conditioning equipment and Common Area equipment, fixtures and furnishings, and capitalized building repairs and renovations; and (6) the cost of all Marketplace Lessee services, supervision and overhead properly allocated to the operation and management of the Marketplace and/or the Improvements in accordance with generally accepted accounting principles and a formula approved by the Auditor. Operating Expenses shall not include any part of Marketplace Development Cost.

"Operating Income" means: (1) the gross operating revenues and funds received by the Marketplace Lessee arising out of or resulting from the rental and/or ownership and operation of the Marketplace and/or the Improvements (other than funds received as capital contributions, property and/or casualty insurance or condemnation proceeds, or the proceeds of loans, financings or sales of property), including, but not limited to, all Gross Receipts and Operating Contributions; (2) any decreases in the amount of accounts receivable from the total accounts receivable on the last day of the

period prior to the period being accounted for to the last day of the current period less increases in the amount of accounts receivable from the total accounts receivable on the last day of the period prior to the period being accounted for to the last day of the current period; and (3) amounts previously set aside by the Marketplace Lessee, including the Special Interest and Operating Expense Reserve, which the Marketplace Lessee ceases to maintain as reserves, either as the result of payment from such reserves, a Refinancing, a Transfer, other transactions, or because the Marketplace Lessee no longer regards as necessary or appropriate to maintain as reserves for the operation of the Marketplace and/or the Improvements. Prepaid rents, prepaid payments and security deposits shall not be included in Operating Income until earned, applied or forfeited.

"Operating Period" has the meaning set forth in section 2.7.2.3.

"Operating Period Rent" means, collectively, Standard Annual Base Rent, Annual Additional Rent and Additional Lease Rent-Profit Participation.

"Operating Period Rent Accrual Date" has the meaning set forth in section 2.7.2.3.

"PCBs" means polychlorinated biphenyls.

"Person" means an individual, general or limited partnership, corporation, joint venture, trust, business trust, cooperative or association, unincorporated organization or government or any agency or political subdivision thereof, and the heirs, executors, administrators, successors and assigns of such individual or entity where the context so admits.

"Project" has the meaning set forth in Recital 6.

"Project Component" has the meaning set forth in Recital 7.

"Project Component Lease" means any lease by which ATDC demises or leases to or permits the use and occupancy by another Person of a portion of the Land in

order that such Person might develop, construct and operate upon such portion of Land, one of the Project Components which is to comprise a portion of the Project.

"Project Component Lessee" means any Person who (1) is an Affiliate of the Developer and (2) is using or occupying or entitled to use or occupy any portion of the Land under a Project Component Lease.

"Project Land" has the meaning set forth in section 15.1.

"Public Charges" has the meaning set forth in section 2.10.1.

"Public Improvements" means the public improvements listed in Exhibit E attached hereto.

"Public Improvements Development Cost" means an amount, certified in reasonable detail to ATDC by an appropriate, authorized representative of the Marketplace Lessee, equal to the aggregate of the following costs, expenses and fees actually incurred by the Marketplace Lessee for the purpose of and properly allocated to the development and construction of the Public Improvements in accordance with generally accepted accounting principles, including:

- (1) design, planning, architectural and engineering costs, expenses and fees;
- (2) the costs, expenses and fees of developing, constructing and furnishing the Public Improvements, including, but not limited to:
  - (a) construction labor, equipment, materials and supplies, (b) furnishing and equipping any Common Areas, tenant spaces and service areas, (c) landscaping and similar activities with respect to the Public Improvements, (d) signs and exhibits, and (e) fees and expenses paid to contractors and subcontractors;
- (3) the proportional costs, expenses and fees of permits, licenses, surveys, tests and all Public Charges;

- (4) the proportional costs, expenses and fees of property, liability, workers' compensation, title and other insurance;
- (5) the proportional utility costs, expenses, tap-in fees or other fees for connection to utility systems required for the Public Improvements beyond what existed immediately prior to the signing of this Marketplace Lease;
- (6) legal and accounting fees, costs and expenses limited to the fees, costs and expenses of negotiation and execution of any agreements related directly to the Public Improvements;
- (7) the proportional salaries, fringe benefits, occupancy costs, payroll taxes, travel and moving expenses, other costs of support and employment, and other costs, expenses and fees incurred by the Marketplace Lessee and properly allocated to the development and general management, planning and design, engineering, construction, tenant coordination, leasing, sales, marketing and property management of the Public Improvements, all without profit to the Marketplace Lessee; and
- (8) the proportional costs, expenses and fees (including, but not limited to, commitment fees, loan origination fees and other arrangement fees paid by the Marketplace Lessee) related to any Leasehold Mortgage due and paid during the Development Period.

"Reconstruction Work" has the meaning set forth in section 9.2.8.2.

"Refinancing" means any refinancing, including, but not limited to, by way of a Leasehold Mortgage or mortgage, or by way of a sale-leaseback or lease-leaseback, of the Marketplace Lessee's estate in the Marketplace.

"Refinancing Proceeds" means the net proceeds available to the Marketplace Lessee out of any Refinancing after deduction of (1) all costs and expenses

associated with the negotiation and closing or consummation of such Refinancing, (2) all amounts required to repay the then existing debt secured by all Leasehold Mortgages being refinanced or to repurchase or release the Marketplace Lessee's estate in the Marketplace which is the subject of such Refinancing if previously conveyed in a sale-leaseback or lease-leaseback transaction, (3) all amounts required to repay any other existing Marketplace Financing, (4) all amounts required to repay any unpaid Service and Equity Fee and any Unpaid Return on the Service and Equity Fee, and (5) all amounts required to repay any then existing Marketplace Lessee Equity to the extent such is not included in Marketplace Financing and any unpaid Equity Financing Return.

"Rent" means, collectively, Development Period Rent, Standard Annual Base Rent, Annual Additional Rent and Additional Lease Rent - Profit Participation.

"Rent Year" means a fiscal year consisting of the twelve (12) month period between any January 1 and December 31. Any period of less than twelve (12) months between (1) the Operating Period Rent Accrual Date and the first January 1 thereafter and (2) any January 1 and the last day of this Marketplace Lease Term shall be considered a partial rent year and the Rent and any financial results to be determined under this Marketplace Lease shall be appropriately apportioned as to the number of days in the partial rent year. During the Term of this Marketplace Lease, the Rent Year may be changed by the Marketplace Lessee with the consent of ATDC.

"Return on Service and Equity Fee" means a return of eight percent (8%) non-compounded (no interest on interest) cumulative annual return on the outstanding balance of the Service and Equity Fee which shall be paid annually, as funds are available, from Net Operating Income

"Schedule for DOT Expenses and Losses in Revenues" has the meaning set forth in section 16.1.

"Schematic Plans" has the meaning set forth in section 3.1.2.1.

"Service and Equity Fee" means the combined total of the \$2,400,000.00 Marketplace Lessee's Service Fee and the \$2,000,000.00 Marketplace Equity Arrangement Fee which shall be paid off as funds are available from Net Operating Income.

"Short-Term Leases" has the meaning set forth in section 2.1.2.

"Special Interest and Operating Expense Reserve" means a special reserve not to exceed \$2,500,000.00 which may be required under the terms and conditions of the Initial Marketplace Debt Financing and funded as needed from Net Operating Income after payment of the Return on the Service and Equity Fee, and payments on the Service and Equity Fee, if any.

"Standard Annual Base Rent" has the meaning set forth in section 2.7.2.3.

"State" means the State of Hawaii.

"State Agency" means an agency, department, body politic, or other instrumentality of the State.

"State Fiscal Year" has the meaning set forth in section 16.2.1.

"Substantial Completion" means the occurrence of both of the following:  
(1) a temporary or permanent certificate of occupancy has been issued by the proper authorities and (2) the work in question can be used for its intended purpose.

"Term of this Marketplace Lease" has the meaning set forth in section 2.2.

"Transfer" has the meaning set forth in section 5.2.

"Treatment Site" has the meaning set forth in section 15.4.4.

"Work Product Cost" means development costs incurred by the Developer prior to the date of this Marketplace Lease which are properly allocated to Project Components other than the Marketplace, which may be sold by the Marketplace Lessee to other Project Components or Project Component Lessees. As of the date of this Marketplace Lease, the Work Product Cost is agreed to be \$4,873,229.00 for the Piers 5

and 6 Component; \$4,028,654.00 for the Piers 10 and 11 Component; and \$2,088,470.00 for the Piers 13 and 14 Component.

"Work Product Proceeds" means the proceeds, including cash and other consideration received by the Marketplace Lessee as the result of any sale of the Work Product Cost or portion thereof after deduction of payments to the Marketplace Lessee of (1) unpaid Return on the Service and Equity Fees; (2) unpaid Service and Equity Fees; (3) unpaid Equity Financing Return; and (4) Work Product Cost allocated to the purchasing Project Component Lessee.

## **ARTICLE II**

### **GENERAL TERMS OF LEASE OF PROPERTY**

**Section 2.1. Lease of Property to the Marketplace Lessee.** ATDC demises and leases to the Marketplace Lessee, and the Marketplace Lessee rents from ATDC, that portion of the Land as more particularly described in Exhibit A attached hereto, together with all existing and future improvements thereon, together with and subject to the rights, restrictions, conditions, covenants, easements and appurtenances appertaining thereto and hereinafter mentioned, reserved or granted (collectively, the "Leased Property"). The Leased Property does not include any of the maritime facilities or piers described in Exhibit E attached hereto.

#### **2.1.1. Offsite Parking.**

(a) After Substantial Completion of the Marketplace, but prior to completion of the projects contemplated for Piers 5 and 6 and Piers 10 and 11, or December 31, 1999, whichever shall first occur, the Marketplace Lessee shall have the right to the exclusive use of seven hundred thirty-seven (737) parking stalls (of which approximately forty percent (40%) may be compact stalls) on the Piers 5 and 6 and 10 and 11 sites, at Irwin Park, at Pier 12, or at any other location as shown on the map attached hereto as Exhibit C. In addition, the Marketplace Lessee shall have the



right to the non-exclusive use of an additional one hundred seventy-eight (178) parking stalls, of which thirty-five (35) may be compact stalls, and sixteen (16) may be tandem stalls, within the Marketplace Parking Range, provided that such use shall be shared with DOT for its offices on the basis set forth in paragraph 8(d) of Exhibit E attached to this Marketplace Lease and to accommodate maritime operations. The Marketplace Lessee shall have the right to use stalls at the Ala Moana Mini-Park or at Irwin Park if it is determined by the State that there is no legal impediment to such use, provided that no action shall be taken by the Marketplace Lessee which might jeopardize the title of the State to Irwin Park and the Marketplace Lessee shall indemnify and hold harmless ATDC and the State against any and all actions challenging the use of Irwin Park for such parking and/or seeking to cause the title to Irwin Park to revert to any other party.

(b) ATDC shall have the right, in the exercise of its sole discretion, at any time during the term of this Marketplace Lease, to designate any parking stalls within the Marketplace Parking Range as replacement stalls at no cost to the Marketplace Lessee and to terminate the right of the Marketplace Lessee to use any other stalls, by giving thirty (30) days' notice of such designation to the Marketplace Lessee, provided that the number of Offsite Parking stalls available to the Marketplace Lessee shall not be reduced to fewer than one thousand (1000) stalls in the aggregate (of which up to approximately forty percent (40%) may be compact stalls) at any time.

(c) The Marketplace Lessee shall bear sole responsibility for the costs of developing the initial nine hundred fifteen (915) parking stalls and operating and maintaining all Offsite Parking stalls used by it and shall have the right to all income derived from such operations; provided, however, that ATDC may require the Developer and/or any Project Component Lessee (other than the Marketplace Lessee) to construct and make available to the Marketplace Lessee, at no cost to the Marketplace Lessee, a number of replacement parking stalls to be designated by ATDC located on the property leased to that Project Component Lessee or other property

within the Marketplace Parking Range; provided that no Project Component Lessee shall be required to provide more than five hundred (500) replacement stalls, except that the Piers 5 and 6 Component Lessee may be required to provide up to six hundred forty-one (641) stalls, and the Hotel Lessee may be required to provide no more than one hundred fifty (150) stalls. The rights of the Marketplace Lessee to the use of offsite parking stalls shall be as set forth in an agreement between the Marketplace Lessee and ATDC in a form to be agreed upon by the parties.

(d) The Marketplace Lessee shall provide all required administration, supervision and management for a professional parking operation on the location(s) for Offsite Parking.

**2.1.2. Short-Term Retail Spaces.** After Substantial Completion of the Marketplace Improvements, ATDC will lease retail spaces (which spaces shall not exceed ten thousand (10,000) square feet in the aggregate) in the makai end of the renovated building at Piers 10 and 11 to the Marketplace Lessee on a short-term basis for occupancy by tenants of the Marketplace (the "Short-Term Leases"). Such Short-Term Leases shall expressly provide that they are terminable upon execution of the Project Component Lease for the Pier 10 Project Component or the Pier 11 Project Component. The terms of the Short-Term Leases shall end on December 31, 1999 unless sooner terminated by the execution of a Project Component Lease for Pier 10 or 11 and the terms and conditions of the Short-Term Leases shall be as set forth in the form of the Short-Term Lease attached hereto as Exhibit D.

**2.1.3. Easements Reserved for State Functions.** ATDC reserves the right to establish easements over, under, upon or through the Leased Property which are required for maritime, highway, telecommunications or utility purposes related to State functions which easements shall run with the Land and be binding upon the Marketplace Lessee and its successors and assigns, provided that such easements shall not unreasonably interfere with the Marketplace Lessee's use or enjoyment of the

Leased Property and/or the aesthetic environment of the Leased Property. With respect to such easements, ATDC shall use its reasonable efforts to minimize disruption to the Marketplace Lessee's use and enjoyment of the Leased Property or to the aesthetic environment of the Leased Property.

**2.1.4. Easements Reserved Under and Over Streets.** ATDC also reserves the right to establish easements over, under, upon or through Ala Moana Boulevard and Fort, Bishop and Richards Streets within the Leased Property which are required for maritime, highway, telecommunications or utility purposes which easements shall run with the Land and be binding upon the Marketplace Lessee and its successors and assigns, provided that such easements shall not unreasonably interfere with the Marketplace Lessee's use or enjoyment of the Leased Property and/or the aesthetic environment of the Leased Property. With respect to such easements, ATDC shall use its reasonable efforts to minimize disruption to the Marketplace Lessee's use and enjoyment of the Leased Property or to the aesthetic environment of the Leased Property. The aforementioned streets shall be kept open to vehicular and pedestrian traffic, including access to and from the property currently owned by the Hawaiian Electric Industries, Inc. and Hawaii Maritime Center, and shall not be closed except for maintenance and special events as approved by ATDC in its discretion. DOT shall have access to and from the maritime facilities at all times.

**2.1.5. Right of Entry.** Without in any manner obligating ATDC or DOT so to do, and without modifying the obligations of the Marketplace Lessee under the Marketplace Lease, ATDC and DOT shall have the right to enter the Leased Property for the following purposes: (i) ascertaining the compliance by the Marketplace Lessee with the terms of this Marketplace Lease (including, without limitation, compliance with the maintenance provisions of this Marketplace Lease) and (ii) taking appropriate action to deal with emergency situations which may arise on the Leased Property including, without limitation, with respect to fire, personal injury or accidents

and natural disasters. Any routine exercise of the right of entry under clause (i) above shall occur during ordinary working hours and ATDC or DOT shall give the Marketplace Lessee reasonable notice of the time and place that such exercise of the right of entry is to occur. ATDC and DOT shall not exercise the right of entry granted hereby in any manner which unreasonably interferes with the Marketplace Lessee's use and enjoyment of the Leased Property. Other State Agencies may exercise any right of entry reserved to ATDC hereunder. If ATDC or DOT or other State Agencies exercises such right of entry, ATDC or DOT shall be responsible to the Marketplace Lessee for any damages or injuries caused by the negligence or wrongful act or omission by ATDC, DOT or their agents, to the fullest extent permissible under Hawaii Revised Statutes, Chapters 661 and 662 or other laws.

**2.1.6. DOT Access.** DOT shall have the right to enter upon the Leased Property for ingress and egress to and from its facilities, including, but not limited to, the Aloha Tower offices, ferry terminal, maintenance facilities, cruise ship terminals, piers and ship servicing areas. With respect to such easements, DOT shall use its reasonable efforts to minimize disruption to the Marketplace Lessee's use and enjoyment of the Leased Property or to the aesthetic environment of the Leased Property.

**Section 2.2. Term of this Marketplace Lease.** ATDC demises and leases to the Marketplace Lessee, and the Marketplace Lessee rents from ATDC, the Leased Property for a term commencing on September 29, 1993, (the "Commencement Date") and ending sixty-five (65) years from the Commencement Date (the "Term of this Marketplace Lease").

**Section 2.3. Memoranda of Term of Marketplace Lease.** Within thirty (30) days after the Commencement Date, ATDC and the Marketplace Lessee, upon the request of either party, shall execute one (1) or more written memoranda in such form as will enable them to be duly recorded in the Land Records setting forth the

description of the Leased Property, the Commencement Date, and the termination date of this Marketplace Lease. Upon termination or cancellation of this Marketplace Lease, ATDC and the Marketplace Lessee shall record a memorandum thereof in the Land Records.

**Section 2.4. Establishment of DCCR.** The Developer has recorded in the Land Records a Declaration of Covenants, Conditions and Restrictions (the "DCCR"), a copy of which is attached hereto as Exhibit F. The DCCR is binding upon ATDC, the Marketplace Lessee and the Marketplace Subtenants, and their respective successors and assigns, as covenants running with the leasehold interest in the Land which is subject to the DCCR for the period established therein. A corporation or association will be formed to perform the conditions of the DCCR. ATDC, DOT and Developer will be members of such corporation or association with representation on its board of directors, as more specifically provided therein, but ATDC and DOT shall have no responsibility for the maintenance, repair, security and architectural integrity of any of the Improvements.

**Section 2.5. Marketplace Pier 10 Space Lease.** Concurrently with the execution of this Marketplace Lease, the parties hereto shall execute a long-term Marketplace Pier 10 Space Lease (the "Pier 10 Space Lease") for a term identical with the term of this Marketplace Lease, a short form of which shall be recorded in the Land Records.

**Section 2.6. Encumbrances, Etc.** ATDC represents, warrants and covenants that the Leased Property is free and clear of all liens, covenants, restrictions, prescriptive rights of the public, conditions, easements, appurtenances appertaining thereto, encumbrances, leases (other than this Marketplace Lease), tenancies, or clouds on title whatsoever except those items described in Exhibit A attached hereto.

**Section 2.7. Rent.**

**2.7.1. Fixed Rent.** Under the terms of the Development Agreement, the Developer is obligated to pay to ATDC the sum of SIXTY MILLION AND NO/100 DOLLARS (\$60,000,000.00) as fixed rent ("Fixed Rent"). No Fixed Rent shall be allocated to the Marketplace Lessee for purposes of determining the Marketplace Lessee's Allocated Share of expenses since the Marketplace Lessee has no obligation to pay any part of the Fixed Rent.

**2.7.2. Rents Payable by the Marketplace Lessee.** The rents to be paid by the Marketplace Lessee to ATDC are as hereinafter set forth in this section 2.7.2.

**2.7.2.1. Holding Period Rent.** Commencing on the effective date of this Marketplace Lease, and continuing until commencement of the payment of Development Period Rent, the Marketplace Lessee shall pay ATDC non-refundable Holding Period Rent in the amount of TWO THOUSAND FIVE HUNDRED AND NO/100 DOLLARS (\$2,500.00) due on the first day of each month in advance ("Holding Period Rent").

**2.7.2.2. Development Period Rent.** The Marketplace Lessee shall, during that period of time commencing upon the first day of the month following the earlier to occur of that date upon which the Marketplace Lessee commences construction of the Marketplace, or June 1, 1993 (such date is herein referred to as the "Development Period Rent Accrual Date"), and terminating upon Substantial Completion of the Marketplace, or November 30, 1994, whichever shall first occur (such period of time is herein referred to as the "Development Period"), pay to ATDC as development period rent ("Development Period Rent") a monthly sum of FORTY ONE THOUSAND SIX HUNDRED SIXTY-SIX AND 67/100 DOLLARS (\$41,666.67), which sum may be adjusted after expiration of the first year of the Operating Period by the payment of a sum equal to fifty percent (50%) of the Annual

Additional Rent for the first year, if any, prorated to the elapsed time of the Development Period.

(Explanation of the calculation of the Development Period Rent: Development Period Rent is based on fifty percent (50%) of Operating Period Rent during the first year of the Operating Period. Fifty percent (50%) of the Standard Annual Base Rent of ONE MILLION AND NO/100 DOLLARS (\$1,000,000.00) for the first year is FIVE HUNDRED THOUSAND AND NO/100 DOLLARS (\$500,000.00) divided by twelve (12) months equals FORTY ONE THOUSAND SIX HUNDRED SIXTY-SIX AND 67/100 DOLLARS (\$41,666.67). After the first year of the Operating Period, the Annual Additional Rent, if any, is determined and an adjustment is made at that time. For example, if the Annual Additional Rent for the first year of the Operating Period is TWO HUNDRED THOUSAND AND NO/100 DOLLARS (\$200,000.00) and the Development Period is fourteen (14) months, the adjustment in Development Period Rent would be fifty percent (50%) of TWO HUNDRED THOUSAND AND NO/100 DOLLARS (\$200,000.00) equals ONE HUNDRED THOUSAND AND NO/100 DOLLARS (\$100,000.00) divided by twelve (12) months equals EIGHT THOUSAND THREE HUNDRED THIRTY-THREE AND 33/100 DOLLARS (\$8,333.33) multiplied by fourteen (14) months equals ONE HUNDRED SIXTEEN THOUSAND SIX HUNDRED SIXTY-SIX AND 66/100 DOLLARS (\$116,666.66) due as part of the Development Period Rent.)

**2.7.2.3. Standard Annual Base Rent.** The Marketplace Lessee shall, with respect to those Rent Years occurring during that period of time commencing upon the first day of the first month following the Development Period (such day is herein referred to as the "Operating Period Rent Accrual Date") and terminating upon the last day of the Term of this Marketplace Lease (hereinafter, such period of time is referred to as the "Operating Period"), pay to ATDC as standard annual base rent ("Standard Annual Base Rent") an annual sum determined as follows:

(a) With respect to the first Rent Year occurring during the Operating Period, the Standard Annual Base Rent shall be in the amount of ONE MILLION AND NO/100 DOLLARS (\$1,000,000.00).

In the event that the Operating Period Rent Accrual Date occurs on or prior to June 30 of the first year, then the remainder of the calendar year shall be considered the first Rent Year with the monthly rent appropriately prorated on the basis of a full year. In the event that the Operating Period Rent Accrual Date occurs after June 30, the first Rent Year shall be the remainder of the calendar year and all of the subsequent calendar year, with the monthly rent appropriately prorated on the basis of an equivalent full year.

(b) Commencing with the second Rent Year occurring during the Operating Period and with respect to each subsequent Rent Year occurring during the Operating Period, the Standard Annual Base Rent for each such Rent Year shall be in that amount determined by adding to the Standard Annual Base Rent for the immediately preceding Rent Year, the amount of the Annual Additional Rent properly due and payable to ATDC with respect to such immediately preceding Rent Year, provided, however, that in no event whatsoever shall the Standard Annual Base Rent to be paid in any given Rent Year be less than the Standard Annual Base Rent properly due and payable to ATDC for any prior Rent Year.

(c) If DOT's repairs to the piers adjacent to the Leased Property cause the Marketplace Lessee to abate rent to any Marketplace Subtenant, the Standard Annual Base Rent shall be abated by ten percent (10%) of the amount of such abatement and fifty percent (50%) of the abated operating contributions not recovered from other tenants during the period of such abatement.

**2.7.2.4. Annual Additional Rent.** The Marketplace Lessee shall, with respect to each of those Rent Years occurring during the Operating Period, pay to ATDC as annual percentage rent ("Annual Additional Rent") an annual sum



determined by (a) multiplying Gross Receipts for each such Rent Year by ten percent (10%), and (b) subtracting from the product obtained pursuant to clause (a) of this section 2.7.2.4. the Standard Annual Base Rent paid with respect to such Rent Year; provided, however, that in no event whatsoever shall Annual Additional Rent ever be less than zero (0).

**2.7.2.5. Additional Lease Rent - Profit Participation.**

Subject to the limitations of section 2.9.3., the Marketplace Lessee shall, with respect to each of those Rent Years occurring during the Operating Period, pay to ATDC as additional lease rent ("Additional Lease Rent - Profit Participation") an annual sum determined by multiplying Net Cash Flow for each such Rent Year by twenty-five percent (25%), provided, however, that in no event whatsoever shall such annual sum be less than zero (0).

**2.7.2.6. The Marketplace Lessee Fee Participation.** In the event that the combined total of the Marketplace Lessee's Fee and the Marketplace Lessee's Service Fee exceeds three percent (3%) of all other Marketplace Development Cost, then the Marketplace Lessee shall pay to ATDC seventeen and one-half percent (17 1/2%) of any such excess. The Marketplace Lessee shall pay ATDC's seventeen and one-half percent (17 1/2%) participation upon receipt of the Marketplace Lessee's receipt of its fee.

**2.7.2.7. The Marketplace Lessee Work Product Participation.** In addition to the foregoing rents, the Marketplace Lessee shall pay ATDC twenty-five percent (25%) of any Work Product Proceeds, calculated after deduction of the five percent (5%) of Work Product Proceeds payable to the Housing Foundation under section 14.1.(b), within thirty (30) days of receipt of such Work Product Proceeds by the Marketplace Lessee

**2.7.3. Payment of Rent by the Marketplace Lessee.**

**2.7.3.1. Development Period Rent.** Development Period Rent shall commence to accrue on the Development Period Rent Accrual Date. The first payment of Development Period Rent shall be payable on the first day of the first month following the Development Period Rent Accrual Date, and shall be (a) for that period of time occurring between the Development Period Rent Accrual Date and the last day of the month in which the Development Period Rent Accrual Date occurs, appropriately apportioned as to the number of days in such period, and (b) for the first month following the month in which the Development Period Rent Accrual Date occurs. Thereafter, Development Period Rent shall be payable on or before the first day of each month occurring during the Development Period.

**2.7.3.2. Standard Annual Base Rent.** Standard Annual Base Rent shall commence to accrue on the Operating Period Rent Accrual Date. The first payment of Standard Annual Base Rent shall be payable on the Operating Period Rent Accrual Date, and, thereafter, the Standard Annual Base Rent shall be payable on or before the first day of each month of each Rent Year occurring during the Operating Period. For the first Rent Year, the monthly rent shall be the amount set forth in section 2.7.2.3. For the first four (4) months of each succeeding Rent Year, the Standard Annual Base Rent shall be identical to the immediately preceding Rent Year. At the end of the fourth month, the difference between the amount paid and the amount due, if any, for the first four (4) months shall immediately become due and payable. Thereafter, one twelfth (1/12) of the Standard Annual Base Rent for the current Rent Year shall be payable on the first day of each month.

**2.7.3.3. Annual Additional Rent.** Annual Additional Rent shall commence to accrue on the Operating Period Rent Accrual Date. Annual Additional Rent shall be determined annually at the end of each Rent Year occurring during the Operating Period and shall be payable within one hundred twenty (120) days after the end of each such Rent Year.

**2.7.3.4. Additional Lease Rent - Profit Participation.**

Additional Lease Rent - Profit Participation shall commence to accrue on the Operating Period Rent Accrual Date. Additional Lease Rent - Profit Participation shall be determined annually at the end of each Rent Year occurring during the Operating Period and shall be payable within one hundred twenty (120) days after the end of each such Rent Year.

**2.7.4. Manner of Payment.** All Rents shall be payable without notice or demand therefor and shall be paid to ATDC at the office of ATDC at the address specified in section 12.5., or such other place as ATDC shall designate from time to time in a notice given pursuant to the provisions of section 12.5. All rents shall be deposited into the Aloha Tower fund or such other fund as is designated by Hawaii Revised Statutes, Chapter 206J. Any Rents not paid when due shall accrue interest at the Default Rate until paid.

**2.7.5. Records of the Marketplace Lessee.**

**2.7.5.1. The Marketplace Lessee to Preserve Records.** For the purpose of permitting verification by ATDC of any amounts due on account of Operating Period Rent, the Marketplace Lessee, after the applicable Operating Period Rent Accrual Date, will keep and preserve for at least three (3) years, at the address (which shall be in the State) specified in section 12.5., original books and records which shall disclose all information required to determine Annual Additional Rent and Additional Lease Rent - Profit Participation. Upon providing at least ten (10) days prior written notice to the Marketplace Lessee, ATDC, through its employees and/or independent accountants, shall have the right during customary business hours to inspect and copy such books and records and to make an examination or audit thereof which ATDC may desire. ATDC and its agents shall keep confidential, to the extent permitted by law, all information disclosed pursuant to this section 2.7.5.1. If such audit shall disclose a liability for Operating Period Rent (or any of the elements

comprising Operating Period Rent as defined in section 1.3) in excess of the Operating Period Rent previously paid by the Marketplace Lessee for the period in question, the Marketplace Lessee shall, within ten (10) business days thereafter, pay such additional Operating Period Rent. If such audit shall disclose an overpayment by Marketplace Lessee, the amount of such overpayment shall be credited against the Rent due for the next Rent Year. Should such additional Operating Period Rent equal or exceed three percent (3%) or more of any of the Standard Annual Base Rent, Annual Additional Rent or Additional Lease Rent - Profit Participation previously paid for the period in question, the Marketplace Lessee shall also within ten (10) business days thereafter pay ATDC's cost of audit and interest on the additional Operating Period Rent at the Default Rate commencing as of the date on which such additional Operating Period Rent would have been due and payable under this section 2.7. to the date of payment thereof.

**2.7.5.2. Statement of Annual Additional Rent and Additional Lease Rent - Profit Participation.** With respect to those Rent Years commencing on or after the Operating Period Rent Accrual Date, the Marketplace Lessee shall deliver to ATDC, within one hundred twenty (120) days after the end of each such Rent Year, a statement showing, in reasonable detail, the computation of the Annual Additional Rent and Additional Lease Rent - Profit Participation for the preceding Rent Year. The annual statement shall be signed and certified by an appropriate, authorized representative of the Marketplace Lessee, stating specifically that such representative has examined such report of the Annual Additional Rent and Additional Lease Rent - Profit Participation, that such representative's examination included such tests of the Marketplace Lessee's books and records as such representative considered necessary or appropriate under the circumstances, and that such report presents fairly the Annual Additional Rent and Additional Lease Rent - Profit Participation due with respect to the preceding Rent Year. If the Marketplace Lessee shall fail to deliver the foregoing statement to ATDC within said one hundred

twenty (120) day period, ATDC shall give written notice of such failure to the Marketplace Lessee and, if the Marketplace Lessee fails to deliver such statement within thirty (30) days after the date of such notice, ATDC shall thereafter have the right either to conduct an audit itself or to employ an independent certified public accountant to examine such books and records as may be necessary or appropriate to certify the amount of the Annual Additional Rent and Additional Lease Rent - Profit Participation due with respect to such Rent Year, and the Marketplace Lessee shall cooperate with such audit, make all books and records available in connection with such audit and promptly pay to ATDC the cost thereof.

**Section 2.8. Refinancing.** Subject to the limitations of section 2.9.3., in the event the Marketplace Lessee shall engage in a Refinancing, the Marketplace Lessee shall pay to ATDC in the manner provided in section 2.7.4., upon closing of such Refinancing, an amount (such amount is herein referred to as the "ATDC Refinancing Participation") equal to twenty-five percent (25%) of the Refinancing Proceeds.

**Section 2.9. Component First Sale.**

**2.9.1. Distribution of Component First Sale Proceeds - Single Transfer.** When, by way of a single Transfer, the Marketplace Lessee shall effect a Transfer of the Marketplace Lessee's entire interest in the Marketplace to a Person which is not an Affiliate of the Marketplace Lessee, the Developer, any entity comprising the Developer, ATHP and/or ATEHLP (hereinafter, such Transfer is referred to as a "Component First Sale"), the Marketplace Lessee shall pay to ATDC in the manner provided in section 2.7.4., an amount (such amount is herein referred to as the "ATDC First Sale Participation") equal to twenty-five percent (25%) of the Component First Sale Proceeds. The ATDC First Sale Participation shall be paid to ATDC in cash or other consideration acceptable to ATDC in its sole discretion at the earlier to occur of (i) sixty (60) days after the closing of the Component First Sale or (ii)

the date on which any distribution of Component First Sale Proceeds is made to the partners or shareholders of the Marketplace Lessee.

**2.9.2. Distribution of Component First Sale Proceeds - Series of Transfers.** When, by way of more than one Transfer, the Marketplace Lessee shall effect a Component First Sale, the Marketplace Lessee shall pay to ATDC in the manner provided in section 2.7.4., the ATDC First Sale Participation. The ATDC First Sale Participation shall be paid to ATDC in cash or other consideration acceptable to ATDC in its sole discretion in the following manner: (i) at any time that any distribution of Component First Sale Proceeds is made, ATDC shall receive an amount equal to twenty-five percent (25%) of such distribution and (ii) after the closing of the last Transfer in such series of Transfers, ATDC shall receive, within the earlier to occur of (x) sixty (60) days after such closing or (y) the date on which any distribution of Component First Sale Proceeds with respect to such last Transfer is made to the partners or shareholders of the Marketplace Lessee, an amount which is equal to the difference between the ATDC First Sale Participation and all distributions previously made to ATDC under this section 2.9.2. In the event of a partial sale, ATDC shall continue to receive Additional Lease Rent-Profit Participation and the ATDC Refinancing Participation as to the unsold portion until such unsold portion is sold.

**2.9.3. Effect of Component First Sale.** Notwithstanding anything contained in this Marketplace Lease to the contrary, in the event the Marketplace Lessee shall effect the Component First Sale, and ATDC shall be paid the ATDC First Sale Participation, no Person, including the Marketplace Lessee and the transferee of the Marketplace Lessee shall thereafter be obligated to pay to ATDC, nor shall ATDC be entitled to receive, Additional Lease Rent - Profit Participation, the ATDC Refinancing Participation or the ATDC First Sale Participation.

**2.9.4. Transfer to an Affiliate.** In the event of any Transfer to an Affiliate of the Marketplace Lessee pursuant to section 5.3.(g) of this Marketplace Lease, it is agreed as follows:

- (i) No Component First Sale shall have occurred;
- (ii) For purposes of section 2.7., section 2.8. and this section 2.9., the transferee Affiliate shall be considered to be the transferor Marketplace Lessee; and
- (iii) No obligations of the transferee Affiliate under this Marketplace Lease shall be derogated by the foregoing.

**2.9.5. Inspection of Financial Records.** The Marketplace Lessee shall keep all financial records necessary or appropriate to determine Component First Sale Proceeds and Refinancing Proceeds at the address (which shall be in the State) specified in section 12.5. ATDC, through its employees and/or independent accountants, shall have the right during customary business hours to inspect and copy such financial records and to make any examination or audit thereof which ATDC may desire. ATDC and its agents shall keep confidential, to the extent permitted by law, all information disclosed pursuant to this section 2.9.5.

**Section 2.10. Public Charges.**

**2.10.1. Payment of Public Charges.** The Marketplace Lessee covenants and agrees to pay and discharge all real property taxes, general excise taxes, levies and assessments of every nature, all charges for metered water, sewer service and other fees or charges which may be levied, assessed or imposed by any public authority or public utility upon the Leased Property or any portion thereof, on the Rent payable hereunder and/or on the interest of any Person therein (the "Public Charges"), it being the intent of the parties that all Rent reserved to ATDC hereunder shall be net of all Public Charges. Such payments shall be made when due prior to the time when any fine, penalty, interest or cost may be added. The Marketplace Lessee shall have the

right to contest the amount or validity, in whole or in part, of any Public Charges by appropriate proceedings. ATDC agrees, unless ATDC reasonably concludes that such contest is without any substantial merit, to consent to and/or formally join in any such proceedings, and to cause ATDC's lessors to consent to and/or formally join in any such proceedings, if and to the extent such consent and/or joinder may be required by law for the prosecution thereof by the Marketplace Lessee. The right of the Marketplace Lessee to contest the validity or amount of any Public Charges, unless otherwise authorized in writing by ATDC, shall not relieve the Marketplace Lessee of its obligation to fully pay Rent to ATDC net of Public Charges, including the amount of Public Charges in dispute, subject to reimbursement by ATDC to the Marketplace Lessee (if the Marketplace Lessee prevails in its challenge) of that portion of the Rent paid by the Marketplace Lessee based on the disputed amounts of Public Charges successfully challenged by the Marketplace Lessee.

**2.10.2. Evidence of Payment of Public Charges.** The Marketplace Lessee, upon written request, shall furnish or cause to be furnished to ATDC official receipts of the appropriate authority, or other proof satisfactory to ATDC, evidencing the payment of any Public Charges which were due and payable pursuant to section 2.10.1. within thirty (30) days of the date of such request.

**Section 2.11. Business Lease.** This Marketplace Lease is a business or commercial lease as distinguished from a lease for residential purposes.

### **ARTICLE III**

#### **CONSTRUCTION OF IMPROVEMENTS**

##### **Section 3.1. Construction of Improvements.**

(a) The Marketplace Lessee shall expend not less than SIXTY-SIX MILLION FIVE HUNDRED NINETEEN THOUSAND AND NO/100 DOLLARS (\$66,519,000.00) in 1993 Marketplace Development Cost and not less than TEN



MILLION SIX HUNDRED NINETY-TWO THOUSAND AND NO/100 DOLLARS (\$10,692,000.00) in 1993 Public Improvements Development Cost (which includes the reserve fund of THREE MILLION AND NO/100 DOLLARS (\$3,000,000.00) referred to in section 3.1.9.) with respect to the construction of the Marketplace Improvements and the Marketplace Public Improvements, for a total expenditure of SEVENTY-SEVEN MILLION TWO HUNDRED ELEVEN THOUSAND AND NO/100 DOLLARS (\$77,211,000.00) provided, however, that should the Marketplace Lessee show, to ATDC's satisfaction, that any or all of the Marketplace Public Improvements required under the terms of this Marketplace Lease can be constructed or provided in a manner set forth in this Marketplace Lease at a cost less than provided herein, then the minimum Public Improvements Development Cost may be reduced accordingly. A statement of the sources and uses of funding by and among the various Project Component Lessees with respect to their respective responsibilities to build various Public Improvements, together with allocations of Fixed Rent, is set forth in Exhibit G attached hereto and incorporated herein.

(b) The Marketplace Lessee shall construct, at no cost to ATDC or the State, the Marketplace Improvements and those Public Improvements listed in Exhibit H attached hereto and incorporated herein (the "Marketplace Public Improvements"; the Marketplace Improvements and the Marketplace Public Improvements are collectively called the "Improvements"). The Marketplace Lessee shall construct the Marketplace Public Improvements pursuant to the terms of this Marketplace Lease and the Construction Right-of-Entry Agreement attached hereto as Exhibit I.

(c) All plans and specifications for the Improvements shall be approved by ATDC before any use of such plans or specifications is made in connection with the Project, and ATDC may reasonably withhold approval of any plans or specifications. In the event that ATDC withholds approval of any plans or

specifications, the Marketplace Lessee shall promptly make such modifications as are requested by ATDC and resubmit them to ATDC for approval. Where ATDC is required to approve plans or specifications, ATDC may transmit such plans or specifications to DOT, DLNR, or any other interested government agency for review. Upon ATDC's written request, the Marketplace Lessee shall promptly prepare, at its sole expense, any plans and specifications for the Improvements reasonably necessary or reasonably useful to obtain governmental or legislative approvals or to fulfill any other obligation of ATDC or of the Marketplace Lessee, or of the Developer, as the case may be. The Marketplace Lessee shall promptly prepare and deliver to ATDC any schematic or conceptual plans or models for Improvements required by ATDC to promote the Project, present the Project to community groups or members of the public, or take any other action consistent with the intent and purpose of this Marketplace Lease. All plans and specifications shall be prepared by the Marketplace Lessee and its respective consultants approved by ATDC, and no substitution of such consultants shall be made without prior approval in writing by ATDC, which approval shall not be unreasonably withheld. Upon execution of this Marketplace Lease, all models and conceptual drawings prepared by the Marketplace Lessee and its consultants in connection with the Marketplace shall be made available to ATDC. Except as otherwise provided herein, all plans and specifications prepared by the Marketplace Lessee and its consultants in connection with the Marketplace shall be made available to ATDC solely for inspection and copying for internal use by State Agencies to the extent that such restriction does not violate State law, it being agreed that the interpretation of State law for such purposes by the Office of Information Practices shall be binding upon all parties.

**3.1.1. Conformity of Construction Plans for Improvements and Other Requirements.** Construction plans and all work by the Marketplace Lessee with respect to the construction of the Improvements shall be in conformity with this

Marketplace Lease, the building code and subdivision regulations of the City and all other applicable federal, State and local laws and regulations. All replacement maritime facilities shall conform to the requirements of the U.S. Coast Guard, U.S. Customs Service, and other affected State and federal agencies. Any improvements (1) which in any way affect the operations or functioning of DOT, or any facilities to be within the jurisdiction and control of DOT, and do not conform to such laws, ordinances or regulations or the plans and specifications approved by ATDC, or (2) which do not materially conform to such laws, ordinances or regulations or to the plans and specifications approved by ATDC, shall be removed or modified as required at the Marketplace Lessee's sole expense.

**3.1.2. Submission of Plans for Improvements.**

**3.1.2.1. Schematic Plans.** The Marketplace Lessee shall complete and submit to ATDC schematic plans for the Improvements no later than November 25, 1992. The Marketplace Lessee shall submit to ATDC eight (8) sets of the schematic plans with respect to such construction (the "Schematic Plans"). Upon receipt thereof, ATDC shall review the same and shall, within forty-five (45) days after such receipt, give the Marketplace Lessee notice of ATDC's approval or disapproval setting forth its reasons for any disapproval. If no notice of disapproval is delivered to the Marketplace Lessee within forty-five (45) days after the submission of the Schematic Plans, or any resubmission thereof as hereinafter provided, they shall be deemed approved. In the event of a disapproval, the Marketplace Lessee shall, within fifteen (15) days after the date the Marketplace Lessee received the notice of such disapproval, resubmit eight (8) sets of the Schematic Plans to ATDC altered to meet the grounds of disapproval. Any resubmission shall be subject to review and approval by ATDC, in accordance with the procedure hereinabove provided for an original submission, until the same shall be approved by ATDC.

**3.1.2.2. Design Development Plans.** The Marketplace Lessee shall complete and submit to ATDC design development plans for the Improvements no later than January 31, 1993. The Marketplace Lessee shall submit to ATDC eight (8) sets of the design development plans for the construction of such Improvements which are the subject of the Schematic Plans (the "Design Development Plans"). Upon receipt thereof, ATDC shall review the same and shall promptly, but in any event within forty-five (45) days after such receipt, give the Marketplace Lessee notice of ATDC's approval or disapproval setting forth its reasons for any disapproval. If no notice of disapproval is delivered to the Marketplace Lessee within forty-five (45) days after the submission of the Design Development Plans, or any resubmission thereof as hereinafter provided, they shall be deemed approved. In the event of a disapproval, the Marketplace Lessee shall, within fifteen (15) days after the date the Marketplace Lessee received the notice of such disapproval, resubmit eight (8) sets of the Design Development Plans to ATDC altered to meet the grounds of disapproval. Any resubmission shall be subject to review and approval by ATDC, in accordance with the procedure hereinabove provided for an original submission, until the same shall be approved by ATDC.

**3.1.2.3. Construction Plans.** The Marketplace Lessee shall complete and submit to ATDC construction plans for the Improvements no later than August 31, 1993, or thirty (30) days before the date on which the Marketplace Lessee has notified ATDC that the Marketplace Lessee intends to execute this Marketplace Lease, whichever first occurs.

The Marketplace Lessee shall submit to ATDC eight (8) complete sets of the working drawings and specifications for the construction of the Improvements (the "Construction Plans"), which Construction Plans shall include, but not be limited to, the following:

- (a) definitive architectural and civil engineering drawings, including off- and on-site development, landscaping and utilities drawings;
- (b) definitive structural drawings;
- (c) definitive electrical and mechanical drawings including, but not limited to, plans for all lighting facilities affecting the exterior appearance of such Improvements;
- (d) definitive traffic and parking drawings showing local circulation and points of ingress and egress; and
- (e) complete specifications.

The Construction Plans shall not include drawings and specifications relating to Marketplace Subtenant improvements.

Upon receipt of the Construction Plans, ATDC shall review the same and shall within forty-five (45) days after such receipt give the Marketplace Lessee notice of ATDC's approval or disapproval setting forth its reasons for disapproval. If no notice of disapproval is delivered to the Marketplace Lessee within forty-five (45) days after the submission of the Construction Plans, or any resubmission thereof as hereinafter provided, they shall be deemed approved. In the event of a disapproval, the Marketplace Lessee shall, within twenty (20) days after the date Marketplace Lessee received the notice of such disapproval, resubmit the Construction Plans to ATDC altered to meet the grounds of disapproval. Any resubmission shall be subject to review and approval by ATDC, in accordance with the procedure hereinabove provided for an original submission, until the same shall be approved by ATDC.

**3.1.2.4. Submission in Phases.** At the option of the Marketplace Lessee, the Construction Plans may be submitted in phases for approval by ATDC and each phase shall be individually governed by the provisions hereof in regard to the review and approval process. Upon the approval of any phase of the

Construction Plans, the Marketplace Lessee may begin to demolish existing improvements and to construct that part of the Improvements which is the subject of such Construction Plans. A phase may consist of a Project Component and/or a portion of a Project Component and/or combinations of portions of Project Components and/or Public Improvements. Where a phase is submitted, ATDC may request that Construction Plans for additional areas be submitted prior to ATDC review. Any Construction Plans submitted on a phased basis may be disapproved if they do not meet the requirements of DOT.

**3.1.3. Reserved.**

**3.1.4. Changes in Improvements.** In the event that during the construction period of any of the Improvements, the Marketplace Lessee deems it necessary to effect a Change in the Improvements described in the Construction Plans, the Marketplace Lessee shall be entitled to effect such a Change; provided, however, that if a proposed Change in the Improvements would result in the Improvements being substantially and materially changed from the Improvements described in the Construction Plans, or would in any way affect the operations or functioning of DOT or any facilities to be within the jurisdiction and control of DOT, the Marketplace Lessee shall notify ATDC of the Marketplace Lessee's intent to effect such proposed Change. Within twenty (20) days after the giving of such notice, ATDC shall give the Marketplace Lessee notice of ATDC's approval or disapproval of such proposed Change setting forth in detail ATDC's reasons for any disapproval. If no notice of disapproval is received by the Marketplace Lessee within such twenty (20) day period, the proposed Change shall be deemed approved. A Change is "substantial and material" within the meaning of this section 3.1.4. if (1) it will cause the total construction cost of the Marketplace being developed to exceed the total debt and equity financing commitments approved by ATDC; (2) it will decrease the gross square footage of the Marketplace by more than five percent (5%); (3) it will affect the exterior appearance of

the Marketplace; or (4) it otherwise has a significant impact upon (a) the design or aesthetics of the Marketplace, (b) any of ATDC's development objectives identified in its request for proposals, (c) the Public Improvements, or (d) the ability of the Marketplace Lessee to perform its obligations.

**3.1.5. Inspection by ATDC and DOT.** During construction of the Improvements, including demolition, ATDC and DOT shall be permitted access to the Leased Property for the purpose of inspecting the construction of the Improvements in order to determine if such construction is proceeding in compliance with the Construction Plans and taking any other action authorized by Chapter 206J, Hawaii Revised Statutes. If ATDC or DOT exercise such right of access and inspection, ATDC or DOT shall be responsible to the Marketplace Lessee for any damages or injuries caused by the negligence or wrongful act or omission by ATDC, DOT, or their agents, to the fullest extent permissible under Hawaii Revised Statutes, Chapters 661 and 662 or other laws. All inspections and other services rendered and relied on by ATDC, DOT or their agents, whether or not paid for by the Marketplace Lessee, shall be rendered or relied upon by ATDC or DOT solely for their benefit and protection. Neither the Marketplace Lessee nor any other Person shall rely or have the right to rely upon such inspections and services in any manner.

**3.1.6. Expediting Requests.** Where the Marketplace Lessee requests that ATDC expedite its review and approval of any plans with respect to the Improvements, ATDC will attempt to honor such request.

**3.1.7. Payment and Performance Bond.** Each Contractor engaged in the construction of Improvements shall, prior to the time such Contractor commences such construction, be required to post with the Marketplace Lessee a payment and performance bond in a principal amount not less than the cost of construction set forth in the particular agreement pursuant to which such Contractor was retained. Each such payment and performance bond shall contain such terms and conditions as are generally

contained within payment and performance bonds issued in connection with the construction of improvements similar to that portion of the Improvements to be constructed and shall name the Marketplace Lessee, ATDC and DOT as assureds or additional assureds thereunder, as the case may be.

**3.1.8. Maintenance of Specific Public Improvements.** The Marketplace Lessee, the other Project Component Lessees and the association established under the DCCR shall bear the responsibility and expense for maintenance of and security and capital improvements for specific Public Improvements as set forth in the DCCR. These specific Public Improvements are: (1) the exterior surface and roof of Aloha Tower, along with the pool and plaza surrounding Aloha Tower, the ground floor lobby of Aloha Tower, and the stair access to office floors and the observation deck, (2) Irwin Memorial Park, (3) the Ala Makai Walkway not otherwise included in any Project Component Lease, and (4) the pedestrian overpass over Nimitz Highway, if constructed.

**3.1.9. Reserve Fund.** A reserve fund of THREE MILLION AND NO/100 DOLLARS (\$3,000,000.00) must be established before commencement of construction of the Improvements, including any demolition. Such fund may be deemed to have been established by the Marketplace Lessee when any loan commitment issued to the Marketplace Lessee has a separate allocation of such amount as a fund to be expended for the following purposes: unforeseen Marketplace Development Costs; unforeseen Public Improvements Development Costs; additional Holding Period Rent for reimbursement of extraordinary expenses, including Holding Period Rents required during the period from January 1, 1995 and the initiation of the construction of the next Project Component; other Project-related public agency cash flow needs; and compensation to DOT for DOT Expenses and Losses in Revenues over and above the FIVE HUNDRED THOUSAND AND NO/100 DOLLARS (\$500,000.00) that the Marketplace Lessee has budgeted for DOT Expenses and Losses in Revenues. Nothing



in this section 3.1.9 shall be construed to limit the Marketplace Lessee's liability for DOT Expenses and Losses in Revenues, the Marketplace Lessee's obligation to construct the Improvements, or any other liability or obligation of the Marketplace Lessee.

**3.1.10. Prior Improvements to Piers 9, 10 and 11.** The Marketplace Lessee shall at its sole expense complete reconstruction and refurbishment of Piers 10 and 11 to permit Piers 10 or 11 to be used as two (2) full service interim cruise vessel terminals to serve two (2) passenger cruise vessels at Piers 9, 10 and 11 before the opening of the Marketplace for business. The cost of providing such improvements and refurbishments shall be referred to as "Maritime Relocation Costs".

**3.1.11. Coordination with DOT and Other Maritime Matters.** The Marketplace Lessee shall employ all mitigating measures required by DOT to accommodate traffic flow and minimize congestion generated by and within the Project. Any work done or caused to be done by the Marketplace Lessee in or immediately adjacent to the highway right-of-way along Nimitz Highway, Ala Moana Boulevard, Fort Street and Richards Street, including, without limitation, promenades, pedestrian overpasses, intersections, traffic signals, signage and markings and Ala Moana mini-park, shall be in conformance with DOT requirements and must be approved by DOT. ATDC will cooperate with the Marketplace Lessee in negotiating such mitigating measures with DOT.

**3.1.12. Maritime Museum and Falls of Clyde.** The Marketplace Lessee shall not take any action which would cause the maritime museum or the Falls of Clyde located at Pier 7 to close to the public and the Marketplace Lessee shall minimize any necessary disturbance of the maritime museum and the Falls of Clyde during construction of the Marketplace. The Marketplace Lessee shall provide reasonable access to the museum and the Falls of Clyde during construction.

**3.1.13. Aloha Tower.** The Aloha Tower structure, including, without limitation, all foundations, superstructure, load-bearing walls, floors and ceilings, shall be protected during construction of the Marketplace and any subsequent maintenance, repair or capital improvements of the Marketplace from damage or impairment of any kind or nature whatsoever. The Marketplace Lessee shall be responsible, at no cost or expense to the State, for ensuring that the Marketplace Lessee's demolition and construction work and other activities do not cause damage to or otherwise impair the Aloha Tower structure and foundations, including, without limitation, utilizing excavation and construction methods that do not cause the Aloha Tower structure and/or foundations to settle or move. The Marketplace Lessee shall act promptly to obtain State and federal government approvals necessary for refurbishment and renovation of Aloha Tower. The Marketplace Lessee must obtain all such approvals not later than six (6) months prior to the date of Substantial Completion of construction of the Marketplace. The Marketplace Lessee, and all of its tenants and sublessees, shall not open for business until Substantial Completion of the refurbishment and renovation of Aloha Tower.

**Section 3.2. Construction of Marketplace Improvements.** The Marketplace Improvements shall be constructed by the Marketplace Lessee in accordance with the terms and provisions of this Marketplace Lease.

**Section 3.3. Conditions Precedent to Commencement of Construction.** The Marketplace Lessee shall not be permitted to commence construction of the Improvements until all of the following have occurred or ATDC has executed a written waiver thereof:

(a) The Marketplace Lessee shall have obtained approval of the Construction Plans pursuant to section 3.1.;

(b) The Marketplace Lessee shall have obtained the necessary financing, if any, and any equity capital and any contribution due from the Developer

necessary for the full payment of the Marketplace Development Cost and the Public Improvements Development Cost, for the phase to be constructed, and shall have submitted to ATDC satisfactory evidence thereof including:

(1) Copies of construction loan commitments, proof of acceptance thereof by the Marketplace Lessee and proof of payment of or present ability to pay all loan commitment fees required to fund such commitments. Such commitments must be firm and binding subject only to normal and customary terms and conditions reasonably capable of being timely satisfied; and

(2) Proof of funding or firm commitments to fund equity capital contributions. For this purpose, the Marketplace Lessee may provide a certified financial statement or other financial statement in form reasonably satisfactory to ATDC, demonstrating that the Marketplace Lessee has adequate funds and is committing such funds to cover the excess, if any, of the amount of the Marketplace Development Cost for the phase to be developed over the amount available to the Marketplace Lessee from the financing sources described in section 3.3.(b)(1);

(c) The Marketplace Lessee shall have submitted to ATDC in writing its good faith estimate of the total amount of the Marketplace Development Cost and the Public Improvements Development Cost for the phase to be developed;

(d) The Marketplace Lessee shall have obtained all permits, licenses and other approvals from governmental authorities necessary for the construction of the Improvements for the phase to be developed;

(e) If the Marketplace Lessee intends to employ a general contractor for the construction of such Improvements, the Marketplace Lessee shall have entered into complete and binding contracts with each such general contractor and shall have delivered copies thereof to ATDC; and

(f) The Marketplace Lessee shall have delivered to ATDC, and ATDC shall have approved of, any payment and performance bond required by section 3.1.7.

**Section 3.4. Coordination of Construction Activities.** Time is of the essence during the period of construction and/or installation of the Improvements. During such construction and/or installation, ATDC will use and exercise due diligence, care and cooperation to prevent impediment, delay or interference with respect to the construction activities of the Marketplace Lessee, and to prevent the Marketplace Lessee from incurring any obligation to pay any extraordinary expense as a result of ATDC's failure to use or exercise such due diligence, care and cooperation; provided, however, that the Marketplace Lessee may not invoke the benefit of this section 3.4. unless it shall have notified ATDC in writing within a reasonably practicable time of any such impediment, delay or interference. This section 3.4. shall not refer to or require any action by ATDC with respect to any permits or approvals required for the Marketplace from Persons other than ATDC, and shall apply only to activities within the control of ATDC which threaten to delay, impede or interfere with construction which occurs on or within a reasonable proximity to the Marketplace. The Marketplace Lessee shall make commercially reasonable efforts during construction or alteration of any Improvements to prevent disturbance or interruption of any occupancy or activities of other Project Component Lessees. The Marketplace Lessee shall indemnify and hold harmless ATDC from and against any and all claims of such other Project Component Lessees, and their agents, affiliates, contractors, tenants, and/or licensees, and all those holding by, through or under them, arising out of or related to the construction or alteration of any such Improvements, including but not limited to any agreed abatement or offset of rents, costs of defense, and reasonable attorneys' fees incurred in connection therewith.

**Section 3.5. Construction Periods.**

**3.5.1. Public Improvements.** The Marketplace Lessee shall not open the Marketplace for business before the maritime improvements required to be constructed are completed, provided, however, that ATDC, at its sole discretion, may modify or waive this requirement if construction has progressed to the point at which ATDC is assured that the maritime improvements will be completed.

**3.5.2. Marketplace Improvements.** The Marketplace Lessee shall cause Substantial Completion of all the Improvements in accordance with the Construction Schedule.

**3.5.3. Construction Schedule.** ATDC and the Marketplace Lessee shall negotiate, agree upon and execute within thirty (30) days of the execution of this Marketplace Lease, a construction schedule for the construction of the Improvements (the "Construction Schedule"). The Construction Schedule shall be updated no less frequently than quarterly and the time periods provided therein shall be subject to extension pursuant to the terms and provisions of this Marketplace Lease or as otherwise mutually agreed upon by the Marketplace Lessee and ATDC.

**3.5.4. Confirmation of Construction Periods.** At the request of the Marketplace Lessee or ATDC, the parties hereto will execute and deliver from time to time such certificates, documents or instruments as may be appropriate to confirm the dates of commencement or completion of construction of the Improvements and/or the Marketplace Improvements, which certificates, documents or instruments, if recordable, may be recorded in the Land Records by the party requesting the same at its expense.

**Section 3.6. Connection of Improvements to Utilities.** The Marketplace Lessee, at its sole cost and expense, will install or cause to be installed all necessary connections between the Improvements and the water, sanitary and storm drain mains and conduits, pipelines, appurtenances and equipment for electricity, telecommunications, fire protection or gas purposes owned or controlled by ATDC, the State or the City, or other public agency or a public utility.

**Section 3.7. Permits and Approvals.** The Marketplace Lessee shall secure any and all permits and approvals required for the Marketplace Lessee to construct the Improvements and shall pay any and all fees and charges due in connection with the issuance of any such permits and approvals.

**Section 3.8. Compliance with Laws.** The Marketplace Lessee and ATDC will comply in every respect with any and all federal, State and municipal laws, ordinances, rules, regulations, orders and notices now or hereafter in force or issued which may be applicable to any and all of the work or operations to be done, performed or carried on by the Marketplace Lessee or ATDC, as the case may be, under the provisions of this Marketplace Lease. Nothing herein shall limit the right of the Marketplace Lessee or ATDC to contest the validity or enforceability of any statute, law, ordinance, rule, regulation, order or notice with which the Marketplace Lessee or ATDC may be required to comply hereunder.

**Section 3.9. Extension of Time Requirements.**

**3.9.1. Improvements.** The times within which the Developer and/or the Marketplace Lessee must submit the Construction Plans, and the times within which the Marketplace Lessee must commence and complete the construction of the Improvements, all as specified in this Article III, may be extended by ATDC, in ATDC's sole discretion, for such periods of time as ATDC deems advisable, for good and sufficient cause shown by the Marketplace Lessee to the sole satisfaction of ATDC. Any such extension shall be in writing and in such form as will enable it to be recorded in the Land Records.

**3.9.2. Reserved.**

**3.9.3. Forced Delay Provisions Not Derogated.** Nothing hereinabove contained in section 3.9. shall be deemed to derogate the right of the Marketplace Lessee to avail itself of the "forced delay" provisions of section 7.4. of this Marketplace Lease.

**Section 3.10. Alterations and Renovations.** After completion of construction of the Improvements, the Marketplace Lessee from time to time may make such alterations or renovations thereof as the Marketplace Lessee may deem desirable; provided, however, that no alteration or renovation which substantially affects the exterior appearance of any of the Improvements or affects the operations or functioning of DOT or any facilities within the jurisdiction and control of DOT, including any interruption in utility service, or which does not conform to any applicable law, the ATDC development rules or plan, or to the DCCR, this Marketplace Lease or any of the agreements attached hereto, shall be constructed without the prior written approval of plans and specifications by ATDC.

**Section 3.11. Memoranda of Dates of Substantial Completion.** Within thirty (30) days after the date of Substantial Completion of the Improvements, ATDC and the Marketplace Lessee, upon the request of either such Person, shall execute one or more written memoranda in such form as will enable them to be duly recorded in the appropriate Land Records setting forth the applicable date of Substantial Completion and the then anticipated termination date of the lease term set forth in this Marketplace Lease.

**Section 3.12. Rights of Entry Required for Construction of Improvements.** ATDC shall arrange for rights of entry from DOT and other State Agencies in favor of the Marketplace Lessee in order for the Marketplace Lessee to construct the Improvements pursuant to the terms of that certain Construction Right-of-Entry Agreement attached hereto as Exhibit I. ATDC understands that in order for the Marketplace Lessee to construct the Improvements, the Marketplace Lessee must store materials and equipment, enter and temporarily construct upon DOT lands.

**Section 3.13. General Construction Standards.** All construction, alteration or repair work permitted hereby shall be accomplished expeditiously, diligently and in accordance with good engineering and construction practices.

## ARTICLE IV

### LAND USES

**Section 4.1. Land Uses.** The Marketplace Lessee agrees, for itself and its successors and assigns to or of the Leased Property hereby conveyed: (a) to use and occupy the Leased Property for (i) any lawful retail, office or other commercial and related and incidental uses, such as management offices, and other uses commonly found in mixed-use complexes, and (ii) any other uses ancillary to the foregoing and (b) not to use the Leased Property (i) in a manner likely to injure the reputation of the Leased Property or which will be in violation of law, (ii) for any disreputable or immoral purpose whatsoever, or (iii) in a manner which substantially or unreasonably interferes with or hinders DOT's management or operation of Honolulu Harbor.

**Section 4.2. Maintenance of Leased Property.** The Marketplace Lessee shall at all times during the Term of this Marketplace Lease take good professional care of the Leased Property including without limitation the Common Areas, parking areas, sidewalks, curbs, roadways, exterior lighting, fences, surface and storm drainage systems, sanitary sewers and other utilities on the Leased Property, except as may be otherwise provided in any agreement between the Marketplace Lessee and DOT or any other State Agency, and shall at all times during the Term of this Marketplace Lease maintain the same in a first-class, safe, neat, attractive and sanitary condition. The Marketplace Lessee promptly shall make all necessary repairs, interior and exterior, structural and nonstructural, ordinary and extraordinary, to keep the Leased Property in such condition. The term "repairs" as used in this section 4.2. shall include replacements or renovations or any major rehabilitation when necessary, and all such repairs made by the Marketplace Lessee shall be to at least the standards of design, construction, materials and workmanship as are then prevalent for existing, first-class, retail/office projects in the City.



## **ARTICLE V**

### **ASSIGNMENT; TRANSFER**

#### **Section 5.1. Reserved.**

**Section 5.2. Prohibited Transfers.** Except as specifically permitted in this Marketplace Lease, neither the Marketplace Lessee nor ATDC shall make or suffer to be made any total or partial sale, pledge, lease, assignment, conveyance, mortgage, trust or power, or other transfer of their respective interests herein, including, but not limited to, by operation of law ("Transfer"), other than one (1) or more Leasehold Mortgages, mortgages or financing conveyances permitted pursuant to the terms of this Marketplace Lease. For the purposes of this Article V, Transfers of Control of a Person by Transfers of stock or other forms of ownership and Control shall be deemed Transfers as provided above. Any Transfer made by the Marketplace Lessee or by ATDC, as the case may be, in violation of this Article V shall be deemed to be an Event of the Marketplace Lessee's Default or an Event of ATDC's Default, as the case may be, whether or not the Person making the Transfer had knowledge thereof.

#### **Section 5.3. Permitted Transfers by the Marketplace Lessee.**

Notwithstanding the provisions of section 5.2., the following Transfers shall be permitted hereunder:

(a) Prior to the Substantial Completion of the Marketplace, any Transfer by the Marketplace Lessee of up to thirty-five percent (35%) of the Marketplace Lessee's interest in the Leased Property may be made without the consent of ATDC, if such a Transfer is necessary to enable the Marketplace Lessee to raise additional capital to be used in connection with the development, construction and/or operation of the Marketplace. Should the Marketplace Lessee wish to effect any Transfer during such period which would result in a Transfer of more than thirty-five percent (35%) of the Marketplace Lessee's interest in the Leased Property, the prior

written consent of ATDC must be obtained for such a Transfer and ATDC must be furnished with financial and other information in regard thereto which is in form and substance reasonably satisfactory to ATDC; provided, however, that ATDC shall in no event be obligated to consent to a Transfer by the Marketplace Lessee of a Controlling interest in the Leased Property; and provided further, however, that if ATDC does not notify the Marketplace Lessee of its objections to the Transfer in writing, within thirty (30) days following the giving of notice and such information by the Marketplace Lessee to ATDC that the Marketplace Lessee intends to effect such Transfer, such Transfer shall be deemed approved by ATDC.

(b) Commencing upon the Substantial Completion of the Marketplace, any Transfer of less than a Controlling interest in the Leased Property to any Person, without the consent of ATDC.

(c) Commencing upon the second (2nd) anniversary of the Substantial Completion of the Improvements, and after financial and other information in regard to the transferee which is in form and substance reasonably satisfactory to ATDC is furnished to it, and upon the written approval of ATDC, any Transfer of a Controlling interest in the Leased Property may be made; provided, however, that such a Transfer may be disapproved if ATDC reasonably concludes that such Transfer would have an adverse impact upon the operation of the Marketplace as a first-class, retail/office complex; and provided further, however, that if ATDC does not notify the Marketplace Lessee of its objections to the Transfer, in writing, within thirty (30) days following the giving of notice and such information by the Marketplace Lessee to ATDC that the Marketplace Lessee intends to effect such Transfer, such Transfer shall be deemed approved by ATDC.

(d) Any Transfer with respect to a sale-leaseback, lease-leaseback or similar financing transaction; provided, however, that such Transfer shall be subject to the consent of ATDC, which consent shall not be unreasonably withheld nor

conditioned on the payment of any money; except the ATDC Refinancing Participation provided for in section 2.8.

(e) Any Transfer by way of a Leasehold Mortgage to a Leasehold Mortgagee or a Lender, or to an agent, designee or nominee of a Lender which is wholly owned or Controlled by a Lender; provided, however, that such Transfer shall be subject to the consent of ATDC, which consent shall not be unreasonably withheld nor conditioned on the payment of any money.

(f) Any Transfer directly resulting from the foreclosure of a Leasehold Mortgage or the assignment of the Marketplace Lease in lieu of foreclosure of a Leasehold Mortgage, or any Transfer made by the purchaser at foreclosure of a Leasehold Mortgage or by the assignee of an assignment of the Marketplace Lease in lieu of foreclosure of a Leasehold Mortgage.

(g) Any Transfer to a Person which is an Affiliate of the Marketplace Lessee, ATHP and/or ATEHLP.

**Section 5.4. Permitted Transfers of ATDC's Interests.** ATDC may make or create or suffer to be made or created a Transfer of all or any part of its interest in the Leased Property or this Marketplace Lease without obtaining the consent of the Marketplace Lessee, provided that the transferee shall expressly assume all of the obligations of ATDC hereunder.

**Section 5.5. Transferee.** Before any Transfer permitted herein, the transferor shall:

(a) provide written notice of such Transfer and designate the transferee involved therein to the Marketplace Lessee or ATDC, as the case may be, and any Leasehold Mortgagee of which the transferor has been given notice hereunder;

(b) provide the Marketplace Lessee or ATDC, as the case may be, with an instrument (in form and substance reasonably satisfactory to the Marketplace

Lessee or ATDC, as the case may be) in recordable form whereby such transferee agrees to perform and fulfill the obligations of the transferor; and

(c) provide in the instrument transferring the Marketplace Lessee's interest that any such consent given by ATDC to a Transfer shall not be deemed to be a consent to any subsequent Transfer.

**Section 5.6. Marketplace Lease.** ATA, ATA, Inc., a Hawaii corporation, (the general partner of Aloha Tower Hawaiian Partners, a Hawaii limited partnership and the general partner of ATA) and Aloha Tower Enterprise Hawaii, Inc., a Maryland corporation, (the general partner of Aloha Tower Enterprise Hawaii Limited Partnership, a Maryland limited partnership and the other general partner of ATA) shall execute a guaranty of performance of the Marketplace Lessee during the Development Period. Such Guaranty shall be in a form attached hereto as Exhibit J.

**Section 5.7. Liability of Transferor.** Following any Transfer permitted herein, other than a Transfer to an Affiliate, whereby the transferor shall have transferred and assigned its entire interest in this Marketplace Lease and Marketplace Improvements, if (a) the transferor is not then in default of any of its obligations to ATDC under this Marketplace Lease, (b) the transferee shall have executed the instrument required by section 5.5., and (c) ATDC shall have consented to such Transfer after being provided with financial and other information with respect to the transferee which is in form and substance reasonably acceptable to ATDC (or (1) the time for ATDC to act upon the transferor's request for such consent has expired and ATDC has not responded to such request, or (2) the transferor is a Lender or an Affiliate of a Lender and has effected such Transfer without ATDC's consent under section 5.3.(f)), then ATDC shall release the transferor from liability under this Marketplace Lease arising from and after the effective date of the Transfer. Except as provided in this section 5.7., the transferor shall not be released from liability under this Marketplace Lease and no Transfer shall become effective unless the transferor shall

have executed an instrument acknowledging such liability. No Transfer shall be permitted unless the Marketplace Lessee is not in default and has paid all sums due to ATDC under this Marketplace Lease.

## **ARTICLE VI**

### **MORTGAGE FINANCING; RIGHTS OF LEASEHOLD MORTGAGEE**

**Section 6.1. Leasehold Mortgages.** The Marketplace Lessee shall have the right at any time during the Term of this Marketplace Lease to encumber its leasehold estate by way of one or more Leasehold Mortgages in accordance with the terms and provisions of section 5.3., if ATDC has given its written consent to such Leasehold Mortgage, which consent shall not be unreasonably withheld nor conditioned on the payment of any money other than reasonable out-of-pocket costs (including reasonable attorneys' fees) incurred by ATDC in giving its consent. ATDC hereby approves The Mitsui Trust and Banking Co., Ltd., a Japan corporation, as a Leasehold Mortgagee subject to approval of mortgage documents, terms and amounts, provided that there are no material changes in its financial condition. Upon giving of such consent, a Leasehold Mortgagee shall have the following rights and be subject to the protection of section 6.2.

#### **Section 6.2. Rights of Leasehold Mortgagees.**

**6.2.1. ATDC Acceptance.** The Marketplace Lessee irrevocably directs that ATDC accept, and ATDC agrees to accept performance and compliance by any Leasehold Mortgagee, at such Leasehold Mortgagee's sole option, of and with any term, covenant, agreement, provision or limitation to be kept, observed or performed by the Marketplace Lessee.

**6.2.2. Cure of Default.** ATDC agrees that following an Event of the Marketplace Lessee's Default and the expiration of any period within which the Marketplace Lessee may cure such Event of the Marketplace Lessee's Default, ATDC

will take no action to terminate the Term of this Marketplace Lease as provided in this Marketplace Lease, nor to re-enter and take possession of the Leased Property, unless it shall first give each Leasehold Mortgagee notice after the expiration of any such cure period specifying such Event of the Marketplace Lessee's Default and stating the intention of ATDC, on a date specified in such notice, to re-enter and take possession of the Leased Property. Notwithstanding such notice, the Term of this Marketplace Lease shall not be terminated nor shall ATDC re-enter and take possession of the Leased Property, if:

(a) such Event of the Marketplace Lessee's Default can be cured by the payment of a fixed monetary amount and any Leasehold Mortgagee shall make such payment within thirty (30) days after the date such notice is given, and such notice shall be deemed to have been given on the earliest of one (1) business day after telecopy transmission, the date of personal delivery or five (5) business days after mailing; or

(b) such Event of the Marketplace Lessee's Default can be cured with the exercise of reasonable diligence by a Leasehold Mortgagee after obtaining possession of the Leased Property, and a Leasehold Mortgagee, within forty-five (45) days after the date such notice is given (such notice shall be deemed to have been given on the earliest of one (1) business day after telecopy transmission, the date of personal delivery or five (5) business days after mailing), commences such proceedings (including, as applicable but not limited to, the filing of a petition for the appointment of a receiver or a foreclosure proceeding) as are necessary to obtain such possession and thereafter diligently prosecutes such action and promptly upon obtaining such possession commences (and thereafter diligently pursues) the curing of such Event of the Marketplace Lessee's Default; or

(c) such Event of the Marketplace Lessee's Default is not capable of being cured by a Leasehold Mortgagee, even if possession of the Leased

Property were obtained, and a Leasehold Mortgagee, within forty-five (45) days after the date such notice is given (such notice shall be deemed to have been given on the earliest of one (1) business day after telecopy transmission, the date of personal delivery or five (5) business days after mailing), publishes any required notice of foreclosure or institutes foreclosure proceedings, as the case may be, and thereafter proceeds with diligence to acquire or acquire and sell the Marketplace Lessee's interest in this Marketplace Lease (except that if such Leasehold Mortgagee is precluded from instituting or proceeding with such foreclosure by reason of a bankruptcy or insolvency proceeding filed by or against the Marketplace Lessee, said forty-five (45) day period shall be extended by a period of time equal to the period during which said Leasehold Mortgagee is so precluded from instituting or proceeding with such foreclosure so long as such Leasehold Mortgagee makes diligent efforts to (1) dismiss the bankruptcy or other action, (2) lift the stay or (3) appoint a trustee or receiver) and takes any action reasonably necessary or appropriate to permit said Leasehold Mortgagee to foreclose.

**6.2.3. Marketplace Lease Termination; New Lease.**

(a) In the event of the termination of this Marketplace Lease prior to its stated expiration date for any reason including, without implied limitation, pursuant to an Event of the Marketplace Lessee's Default or the rejection or disaffirmance of this Marketplace Lease pursuant to any bankruptcy law or any other law affecting creditors' rights (other than by reason of voluntary termination by the Marketplace Lessee, consented to by each Leasehold Mortgagee and ATDC or by reason of any termination pursuant to the provisions of section 9.2.10., Damage And Destruction, or Article X, Condemnation), ATDC shall give all Leasehold Mortgagees notice of such termination and shall enter into a new lease of the Leased Property with a Leasehold Mortgagee or, at the request of such Leasehold Mortgagee, with an assignee, designee or nominee of such Leasehold Mortgagee for the remainder of the Term of this Marketplace Lease effective as of the date of such termination, at the rate and upon the

same covenants, agreements, terms, provisions and limitations as are herein contained, provided:

(i) such Leasehold Mortgagee makes written request upon ATDC for such new lease within thirty (30) days after the giving of such notice of termination and such written request is accompanied by payment to ATDC of all amounts then due to ATDC from the Marketplace Lessee of which ATDC shall have given the Leasehold Mortgagee notice;

(ii) such Leasehold Mortgagee pays or causes to be paid to ATDC at the time of the execution and delivery of such new lease any and all additional sums which would at the time of the execution and delivery thereof be due under this Marketplace Lease but for such termination and pays or causes to be paid any and all out-of-pocket expenses including reasonable attorneys' fees, court costs and disbursements incurred by ATDC in connection with any such termination and/or in connection with the execution and delivery of such new lease and any conveyance of title to the Leased Property, less the net income from the Leased Property collected by ATDC subsequent to the date of the termination of this Marketplace Lease and prior to the execution and delivery of such new lease; and

(iii) such Leasehold Mortgagee agrees to cure, within thirty (30) days after the execution and delivery of such new lease, all uncured Events of the Marketplace Lessee's Default of which ATDC shall have given the Leasehold Mortgagee notice (except any Event of the Marketplace Lessee's Default which is not capable of being cured by a Leasehold Mortgagee, even if possession of the Leased Property were obtained, which Events of the Marketplace Lessee's Default, if any, to the extent that the same shall have occurred prior to the execution and delivery of such new lease shall be deemed to have been waived), or if any such Event of the Marketplace Lessee's Default cannot be cured within such period, such Leasehold



Mortgagee agrees to commence, within such period, to cure such Event of the Marketplace Lessee's Default and thereafter pursues the same with due diligence.

(b) If ATDC receives written requests in accordance with the provisions of this section 6.2.3. from more than one (1) Leasehold Mortgagee whose Leasehold Mortgage has been approved by ATDC, ATDC shall only be required to deliver the new lease to the Leasehold Mortgagee who is, among such Leasehold Mortgagees requesting a new lease, the holder of the most junior Leasehold Mortgage; provided, however, that such Leasehold Mortgagee shall, not later than the execution of such new lease, pay in full the sums secured by any or all Leasehold Mortgages which are prior in lien to the Leasehold Mortgage held by such Leasehold Mortgagee.

(c) Any new lease made pursuant to this section 6.2.3. shall

- (i) have the same relative priority in time and in right as this Marketplace Lease, and
- (ii) have the benefit of all of the right, title, powers and privileges of the Marketplace Lessee hereunder in and to the Leased Property. At any Leasehold Mortgagee's request, ATDC will enter into an agreement with any Leasehold Mortgagee granting to the Leasehold Mortgagee the rights set forth in this section 6.2.3.(c).

(d) Unless and until ATDC has received notice from each Leasehold Mortgagee within the thirty (30) day period provided for in section 6.2.3.(a)(i) that the Leasehold Mortgagee elects not to request a new lease as provided herein, or until the period therefor has expired without receipt of any such request, ATDC shall not cancel or agree to the termination or surrender or material amendment of any existing subleases or other agreements affecting the Leased Property which will be binding on a Leasehold Mortgagee entering in a new lease, nor enter into any new subleases under this Marketplace Lease or such other agreements without the prior written consent of each Leasehold Mortgagee. Such new lease with a Leasehold Mortgagee (or its assignee, designee or nominee) shall provide that ATDC shall assign to such lessee all of its rights, if any, in subleases whose sublessees have attorned to

ATDC. The right to a new lease as set forth in this section 6.2.3. shall be in addition to the Leasehold Mortgagee's other rights under this Marketplace Lease including, without implied limitation, its rights under section 6.2.2.

**6.2.4. Consent of Leasehold Mortgagee to Amendments.** This Marketplace Lease shall not be modified, amended, surrendered, canceled or wholly or partially terminated by the Marketplace Lessee, without the written consent of each Leasehold Mortgagee whose name and address shall have been furnished to ATDC.

**6.2.5. Foreclosure By Leasehold Mortgagee.** In event of foreclosure by a Leasehold Mortgagee, the following shall apply:

(a) **Judicial Foreclosure.** The foreclosure of a Leasehold Mortgage by judicial proceedings and the foreclosure sale of this Marketplace Lease shall not require the consent of ATDC. ATDC shall be joined as a party to such proceedings and be given notice and opportunity to object to such sale, provided, however, that upon such foreclosure and sale, ATDC shall recognize the purchaser in connection therewith as the lessee under this Marketplace Lease, provided that such purchaser shall undertake in writing to perform all covenants and obligations of the lessee hereunder from and after the time the purchaser acquires title to this Marketplace Lease.

(b) **Leasehold Mortgagee's Rights After Foreclosure.** In the event a Leasehold Mortgagee either acquires the leasehold estate created by this Marketplace Lease upon foreclosure (whether judicial or non-judicial in nature) or by assignment of lease in lieu of foreclosure, or acquires a leasehold estate pursuant to the terms of any new lease provided herein, such Leasehold Mortgagee may, without the consent of ATDC, sell or assign such leasehold estate to an assignee who shall cure all existing defaults which are then capable of being cured and shall undertake in writing to perform all covenants and obligations of the lessee under this Marketplace Lease from and after the date of the assignment.

(c) Marketplace Lease Default Cured. Nothing contained herein shall be construed to require any Leasehold Mortgagee to continue foreclosure proceedings after the applicable Events of the Marketplace Lessee's Default have been cured. If the applicable Events of the Marketplace Lessee's Default are cured (whether by the Marketplace Lessee, any Leasehold Mortgagee or other Person) and the Leasehold Mortgagee discontinues such foreclosure proceedings, this Marketplace Lease shall be reinstated and shall continue in full force and effect as if no Events of the Marketplace Lessee's Default had occurred.

**6.2.6. Notice to ATDC and Leasehold Mortgagee.** If any Leasehold Mortgagee shall furnish ATDC with a written notice setting forth the name and address of such Leasehold Mortgagee (which name and address may be amended by written notice to ATDC by such Leasehold Mortgagee from time to time), ATDC shall thereafter send to said Leasehold Mortgagee a copy of any notice of an Event of the Marketplace Lessee's Default given to the Marketplace Lessee under this Marketplace Lease, and no such notice shall be deemed to have been properly given unless and until (a) a copy thereof shall have been sent to such Leasehold Mortgagee at the address specified in such Leasehold Mortgagee's notice to ATDC, or (b) such Leasehold Mortgagee actually receives such notice.

**6.2.7. Performance by Leasehold Mortgagee.** No Leasehold Mortgagee shall have any liability for the performance of any of the covenants, conditions or obligations of the Marketplace Lessee under this Marketplace Lease unless and until such time as such Leasehold Mortgagee acquires title to the leasehold estate created by this Marketplace Lease.

**Section 6.3. No Subordination of Fee Simple.** Neither ATDC nor the State shall be required to subordinate its interest in the Leased Property or any portion thereof or otherwise pledge, hypothecate or transfer the fee simple title to the Land.

## ARTICLE VII

### **DEFAULT; REMEDIES**

**Section 7.1. Events of Default - the Marketplace Lessee.** The following events are hereby defined as "Events of the Marketplace Lessee's Default":

**7.1.1. Failure - Payment of Money.** If the Marketplace Lessee fails to pay any Holding Period Rent, or any other rents or other amounts due hereunder, within five (5) days after notice of such failure.

**7.1.2. Failure - Performance of Other Covenants, Etc.** If the Marketplace Lessee fails, refuses or neglects to perform any of its other obligations hereunder or under the DCCR, and such failure continues for a period of thirty (30) days or such additional time, not to exceed one hundred twenty (120) days, reasonably necessary to cure such default following written notification of such failure to perform. Such default shall also occur, without notice or opportunity to cure, if the Marketplace Lessee repudiates or refuses to perform its obligations hereunder, or intentionally commits any act which renders further performance of this Marketplace Lease impossible. 156 4072

**7.1.3. Failure - Bankruptcy, Insolvency, Etc.** If the Marketplace Lessee files a voluntary petition in bankruptcy or insolvency or for reorganization or arrangement under the bankruptcy code of the United States or under any insolvency act of any State or nation, or voluntarily takes advantage of any such law or act by answer or otherwise or is dissolved or admits its bankruptcy or insolvency or an inability to satisfy its creditors or makes an assignment for the benefit of creditors; or if all or substantially all of the assets of the Marketplace Lessee are attached, seized, subjected to a writ of distress warrant or are levied upon, or come into the possession of any receiver, trustee, custodian, or assignee for the benefit of creditors, and the same is not vacated, stayed, dismissed, set aside or otherwise remedied within one hundred twenty (120) days after the occurrence thereof; or if this Marketplace Lease shall be transferred

or assigned by the Marketplace Lessee in a manner prohibited in this Marketplace Lease.

**7.1.4. Failure - To Protect Marketplace From Liens, Etc.** If the Marketplace Lessee shall cause, suffer or permit the Marketplace or any portion thereof or the interest of any party hereto or of the State therein to be subjected to or encumbered by any lien, encumbrance, writ of attachment, or other process, including, without limitation, any judgment or mechanic's lien imposed against the Marketplace Lessee or any of its Affiliates, and shall fail to remove by bond or otherwise such lien, encumbrance, writ of attachment or other process within thirty (30) days after such has attached.

**7.1.5. Abandonment of the Leased Property.** If the Marketplace Lessee shall abandon any portion of the Leased Property.

**Section 7.2. Remedies for the Marketplace Lessee's Default.**

**7.2.1. Remedies.** Subject to the provisions of Article VI of this Marketplace Lease, if any of the Events of the Marketplace Lessee's Default shall occur, ATDC, to the fullest extent permitted by law and equity, shall have the right to pursue any or all of the following remedies:

(a) if the default is a Material Default, the right and option to terminate this Marketplace Lease and all of ATDC's obligations hereunder by giving notice of such election to the Marketplace Lessee, whereupon this Marketplace Lease shall terminate as of the date specified in such notice;

(b) the right to cure any such default, at the Marketplace Lessee's cost and expense, and to be reimbursed by the Marketplace Lessee for any and all of the costs and expenses (including, but not limited to, reasonable attorneys' fees, court costs and other necessary disbursements) incurred by ATDC in effecting such cure, together with interest thereon at the Default Rate;

(c) the right to a writ of mandamus, injunction or other similar relief, to the fullest extent available to it under State or federal law; and

(d) the right to maintain any and all actions at law or suits in equity or other proper proceedings to enforce the curing or remedying of such Events of the Marketplace Lessee's Default or for damages resulting from such Events of the Marketplace Lessee's Default.

In the event of termination of this Marketplace Lease following an Event of the Marketplace Lessee's Default, the Marketplace Lessee shall remain liable to ATDC for any damages caused by any breach of this Marketplace Lease as may be cognizable by law and ATDC shall be free to seek specific performance of this Marketplace Lease or any other legal or equitable remedy available.

**7.2.2. Additional Remedies.** In the event of termination of this Marketplace Lease upon a Material Default by the Marketplace Lessee, ATDC shall retain as liquidated damages all deposits, Holding Period Rent, and other monies paid by the Marketplace Lessee and shall have no further liability to the Marketplace Lessee, except for any liability arising out of an Event of ATDC's Default. In the event of a termination of this Marketplace Lease, the Marketplace Lessee shall use its commercially reasonable efforts (including the payment of any fees) to obtain the requisite authority from its architects and consultants and any other party having an interest therein and deliver to ATDC all models, conceptual drawings, plans, specifications, blueprints, and other Marketplace documents prepared by itself or its consultants, and, upon such delivery, such items shall become the sole property of ATDC. ATDC shall thereafter be free to use such plans and specifications to construct the Marketplace, either by itself or in conjunction with any other Person, and ATDC shall be free to enter into any contract or agreement with any of the Marketplace Lessee's Affiliates, partners, consultants, architects, planners, engineers, or employees. ATDC shall also thereafter be and become the sole owner of all permits, approvals and

other governmental entitlements related to the Leased Property, and the Marketplace Lessee shall cooperate with ATDC in effecting the transfer of such permits, approvals and entitlements, upon payment by ATDC of all costs associated therewith. The Marketplace Lessee shall execute a release of its rights under this Marketplace Lease and memorandum of termination of this Marketplace Lease in recordable form. Upon such termination, ATDC shall be free to enter into negotiations with any other Person for development of the Marketplace, to repeat the Request-For-Proposal process (in which process the Marketplace Lessee may or may not be free to participate), to develop the Marketplace itself without participation by the Marketplace Lessee or to take any other action with respect to the Marketplace.

**Section 7.3. Event of Default - ATDC.**

**7.3.1. Event of ATDC's Default.** The following event is hereby defined as "Event of ATDC's Default":

If ATDC fails, refuses or neglects to perform any of its obligations hereunder, and such failure continues for a period of thirty (30) days or such additional time, not to exceed one hundred twenty (120) days, reasonably necessary to cure such default following written notification by the Marketplace Lessee of such failure to perform. Such default shall also occur, without notice or opportunity to cure, if ATDC repudiates or refuses to perform its obligations hereunder, or intentionally commits any act which renders further performance of this Marketplace Lease impossible.

**7.3.2. Remedies for ATDC's Default.** If an Event of ATDC's Default shall occur, the Marketplace Lessee, to the fullest extent permitted by law and equity, shall have the right to pursue any or all of the following remedies:

(a) if the default is a Material Default, the right and option to terminate this Marketplace Lease and all of the Marketplace Lessee's obligations hereunder by giving notice of such election to ATDC, whereupon this Marketplace Lease shall terminate as of the date specified in such notice;

(b) the right to cure any such default, at ATDC's cost and expense, and to be reimbursed by ATDC for any and all of the costs and expenses (including, but not limited to, reasonable attorneys' fees, court costs and other necessary disbursements to the extent permitted by law) incurred by the Marketplace Lessee in effecting such cure, together with interest thereon at the Default Rate;

(c) the right to a writ of mandamus, injunction or other similar relief, to the fullest extent available to it under State or federal law; and

(d) the right to maintain any and all actions at law or suits in equity or other proper proceedings to enforce the curing or remedying of such Events of ATDC's Default or for damages resulting from such Events of ATDC's Default.

In the event of termination of this Marketplace Lease following an Event of ATDC's Default, ATDC shall promptly on demand return to the Marketplace Lessee all models, conceptual drawings, plans, specifications, blueprints, and other Project documents which have been generated by the Marketplace Lessee and its consultants, or by any planner, architect or engineer retained by the Marketplace Lessee. The Marketplace Lessee shall have no further liability to ATDC hereunder, except for any liability arising out of a default by the Marketplace Lessee, and the Marketplace Lessee shall have no further duty to develop the Marketplace or perform any obligations hereunder. ATDC shall remain liable to the Marketplace Lessee for any damages caused by any breach of this Marketplace Lease as may be cognizable by law, and the Marketplace Lessee shall be free to seek specific performance of this Marketplace Lease or any other legal or equitable remedy available, provided that nothing in this Marketplace Lease shall be construed as a waiver of sovereign immunity or any other defense available to the State, its officers, agents or employees.

**Section 7.4. Forced Delay.** For the purpose of any of the provisions of this Marketplace Lease, the Marketplace Lessee shall not be considered in breach of or in default of any of its development obligations in the event of forced delay in the



performance of such obligations due to causes beyond the control of the Marketplace Lessee or its architects, consultants, engineers, contractors or subcontractors, including tsunami, earthquake, strikes, lockouts, actions of labor unions, riots, hurricanes, typhoons, tornadoes, water spouts, floods, explosions, acts of God, acts of the public enemy, unforeseeable acts of government (including the federal government, the State, the City, their departments and agencies), litigation by any third party (due in no part to the fault, negligence or wrongful actions of the Marketplace Lessee), war, invasion, insurrection, mob violence, sabotage, malicious mischief, vandalism, inability (notwithstanding good faith and diligent efforts) to procure, or exceptional shortage of, labor, equipment, facilities, materials or supplies in the open market (it being recognized by the Marketplace Lessee that labor and material shortages and procurement problems exist generally in the State and the Marketplace Lessee must take such shortages and problems into consideration in scheduling its development activities), failures of transportation, fires or other casualties, epidemics, and quarantine restrictions which prevent entry onto the Leased Property, freight embargoes, and unforeseeable inability (notwithstanding good faith and diligent efforts) to obtain governmental permits or approvals; it being the purpose and intent of this section 7.4. that in the event of the occurrence of any such forced delay due to the causes enumerated above, the time or times for the Marketplace Lessee to develop the Marketplace under this Marketplace Lease shall be extended for a period of time equal to the actual delay incurred by the Marketplace Lessee as a result of the forced delay; provided, however, that if the Marketplace Lessee shall seek the benefit of the provisions of this section 7.4., the Marketplace Lessee shall, within thirty (30) days after the beginning of any such forced delay, give notice to ATDC in writing of the cause or causes thereof. Upon the termination of any forced delay, the parties hereto agree that, upon the request of either party, they will enter into a memorandum

agreement showing the effect of the forced delay upon the dates and time schedules provided for herein.

**Section 7.5. Obligations, Rights and Remedies Cumulative.** The rights and remedies of the parties to this Marketplace Lease, whether provided by law, equity, or by this Marketplace Lease, shall be cumulative, and the exercise by either party of any one or more of such remedies shall not preclude the exercise by it, at the same or different times, of any other such remedies for the same default or breach as provided herein or of any of its remedies for any other default or breach by the other party as provided herein.

## **ARTICLE VIII**

### **PROTECTION AGAINST MECHANICS' LIENS AND OTHER CLAIMS**

#### **Section 8.1. The Marketplace Lessee to Discharge Mechanics' Liens.**

(a) The Marketplace Lessee shall indemnify ATDC, DOT and the State against all mechanics' or materialmen's liens which may attach to or be asserted against any portion of the Leased Property during the Term of this Marketplace Lease. Contractors of the Marketplace Lessee shall enter into an agreement prior to commencement of construction in form and substance reasonably satisfactory to ATDC, whereby such contractors shall indemnify ATDC, DOT and the State against any claims for such liens which may be asserted by it or its subcontractors or suppliers, and all such lien rights shall be waived.

(b) The Marketplace Lessee shall at all times keep the Leased Property free and clear of all mechanics' and materialmen's liens and all other liens and encumbrances. If at any time during the Term of this Marketplace Lease any action to impose a mechanics' or materialmen's lien shall at any time be filed against all or any portion of the Leased Property, the Marketplace Lessee shall promptly take and diligently prosecute appropriate action to have the same discharged or contest in good

faith the amount or validity thereof, and if unsuccessful in such contest, to have the same discharged. Upon the Marketplace Lessee's failure to do so, ATDC, in addition to any other right or remedy that ATDC may have (including without limitation the right to deliver to the Marketplace Lessee a notice of default under section 7.1.), may take such action as may be reasonably necessary or appropriate to protect the interests of ATDC or any other State Agency in the Leased Property, and the Marketplace Lessee shall pay any amount paid by ATDC in connection with such action, and all reasonable legal and other costs and expenses incurred by ATDC in connection therewith (including, but not limited to, reasonable attorneys' fees, court costs and other disbursements made by ATDC, DOT and/or any other State Agency). Any such amounts paid by ATDC, DOT or the State and the amount of any such expenses or costs incurred by ATDC, DOT or the State, if not paid by the Marketplace Lessee to ATDC within thirty (30) days after the date the Marketplace Lessee receives written notice from ATDC of the amount thereof and demand for payment of the same, shall, with interest thereon at the Default Rate from the date of receipt by the Marketplace Lessee of the aforesaid written notice and demand to the date of payment thereof by the Marketplace Lessee, be treated as additional rent, and shall be payable by the Marketplace Lessee to ATDC not later than thirty (30) days after the giving of such written notice and demand.

**Section 8.2. Payment of Materialmen and Suppliers.** The Marketplace Lessee shall make, or cause to be made, prompt payment of all money due and legally owing to all Persons doing any work or subcontractors in connection with the development, construction, equipment, repair or reconstruction by the Marketplace Lessee of any of the Improvements. Subject to section 7.1.4., nothing in this section 8.2. shall limit the right of the Marketplace Lessee to contest, in good faith, by legal proceedings or otherwise, whether any amount claimed or alleged to be due and owing

to any such Person is legally due and owing and to withhold payment of such amounts pending resolution of such dispute.

**Section 8.3. No Agency of the Marketplace Lessee.** Nothing contained in this Marketplace Lease shall be construed as constituting the consent of ATDC, express or implied, to the appointment of the Marketplace Lessee, any contractor or other Person as the agent for ATDC or the State or as the consent of ATDC or the State to the attachment of any mechanics' or materialmen's lien to its or the State's interests in any of the Leased Property or Improvements.

**Section 8.4. No Intended Beneficiaries.** The provisions of sections 8.1., 8.2. and 8.3. shall be valid and binding upon the parties hereto, but are not intended to confer, and shall not be construed as conferring, any rights or remedies upon any contractor, subcontractor, materialman, supplier or laborer that provides either goods or services to the Marketplace Lessee, ATDC or the State in connection with the construction activities of the Marketplace Lessee, ATDC or the State. Accordingly, nothing contained herein shall be construed as creating any cause of action by any contractor, subcontractor, materialman, supplier or laborer.

## **ARTICLE IX**

### **INDEMNIFICATION; INSURANCE**

**Section 9.1. Indemnification by the Marketplace Lessee.** Notwithstanding any policy or policies of insurance required of the Marketplace Lessee, the Marketplace Lessee shall indemnify and save harmless ATDC, DOT and the State (and their respective agents, servants, employees and contractors) from and against, and shall reimburse ATDC, DOT and the State (and their respective agents, servants, employees and contractors) with respect to, any and all losses, liabilities, damages, injuries, actions, claims or demands, suits at law, in equity or before administrative tribunals (including, but not limited to, reasonable attorneys' fees, court costs or other

necessary disbursements), arising out of or related to: (a) the negligence of the Marketplace Lessee and those claiming by, through or under it, their agents, servants, employees, contractors, tenants, licensees or business invitees, arising out of the use or occupancy of the Leased Property by such Persons; (b) any breach or default in performing any of the obligations under the provisions of this Marketplace Lease and/or applicable law to be performed by the Marketplace Lessee or any of its agents, servants, employees, contractors, tenants, licensees or business invitees during the Term of this Marketplace Lease; or (c) any intentionally tortious or other wrongful act or omission by the Marketplace Lessee and those claiming by, through or under it, or any of their agents, servants, employees, contractors, tenants, licensees or business invitees, during the Term of this Marketplace Lease. The Marketplace Lessee shall defend any and all such actions, claims, demands or suits on behalf of ATDC, DOT and the State (and their respective agents, servants, employees and contractors) at the sole cost and expense of the Marketplace Lessee, provided, however, the foregoing indemnity shall not apply for and to the extent that any loss, liability, injury or damage has been caused by the negligence or willful misconduct of ATDC, DOT and/or the State (and their respective agents, servants, employees, tenants, licensees, business invitees and contractors). ATDC promptly shall give the Marketplace Lessee notice of any claim made or suit instituted against it or any other party of which it has knowledge relating to any matter which in any way may result in indemnification by the Marketplace Lessee pursuant to this section 9.1., and the Marketplace Lessee shall promptly undertake the defense of such claim or suit. Subject to any prior rights of insurers, upon acceptance of ATDC's tender of defense, the Marketplace Lessee shall be entitled to control the defense and any compromise of any such claim or suit; provided, however, the Marketplace Lessee shall give ATDC opportunity to participate in the defense and any compromise of any such claim or suit to the extent of ATDC's or the State's interests therein.

**Section 9.2. The Marketplace Lessee's Insurance Coverage.**

**9.2.1. The Marketplace Lessee to Maintain Insurance.**

Throughout the Term of this Marketplace Lease, the Marketplace Lessee, at its sole cost and expense, shall maintain or cause to be maintained, to the extent available, from insurers of sound and adequate financial responsibility, duly licensed in the State, listed with a Best's key rating of A+ or better, policies of insurance as set forth below:

**9.2.1.1. Property Coverage Insurance.** Insurance covering loss or damage of real and personal property by fire or lightning. This coverage is to be written in conjunction with endorsements for extended coverage and vandalism and malicious mischief. A Difference in Condition (DIC) or "All Risk" form, if available, will supplement and add perils not otherwise covered. The amount of such insurance to be procured and maintained shall be equal to the cost of repair or replacement, if available, and otherwise to the full insurable value of the Leased Property, as determined by a recognized appraiser or insurer selected by the Marketplace Lessee and approved by ATDC, plus an additional amount equal to the cost, reasonably estimated by ATDC, of demolition, clearing of and hauling of debris from the Leased Property in the event the damage is not restored. For any jointly occupied buildings, the Marketplace Lessee shall maintain such insurance for the full cost of repair and replacement, if available, and otherwise to the full insurable value of each such building, as determined above, with DOT named as an additional insured, if ATDC shall reimburse Marketplace Lessee for any additional premium cost charged to the Marketplace Lessee for insuring the portions of such buildings not owned by or leased to the Marketplace Lessee. The Marketplace Lessee shall maintain coverage for loss or damage by flood or earthquake, if obtainable at a commercially reasonable rate, as determined every five (5) years starting with the sixth (6th) year of this Marketplace Lease, in an amount equal to the amount stated above or such lesser amount as ATDC shall reasonably require. All insurance required by this section 9.2.1.1. may be subject

to a ONE HUNDRED THOUSAND AND NO/100 DOLLARS (\$100,000.00) deductible applying to each claim. Such insurance may be procured and maintained as part of or in conjunction with any other policy or policies carried by the Marketplace Lessee. Insurance obtained by the Marketplace Lessee shall not apply in excess of and shall not be contributing with any insurance policy maintained by ATDC, DOT or the State;

**9.2.1.2. Liability And Property Damage Insurance.** A comprehensive general liability insurance policy or policies no more restrictive than the Insurance Services Office's standard form in protection of the Marketplace Lessee, ATDC, DOT and the State of Hawaii and their officers, agents, servants and employees, and insuring said parties against liability for damages for bodily injury or death or damage to property, including loss of use thereof, occurring on or in any way related to the Leased Property or the Common Areas or occasioned by reason of the occupancy by and the operations of the Marketplace Lessee upon, in and around the Leased Property and the Common Areas, with insurance of such limits as the parties shall reasonably approve, combined single limit, each occurrence, for personal injury or death or damage to property (or such greater amount as may be determined by the Marketplace Lessee), subject to a deductible in an amount approved by ATDC. Such policies shall cover the entire Leased Property and the Common Areas. The Marketplace Lessee shall also require that the Marketplace Subtenants who operate restaurants shall obtain comprehensive general liability insurance with appropriate endorsements for restaurant operations. Portions of the insurance coverage required under this section 9.2.1.2. may be provided under umbrella policies;

**9.2.1.3. Automobile Liability Insurance.** An automobile liability policy of ONE MILLION AND NO/100 DOLLARS (\$1,000,000.00); and

**9.2.1.4. Workers' Compensation.** Workers' Compensation Insurance and Longshoremen's and Harbor Workers' Insurance as required by applicable

law and Employers' Liability Insurance of FIVE HUNDRED THOUSAND AND NO/100 DOLLARS (\$500,000.00); provided, however, that the Marketplace Lessee may be a self-insurer as to Workers' Compensation Insurance and Longshoremen's and Harbor Workers' Insurance if permitted by law. Such insurance may be procured and maintained as part of or in conjunction with any other policy or policies carried by the Marketplace Lessee.

**9.2.2. Certificates of Insurance; Terms.** Upon or prior to the commencement of the Term of this Marketplace Lease, the Marketplace Lessee shall furnish to ATDC (a) certificates of insurance or self-insurance certificates showing the amount and type of insurance then in effect that is required to be procured and maintained or caused to be procured and maintained, by the Marketplace Lessee under section 9.2.1. and stating the date and term of the policies evidencing such insurance and that the Marketplace Lessee has obtained insurance covering its obligation to indemnify ATDC, DOT and the State as set forth in section 9.1., to the extent the liability of the Marketplace Lessee for such indemnification is insurable, and (b) certificates that the insurance so procured and maintained by ATDC or the Marketplace Lessee, as the case may be, complies with the requirements hereof as to amount, types and parties insured thereunder. Certificates evidencing any renewals, replacements or extensions of any or all of the insurance required by section 9.2.1., shall be delivered by the Marketplace Lessee to ATDC prior to the expiration of any policy of insurance or the effective date of any renewal, replacement or extension of any such policy. Each policy of insurance required by section 9.2.1. shall provide for not less than thirty (30) days' notice to ATDC and the Marketplace Lessee before such policy may be canceled or materially amended.

The provisions of this Marketplace Lease as to insurance required to be procured and maintained shall not limit or prohibit, or be construed as limiting or prohibiting, ATDC or the Marketplace Lessee from obtaining any other or greater



insurance with respect to the Leased Property, or the use and occupancy thereof, that either or both of them may wish to carry, or as may be required by any of the Marketplace Lessee's Lenders, but in the event ATDC or the Marketplace Lessee, as the case may be, shall procure or maintain any such insurance not required by this Marketplace Lease, the cost thereof shall be at the expense of the party procuring or maintaining the name.

**9.2.3. Additional Provisions Respecting Insurance.** Except as otherwise provided with respect to self-insurance, all insurance required by sections 9.2.1.1., 9.2.1.2. and 9.2.1.3. shall be procured and maintained in the name of ATDC, DOT and the State, as additional insureds, and the Marketplace Lessee, as insured, from insurance companies of sound and adequate financial responsibility selected by the Marketplace Lessee and acceptable to ATDC. All policies required by sections 9.2.1.1., 9.2.1.2. and 9.2.1.3. of this Marketplace Lease shall provide for payment of the losses to ATDC, DOT, the State, the Leasehold Mortgagees and the Marketplace Lessee, as their respective interests may appear, subject to the provisions of sections 9.2.8. and 9.2.10.; provided, however, that during a construction period any builder's risk insurance carried pursuant hereto may provide for payment to ATDC, DOT and the State, the Marketplace Lessee, or the Contractor, as their respective interests may appear. Subject to the provisions of sections 9.2.8. and 9.2.10. of this Marketplace Lease with respect to the receipt of Net Insurance Proceeds, the Insurance Trustee shall collect and receive all moneys which may become due and payable under any such policies and ATDC, the Marketplace Lessee and any first mortgagee collectively may adjust and compromise any claims thereunder and shall use and apply the proceeds of such insurance as provided in this Marketplace Lease.

Net Insurance Proceeds shall be applied as provided in sections 9.2.8. and 9.2.10. of this Marketplace Lease and proceeds of insurance required by

section 9.2.1. shall be applied toward extinguishment or satisfaction or remedy of the liability, loss or damage with respect to which such proceeds may be paid.

**9.2.4. ATDC May Procure Insurance If the Marketplace Lessee Fails To Do So.** In the event the Marketplace Lessee at any time refuses, neglects or fails to secure and maintain in full force and effect any or all of the insurance required pursuant to section 9.2.1., ATDC, at its option, may procure or renew such insurance, and all amounts of money paid therefor by ATDC shall be treated as additional rent payable by the Marketplace Lessee to ATDC together with interest thereon at the Default Rate from the date the same were paid by ATDC to the date of payment thereof by the Marketplace Lessee. ATDC shall notify the Marketplace Lessee in writing of the date, purposes and amounts of any such payments made by ATDC, which shall be payable by the Marketplace Lessee to ATDC within ten (10) days after such notification.

**9.2.5. Insurance Does Not Waive the Marketplace Lessee's Obligations.** No acceptance or approval of any insurance agreement or agreements of limits of coverage maintained by the Marketplace Lessee pursuant to this Article IX by ATDC shall relieve or release or be construed to relieve or release the Marketplace Lessee from any liability, duty or obligation assumed by or imposed upon the Marketplace Lessee by the provisions of this Marketplace Lease. ATDC shall not be limited in the proof of any damages ATDC may claim against the Marketplace Lessee arising out of or by reason of the Marketplace Lessee's failure to provide and keep in force insurance as required by this Article IX to the amount of the insurance premiums not paid or incurred by the Marketplace Lessee and which would have been payable upon such insurance; but ATDC shall also be entitled to recover as damages for such breach the uninsured amount of any loss suffered or incurred by ATDC or the State by reason of damage to, or destruction of, the Leased Property and Improvements, or any portion thereof, occurring during any period which the Marketplace Lessee shall have

failed to provide such insurance, to the extent that such loss would have been recoverable from an insurer, provided, however, that nothing contained herein shall be construed to prevent the Marketplace Lessee from repairing or rebuilding the Improvements.

**9.2.6. Loss or Damage Not to Terminate Rent or Marketplace Lease.** Except as is hereinafter provided in section 9.2.10., any loss or damage by fire or other casualty, of or to any of the Leased Property at any time, shall not operate to terminate this Marketplace Lease or to relieve or discharge the Marketplace Lessee from the payment of Rent, or any money to be treated as additional rent in respect thereto, pursuant to this Marketplace Lease, as the same may become due and payable as provided in this Marketplace Lease, or subject to section 7.4., from the performance and fulfillment of any of the Marketplace Lessee's obligations pursuant to this Marketplace Lease.

**9.2.7. Proof of Loss.** Whenever any of the Leased Property, or any part thereof, shall have been damaged or destroyed, the Marketplace Lessee shall promptly make proof of loss and shall proceed promptly to cause to be collected all valid claims which may have arisen against insurers or others based upon any such damage or destruction.

**9.2.8. Property Coverage Insurance Proceeds.**

**9.2.8.1. Authorized Payment.** Except as otherwise provided in section 9.2.8.3., all sums payable for loss and damage arising out of the casualties covered by the policies of insurance provided for in section 9.2.1. shall be payable:

(a) directly to the Marketplace Lessee, if the total recovery is equal to or less than that amount obtained by multiplying (i) the sum of TWO HUNDRED FIFTY THOUSAND AND NO/100 DOLLARS (\$250,000.00) by (ii) a fraction, the numerator of which is the Current Consumer Price Index for the Rent

Year in which the loss or damage occurs, and the denominator of which is the Initial Consumer Price Index;

(b) to such commercial bank or trust company authorized to do business in the State designated by the Marketplace Lessee and approved by ATDC and the first Leasehold Mortgagee, if any, (the "Insurance Trustee"), if the total recovery is in excess of that amount obtained by multiplying (i) the sum of TWO HUNDRED FIFTY THOUSAND AND NO/100 DOLLARS (\$250,000.00) by (ii) a fraction, the numerator of which is the Current Consumer Price Index for the Rent Year in which the loss or damage occurs, and the denominator of which is the Initial Consumer Price Index, to be held by such Insurance Trustee pending establishment of reconstruction, repair or replacement costs and to be disbursed to the Marketplace Lessee pursuant to the provisions of section 9.2.8.2.; and

(c) directly to ATDC, DOT or the State to the extent of their interests in the proceeds.

**9.2.8.2. Disposition of Insurance Proceeds for Reconstruction.** All amounts received under such policies shall be used, first, to reimburse ATDC, DOT, the State, the Marketplace Lessee and any Leasehold Mortgagee having an interest for all costs, fees and expenses then incurred in adjusting the loss, and, second, to the extent required by section 9.2.10., for the reconstruction, repair or replacement of the Leased Property so that the Leased Property shall be restored to a condition comparable to the condition prior to the loss or damage (hereinafter referred to as "Reconstruction Work"). In the event the Marketplace Lessee elects not to rebuild under section 9.2.10.2., then such amounts shall be paid to ATDC, DOT, the State and the Marketplace Lessee in accordance with the provisions of section 9.2.10.2. In the event that the Marketplace Lessee elects to rebuild under section 9.2.10.1. from the insurance proceeds received by the Insurance Trustee, there shall be disbursed to the Marketplace Lessee, at such time as the Marketplace Lessee or a

Contractor retained by the Marketplace Lessee commences the Reconstruction Work, such amounts as are required for the Reconstruction Work as established by an estimate made by a competent appraiser or architect designated by the Marketplace Lessee and approved by ATDC. The said appraiser or architect must certify that the amount so certified represents his best estimate of the cost of the Reconstruction Work, and the Marketplace Lessee shall agree that such amount will be applied to the payment of the cost of such Reconstruction Work to the extent required. Such amounts (i) shall be disbursed to the Marketplace Lessee on a progress payment basis against vouchers certified by the registered architect who is supervising the Reconstruction Work and (ii) shall be subject to reasonable and customary retainage. After (1) final completion of all Reconstruction Work, (2) payment in full of all costs of the Reconstruction Work and (3) expiration of all applicable lien periods, or delivery to ATDC of binding waivers from all potential lienors, and if no liens have been filed or recorded which remain unsatisfied, and provided that the Marketplace Lessee is not in default under this Marketplace Lease, then any amount remaining in the hands of the Insurance Trustee after the completion of the Reconstruction Work, together with any interest earned thereon, shall be turned over to the Marketplace Lessee to be used by the Marketplace Lessee in connection with the Marketplace Lessee's normal course of the operation, ownership or management of the Leased Property, except to the extent that any Leasehold Mortgagee requires that such amount be paid to it in payments of amounts secured by its Leasehold Mortgage.

**9.2.8.3. Leasehold Mortgagees May Have Benefit of Insurance Fund for Reconstruction.** In case the Marketplace Lessee with respect to any Leasehold Mortgage not prohibited by this Marketplace Lease shall at any time authorize the Leasehold Mortgagees on its behalf or in its stead to enter upon the Leased Property and undertake or prosecute the reconstruction or repair of any of the Leased Property, or any part thereof, damaged or destroyed by fire, and to have and

receive for the Marketplace Lessee's or the Leasehold Mortgagees' use for such purpose such insurance proceeds, then in that case said insurance proceeds shall be equally available to such Leasehold Mortgagees as to the Marketplace Lessee as provided in section 9.2.8.2., and such insurance proceeds shall in like manner and to like extent, at the request of any such Leasehold Mortgagee, be applied to the reconstruction or repair of the Leased Property, or any part thereof, so damaged or destroyed.

**9.2.9. Reserved.**

**9.2.10. Damage and Destruction.** In the event that the Leased Property is damaged by fire or other casualty, the Marketplace Lessee shall elect whether or not the Leased Property shall be reconstructed and re-equipped on the following terms:

**9.2.10.1. Election to Rebuild.** In the event Marketplace Lessee shall elect that the Leased Property be reconstructed and re-equipped, then (1) all Net Insurance Proceeds paid to the Marketplace Lessee or the Insurance Trustee shall be applied by the Marketplace Lessee to the repair, reconstruction and re-equipping of the Leased Property in accordance with the provisions of section 9.2.8.; (2) this Marketplace Lease shall continue in full force and effect; and (3) the Marketplace Lessee (A) will promptly reconstruct and re-equip the Leased Property in accordance with plans and specifications prepared by the Marketplace Lessee and submitted to and approved by ATDC, and (B) will apply for such purposes so much as may be necessary of any Net Insurance Proceeds. The plans and specifications for the reconstruction and re-equipping of the Leased Property may provide for such changes, alterations or modifications of the Leased Property as they existed immediately prior to the event causing such damage or destruction, including a reduction in scale, as the Marketplace Lessee may elect and ATDC may approve. In the event that the Net Insurance Proceeds are not sufficient to pay in full the costs of the reconstruction and re-equipping of the Leased Property, the Marketplace Lessee will nonetheless complete

the work thereof and will pay that portion of the costs thereof in excess of the amount of such Net Insurance Proceeds. The Marketplace Lessee shall be required, prior to commencement of the Reconstruction Work, to arrange for payment of or demonstrate, to the reasonable satisfaction of ATDC, its present capacity to pay the difference between the Net Insurance Proceeds and the estimated cost of the Reconstruction Work. In case the Net Insurance Proceeds shall exceed the cost of reconstruction and re-equipping of the Leased Property undertaken pursuant to this section 9.2.10.1. and the Marketplace Lessee is not in default under this Marketplace Lease, then the balance of Net Insurance Proceeds remaining, including interest thereon, after paying therefrom the costs of such reconstruction and re-equipping shall belong to the Marketplace Lessee, and shall be used by the Marketplace Lessee in connection with the Marketplace Lessee's normal course of the operation, ownership or management of the Leased Property, except to the extent that any Leasehold Mortgagee requires that such amount be paid to it in payments of amounts secured by its Leasehold Mortgage. The Marketplace Lessee shall not, by reason of the payment of any excess costs as required by the foregoing provisions of this section 9.2.10.1., be entitled to any reimbursement from ATDC or any abatement or diminution of the Rents payable hereunder.

**9.2.10.2. Election Not to Rebuild.** In the event that the Marketplace Lessee shall elect not to reconstruct and re-equip the Leased Property, then: (1) the Marketplace Lessee shall pay to ATDC an amount which is reasonably estimated by ATDC as the cost of clearing the Leased Property; (2) the portion of the Net Insurance Proceeds attributable to the Public Improvements shall be payable to ATDC; and (3) the remainder of the Net Insurance Proceeds, if any, shall be paid to the Marketplace Lessee. Upon the making of such payments, this Marketplace Lease shall forthwith cease and determine, and the parties hereto shall be released and discharged of and from all further obligations hereunder, without prejudice, however, to any claims which may have accrued prior thereto in favor of either party against the other.

**Section 9.3. Waiver of Subrogation.** ATDC and the Marketplace Lessee shall cause each insurance policy carried with respect to the Marketplace to be written in such a manner so as to provide that the insurer waives all right of recovery by way of subrogation against the Marketplace Lessee or ATDC, DOT and the State, as the case may be, in connection with any loss or damage covered by the policy. Neither party hereto shall be liable to the other for any loss or damage caused by fire or any of the casualties covered by "All Risk" property insurance and liability insurance, which loss or damage is covered by the insurance policies maintained by the other party. In the event either party shall fail to obtain such waiver of subrogation, or shall fail to supply the other party with evidence thereof, then such other party shall have the right to procure such waiver, if available, on behalf of, and at the sole cost and expense of, the party failing to obtain the waiver or to supply evidence thereof. If a waiver of subrogation is unavailable to either ATDC or the Marketplace Lessee, the other party shall not be obligated to obtain any waiver of subrogation, provided, however, a waiver of subrogation shall not be deemed to be unavailable solely because the insurer requires payment of an additional premium therefor.

## **ARTICLE X**

### **CONDEMNATION**

In case the Leased Property or any part thereof, or any interest therein, shall be taken as a result, or in anticipation, of the exercise of the right of condemnation or eminent domain, the provisions of this Article X shall apply. A voluntary transfer or conveyance to the condemning governmental authority or its designee pursuant to a threat of condemnation or exercise of the right of eminent domain shall be deemed to be a taking for the purposes of this Marketplace Lease.

**Section 10.1. Taking of the Whole - No Restoration.** In the event that the whole or substantially the whole of the Leased Property is so taken, then (i) such



portion of the award as shall represent the Marketplace Lessee's interest at the time of the taking in the Land and any Improvements, other than the Public Improvements not leased to any Project Component Lessee under any Project Component Lease, subject, however, to all terms and conditions of this Marketplace Lease, including, without implied limitation, the obligation to pay all Rent, shall belong entirely to the Marketplace Lessee and (ii) such portion of the award that represents the Public Improvements not leased to any Project Component Lessee under any Project Component Lease, and ATDC's interest at the time of the taking in the Land (including its right to receive Rent under this Marketplace Lease) shall belong entirely to ATDC, and this Marketplace Lease shall forthwith cease and determine, and the parties hereto shall be released and discharged of and from all obligations hereunder, without prejudice, however, to the claims which may have accrued prior thereto in favor of either party against the other. If there is a dispute among the Marketplace Lessee, ATDC or any Leasehold Mortgagee with respect to the apportionment of any condemnation award under this section 10.1, such award shall be deposited with the court or a commercial bank or trust company as escrow agent until such dispute has been finally resolved.

**10.1.1. Condemnation by State During Development Period.** In the event of a condemnation by the State or State Agency prior to Substantial Completion of all of the Marketplace Improvements, the entire award shall be payable to the Marketplace Lessee until the Marketplace Lessee has recovered (1) all Fixed Rent, Holding Period Rent and Rent paid directly or on an allocated basis by the Marketplace Lessee up to the condemnation date, (2) the costs of all Public Improvements paid by the Marketplace Lessee, and (3) all DOT Expenses and Losses in Revenues paid by the Marketplace Lessee (the three (3) are collectively referred to as the "Marketplace Lessee's Public Expenditures"). The remainder of the award, if any, shall be paid in accordance with other provisions in this Article X. To the extent that

the Marketplace Lessee does not recover the Marketplace Lessee's Public Expenditures from the award, including ATDC's portion of the award, ATDC shall, within one hundred eighty (180) days of demand, return to the Marketplace Lessee any Fixed Rent, Holding Period Rent and Rent previously paid directly or on an allocated basis to ATDC in an amount sufficient to pay to the Marketplace Lessee the unrecovered balance of the Marketplace Lessee's Public Expenditures. For purposes of this section 10.1.1., the condemnation date shall be the date of taking of the Leased Property.

**Section 10.2. Taking of Less Than the Whole - Reasonable Restoration.**

In the event that less than the whole or substantially the whole of the Leased Property shall be so taken and if: (1) the remaining portion of the Leased Property and the Public Improvements available for use by the Marketplace Lessee after reconstruction or restoration will constitute a complete and functional unit suitable for the purposes for which it is intended within one hundred eighty (180) days from the date upon which such taking occurs, and (2) the reasonably estimated cost of such reconstruction or restoration is less than the amount of the condemnation award, then: (A) the condemnation award shall be paid to the Marketplace Lessee to be applied as hereinafter provided; (B) this Marketplace Lease shall continue in full force and effect; (C) the Marketplace Lessee will promptly reconstruct and re-equip the Leased Property in accordance with plans and specifications prepared by the Marketplace Lessee and submitted to and approved by ATDC; and (D) the Marketplace Lessee will apply for such purposes so much as may be necessary of such condemnation award; provided, however, that the Marketplace Lessee shall be obligated to reconstruct and re-equip the Leased Property only to the extent of such condemnation award available for such purpose. In case such condemnation award shall exceed the costs of reconstruction and re-equipping of the Leased Property undertaken pursuant to this section 10.2., then the balance thereof shall be divided between the Marketplace Lessee and ATDC, as their respective interests may appear.

**Section 10.3. Taking of Less Than the Whole - No Restoration.** In the event that less than the whole or substantially the whole of the Leased Property shall be so taken and if either (1) the remaining portion of the Leased Property is not capable of being restored so that the Leased Property and the Public Improvements available for use by the Marketplace Lessee after reconstruction or restoration will constitute a complete and functional unit suitable for the purposes for which it is intended within one hundred eighty (180) days from the date upon which such taking occurs, or (2) the reasonably estimated cost of such reconstruction or restoration is greater than the amount of the condemnation award, then the Marketplace Lessee shall elect whether or not the Leased Property shall be reconstructed and re-equipped. If the Marketplace Lessee shall elect that the Leased Property be reconstructed and re-equipped, the provisions of section 10.2. shall apply as if the Leased Property were capable of being restored within the criteria set forth in said section 10.2.; provided, however, that the Marketplace Lessee shall be obligated to provide any funds which may be required in excess of the condemnation award. If the Marketplace Lessee shall elect that the Leased Property not be reconstructed and re-equipped, the provisions of section 10.1. shall apply as if the whole or substantially the whole of the Leased Property had been taken.

**Section 10.4. Temporary Taking.** In case the use, for a limited period, of all or part of the Leased Property shall be taken by condemnation or in the exercise of the right of eminent domain or threat thereof, then this Marketplace Lease shall not be thereby terminated and the parties shall continue to be obligated under all of its terms and provisions. If such taking is for a period of time ending on or prior to the expiration of the Term of this Marketplace Lease, the Marketplace Lessee shall be entitled to receive and retain any condemnation award and if there shall be a period not less than three (3) years remaining under the Term of this Marketplace Lease, then the Marketplace Lessee shall, at the termination of the period of such taking, restore the

Leased Property as nearly as may be possible to the condition existing immediately prior to such taking to the extent of condemnation award proceeds paid to the Marketplace Lessee and allocated by the taking authority for such restoration, if any, provided, however, that in no event shall the Marketplace Lessee be required to expend funds for such restoration in excess of such allocated amount. If such taking is for a period which extends beyond the expiration of the Term of this Marketplace Lease, or if there shall be less than three (3) years remaining under the Term of this Marketplace Lease (at the time such taking shall end), then, unless the Marketplace Lessee shall elect to restore the Leased Property under the provisions of the immediately preceding sentence, ATDC and the Marketplace Lessee shall share the condemnation award consistent with the provisions of section 10.1., as if there was a taking of the whole.

**Section 10.5. Effect on Rent.** The Marketplace Lessee shall not, by reason of payment of any excess costs as required by the foregoing provisions of this Article X or by reason of any diminution of the Leased Property resulting from any taking thereof, be entitled to any reimbursement from ATDC or any abatement or diminution of the Rent payable hereunder; provided, however, that the Rent payable hereunder shall be reduced after any such diminution of the Leased Property for the remainder of the Term of this Marketplace Lease in the proportion which the value of the Leased Property taken bears to the total value of the Leased Property prior to such taking.

**Section 10.6. Condemnation Proceedings.** It is further expressly understood and agreed that each of the parties hereto shall have the free and unrestricted right to participate in and be represented by counsel in, or in anticipation of or preparation for, any such condemnation proceedings and to receive any award made to such party in any such proceedings, or as the result of negotiations with the agency or party exercising such right of condemnation or eminent domain, subject, however, to

the obligation of the respective parties to use and apply their respective awards in the manner and for the purposes hereinabove provided.

## ARTICLE XI

### **RIGHTS OF OCCUPANCY AND ACCESS; DEPRECIATION OF IMPROVEMENTS**

**Section 11.1. Quiet Enjoyment.** ATDC represents, warrants and covenants that the Marketplace Lessee, upon paying the Rent pursuant to this Marketplace Lease and observing and keeping the covenants and agreements of this Marketplace Lease on its part to be kept and performed, shall lawfully and quietly hold, occupy and enjoy the Leased Property without hindrance or molestation by ATDC or any Person claiming by, through or under it during the Term of this Marketplace Lease. Notwithstanding the foregoing, the Marketplace Lessee and all those claiming by, through or under it waive any and all claims, costs, or damages against ATDC, DOT or the State arising out of any activity by any other Project Component Lessee, or any of their agents, affiliates, tenants, licensees or contractors, including but not limited to construction, demolition, or interference with access or utilities.

**Section 11.2. Depreciation of Marketplace Improvements During Marketplace Lease.** During the Term of this Marketplace Lease, the Marketplace Lessee shall be the owner of all Marketplace Improvements and entitled to claim depreciation on the costs incurred by it with respect to any and all existing improvements and Marketplace Improvements and all equipment, fixtures and machinery therein contained, for all taxation purposes.

**Section 11.3. Surrender of Leased Property.** The Leased Property shall revert to ATDC or its successor upon termination of this Marketplace Lease or expiration of the Term of this Marketplace Lease and ATDC shall not be required to

compensate the Marketplace Lessee for the value thereof. This reversion shall not be construed to impart any ownership to ATDC for any purpose until termination or expiration of this Marketplace Lease. For the purposes of termination on account of condemnation or destruction, the Leased Property shall belong to the Marketplace Lessee. All Public Improvements not leased to the Marketplace Lessee under this Marketplace Lease shall at all times belong to the State.

**Section 11.4. ATDC and the Marketplace Lessee to Join in Certain Actions.**

**11.4.1. Applications and Grants.** Within ten (10) business days after receipt of written request from the Marketplace Lessee, ATDC, to the fullest extent permitted by law, shall, and shall cause DOT and any other executive agencies of the State to:

(a) join the Marketplace Lessee when required by law in any and all duly prepared applications for permits, licenses or other authorizations required by any governmental or public authority which has jurisdiction in connection with any work as may be reasonably necessary or appropriate for the construction by the Marketplace Lessee of the Improvements; and

(b) join the Marketplace Lessee in any grants of, or grant, such easements or rights with respect to electricity, telephone, gas, water, sewer, steam and such other public utilities and facilities as may be reasonably necessary or appropriate for the construction, operation or use of the Leased Property or the Improvements.

**11.4.2. Fees.** The Marketplace Lessee shall pay all fees and charges for all such applications and grants.

## ARTICLE XII

### MISCELLANEOUS PROVISIONS

**Section 12.1. No Partnership or Joint Venture.** Nothing in this Marketplace Lease shall be deemed to create a partnership or joint venture between ATDC or the State on the one hand, and the Marketplace Lessee on the other hand, or to render either party liable in any manner for the debts or obligations of the other.

**Section 12.2. Recording.** This Marketplace Lease, or a memorandum of this Marketplace Lease in form mutually satisfactory to the parties, shall be recorded in the appropriate Land Records, and either party may cause any modification or addition to this Marketplace Lease or any ancillary document relevant to this transaction to be so recorded.

**Section 12.3 Governing Law.** This Marketplace Lease shall be governed by and construed in accordance with the laws of the State, and the courts of the State shall have exclusive jurisdiction over any controversy arising out of this Marketplace Lease or involving the interpretation or enforcement hereof.

**Section 12.4. Conflicts of Interest; Representatives Not Individually Liable.** Unless permitted by Hawaii Revised Statutes Chapter 84 or any rules, regulations or code established by the State Ethics Commission, no director, officer, official, representative or employee of ATDC shall have any personal interest, direct or indirect, in this Marketplace Lease, nor shall any such director, officer, official, representative or employee participate in any decision relating to this Marketplace Lease which affects his personal interests or the interests of any Person in which he is, directly or indirectly, interested. No member, trustee, officer, director, shareholder, individual partners, official, representative or employee of ATDC or of the Marketplace Lessee or its constituent partnerships or Affiliates, as the case may be, shall be personally liable to the Marketplace Lessee or ATDC, as the case may be, or any successor in interest, (i) in the event of any default or breach by the Marketplace Lessee

or ATDC, as the case may be, or any successor in interest, or (ii) for any amount which may become due to the Marketplace Lessee or ATDC, as the case may be, or any successor in interest, or (iii) on any obligations, under the terms of this Marketplace Lease.

**Section 12.5. Notice.** A notice or communication (which shall include, but not be limited to, an approval, a consent, a progress report, a statement or a demand) under this Marketplace Lease by either ATDC to the Marketplace Lessee, or by the Marketplace Lessee to ATDC, shall be in writing and personally delivered or given by mail or telecopier to the other at the address set forth below or to such other address as either party may from time to time direct by written notice to be given in the manner herein prescribed, and such notice or communication shall be deemed to have been given on the earlier of the date of one (1) business day after telecopy transmission, the date of personal delivery, or five (5) business days after mailing:

TO ATDC:

Aloha Tower Development Corporation  
33 South King Street, Suite 403  
Honolulu, Hawaii 96813  
Fax No. (808) 548-7241

and

Andrew V. Beaman, Esq.  
Chun Kerr Dodd & Kaneshige  
745 Fort Street, Suite 900  
Honolulu, Hawaii 96813  
Fax No. (808) 536-5869

TO MARKETPLACE  
LESSEE:

Aloha Tower Associates Piers 7, 8  
and 9 Limited Partnership  
1700 Amfac Tower, 700 Bishop Street  
Honolulu, Hawaii 96813  
Fax No. (808) 523-9080

and

James T. Funaki, Esq.  
Alfred M. K. Wong, Esq.  
1400 PRI Tower  
Grosvenor Center  
733 Bishop Street  
Honolulu, Hawaii 96813  
Fax No. (808) 599-1960



**Section 12.6. Estoppel Certificates.** ATDC and the Marketplace Lessee shall each from time to time, within thirty (30) days after written request by the other, execute, acknowledge and deliver to the party which has requested the same or to any prospective Lender, Leasehold Mortgagee, assignee, or the Marketplace Lessee, a certificate stating that: (a) this Marketplace Lease is in full force and effect and has not been modified, supplemented or amended in any way, or, if this Marketplace Lease has been modified, supplemented or amended, this Marketplace Lease is in full force and effect as modified, supplemented or amended, identifying the agreement effecting such modification, supplementation or amendment, and if this Marketplace Lease is not in full force and effect, the certificate shall so state; (b) this Marketplace Lease as modified, supplemented or amended represents the entire agreement between the parties as to this leasing, or, if it does not, the certificate shall so state; (c) the dates on which the Term of this Marketplace Lease commenced and will terminate; (d) all conditions under this Marketplace Lease, the DCCR and the Marketplace - DOT Capital Improvements, Maintenance, Operations and Security Agreement, to be performed by the party executing such certificate have been satisfied and, to the best of the knowledge, information and belief of the party executing such certificate, all conditions under this Marketplace Lease to be performed by the party not executing such certificate have been satisfied, and, as of the date of such certificate, there are, to the best of the knowledge, information and belief of the party executing such certificate, no existing defenses or offsets which ATDC or the Marketplace Lessee, as the case may be, has against the enforcement of this Marketplace Lease by the other party, or, if such conditions have not been satisfied or if there are any defenses or offsets, the certificate shall so state; (e) the Rent due and payable by the Marketplace Lessee up to the date on which such certificate is delivered has, to the best of the knowledge, information and belief of the party executing such certificate, been paid in full, or, if it has not been

paid, the certificate shall so state; and (f) such other reasonable verification of facts pertaining to this Marketplace Lease which may be requested by the Person seeking the certificate. The Person to whom any such certificate shall be issued may rely on the matters therein set forth and thereafter the party issuing the same shall be estopped from denying the veracity or accuracy of the same.

**Section 12.7. Reserved.**

**Section 12.8. Titles of Articles and Sections.** All titles of the several parts, Articles, sections, subsections and paragraphs of this Marketplace Lease are inserted for convenience of reference only and shall be disregarded in construing or interpreting any of its provisions.

**Section 12.9. Construction of Certain Terms.** Words such as "herein," "hereinafter," "hereof," "hereto," "hereby," "hereunder" and "hereinbelow," when used with reference to this Marketplace Lease, refer to this Marketplace Lease as a whole, unless the context otherwise requires.

**Section 12.10. References to Articles, Etc.** All references in this Marketplace Lease to any Article, section, subsection, paragraph or subparagraph, unless therein expressly indicated to the contrary, shall be deemed to have been made to such Article, section, subsection, paragraph or subparagraph of this Marketplace Lease.

**Section 12.11. Provisions Not Merged with Deed, Lease, Deed of Trust or Leasehold Mortgage.** None of the provisions of this Marketplace Lease is intended to or shall be merged by reason of any deed, lease, deed of trust or Leasehold Mortgage,

(a) transferring the Marketplace Lessee's leasehold estate in the Leased Property or any part thereof from the Marketplace Lessee (or its successors or assigns) to ATDC (or its successors or assigns), or

(b) transferring title to the Leased Property or any part thereof from ATDC (or its successors or assigns) to the Marketplace Lessee (or its successors or assigns).

Any such deed, lease, deed of trust or Leasehold Mortgage shall not be deemed to affect or impair the provisions and covenants of this Marketplace Lease.

**Section 12.12. Counterparts.** This Marketplace Lease may be executed in counterparts, and if executed in counterparts, each such counterpart shall constitute one and the same instrument.

**Section 12.13. Nondisturbance and Attornment.**

**12.13.1. Attornment and Nondisturbance.** Each sublease to which the Marketplace Lessee shall be a party shall contain a clause expressly providing that the sublessee thereunder shall attorn to ATDC in the event of a termination of this Marketplace Lease, if ATDC grants such sublessee a nondisturbance agreement.

**12.13.2. Consent to Marketplace Lease; Attornment and Nondisturbance Agreement by Ground Lessor.** The Marketplace Lessee has entered into this Marketplace Lease upon the condition that DOT and any other ground lessor will forthwith execute the Consent to Marketplace Lease; Attornment and Nondisturbance Agreement attached hereto as Exhibit K and made a part of this Marketplace Lease.

**Section 12.14. Successors and Assigns.** The covenants and agreements herein contained shall be binding upon and inure to the benefit of the Marketplace Lessee and ATDC and their successors and assigns, but the provisions of this section 12.14. shall not be deemed or construed to affect in any way the restrictions on assignments and Transfers provided for in this Marketplace Lease.

**Section 12.15. Consents and Approvals.** Except as otherwise provided herein, whenever under the terms of this Marketplace Lease the consent or approval of a party is required, such consent or approval shall not be unreasonably or arbitrarily withheld, and no charge, direct or indirect, shall be made therefor other than a reasonable fee reflecting the costs of processing such consent or approval. Except as

herein expressly provided to the contrary, if the consenting or approving party shall fail to act upon such request within ten (10) days after receipt of written request therefor, such consent or approval shall be deemed to have been given.

**Section 12.16. Time of the Essence.** Time shall be of the essence hereunder.

**Section 12.17. Reliance Upon Representations.** Each of the representations and warranties made in this Marketplace Lease shall be deemed to have been relied upon by the party to which it was made.

**Section 12.18. Interpretation.** Whenever the context hereof shall so require, the singular shall include the plural, the male gender shall include the female gender and the neuter, and vice versa.

**Section 12.19. Severability.** In case any one or more of the provisions contained in this Marketplace Lease shall for any reason be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision hereof, and this Marketplace Lease shall be construed as if such invalid, illegal or unenforceable provision had never been contained herein.

**Section 12.20. Waiver.** No party hereto shall be deemed to have waived the exercise of any right hereunder unless such waiver is made expressly and in writing, and no such waiver of any such right in any one instance shall be deemed a waiver as to any other instance or any other right. No waiver made by either party with respect to the performance, or manner or time thereof, of any obligation of the other party or any condition to its own obligation under this Marketplace Lease shall be considered a waiver of any rights of the party making the waiver with respect to the particular obligation of the other party or condition to its own obligation beyond those expressly waived and to the extent thereof, or a waiver in any respect in regard to any other rights of the party making the waiver or in regard to any other obligation of the other party.

**Section 12.21. Entire Agreement.** This Marketplace Lease sets forth all of the agreements, conditions and understandings between ATDC and the Marketplace Lessee relative to this Marketplace Lease and supersedes all prior agreements (including the Development Agreement), which shall have no further force or effect, and there are no promises, agreements, conditions, understandings, warranties, or representations, oral or written, expressed or implied, between them other than as set forth or as referred to herein.

**Section 12.22. No Oral Modification.** Any agreement hereafter made shall be ineffective to change, waive, modify, discharge, terminate, or effect an abandonment of this Marketplace Lease in whole or in part unless such agreement is in writing and signed by the party against whom such change, waiver, modification, discharge, termination or abandonment is sought to be enforced.

**Section 12.23. No Party Deemed Drafter.** Each party has thoroughly reviewed and revised this Marketplace Lease and has had the advice of counsel prior to execution hereof, and the parties agree that neither party shall be deemed to be the drafter hereof.

**Section 12.24 Attorneys' Fees.** In the event of any litigation between the parties involving the interpretation or enforcement of this Marketplace Lease, the prevailing party shall be entitled to recover its costs and expenses incurred in such litigation including reasonable attorneys' fees, to the extent permitted by law.

**Section 12.25. Representations and Warranties.**

**12.25.1. ATDC.** ATDC represents and warrants unto the Marketplace Lessee that ATDC is a public body corporate and politic, a public instrumentality and an agency of the State, duly organized and existing by virtue of and in accordance with the laws of the State and the person or persons executing or attesting to the execution of the ATDC documents on behalf of ATDC has or have been duly authorized and empowered to so execute or attest.

**12.25.2. Marketplace Lessee.** The Marketplace Lessee represents and warrants unto ATDC that the Marketplace Lessee is a limited partnership duly organized and existing by virtue of and in accordance with the laws of the State and the person or persons executing or attesting to the execution of the Marketplace Lessee documents on behalf of the Marketplace Lessee has or have been duly authorized and empowered to so execute or attest.

**Section 12.26. Minerals and Waters.** The State reserves the right to all minerals as hereinafter defined, in, on or under the Leased Property and the right, on its own behalf or through persons authorized by it, to prospect for, mine and remove such 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 such minerals by any means whatsoever, excluding strip mining. "Minerals," as used herein shall mean any or all oil, gas, coal, phosphate, sodium, sulfur, iron, titanium, gold, silver, bauxite, bauxitic clay, diaspore, boehmite, laterite, gibbsite, alumina, all ores of aluminum and, without limitation thereon, all other mineral substances and ore deposits, whether solid, gaseous or liquid, in, on, or under the land; provided, that "minerals" shall not include sand, gravel, rock or other material suitable for use and when used in road or other construction in furtherance of the Marketplace Lessee's permitted activities on the Leased Property and not for sale to others; and all surface and ground waters appurtenant to the Leased Property 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 Leased Property as may be required in the exercise of this right reserved; provided that, as a condition precedent to the exercise by the State of the rights reserved in this section 12.26. just compensation shall be paid for any of the Improvements taken or occupied.

**Section 12.27. Prehistoric and Historical Remains.** All prehistoric and historical remains found on, within, under, or adjacent or close to the Leased Property

shall be and remain the property of the State, and the Marketplace Lessee shall immediately stop work, activities and operations in and around the area where such prehistoric and historical remains are discovered and notify ATDC. Such area shall not be disturbed nor any such prehistoric and historical remains disturbed nor removed by the Marketplace Lessee, its employees, agents or contractors, without the express written approval of ATDC.

### **ARTICLE XIII**

#### **ANTI-DISCRIMINATION AND EQUAL EMPLOYMENT OPPORTUNITY**

**Section 13.1. No Discrimination in General.** The Marketplace Lessee, for itself, and its successors and assigns, agrees that it will not use the Leased Property in support of any policy which discriminates against any person on the basis of race, creed, ancestry, marital status, color, sex, age, national origin, or physical handicap (within the meaning of Section 171-64 of the Hawaii Revised Statutes). The Marketplace Lessee shall comply with all federal and State laws and regulations with respect to access for disabled persons.

**Section 13.2. No Discrimination in Labor Practices.** The Marketplace Lessee, for itself, and its successors and assigns, agrees that in the construction, maintenance and operation of any Improvements upon the Leased Property in accordance with the provisions of this Marketplace Lease:

(a) The Marketplace Lessee will not discriminate against any employee or applicant for employment because of race, color, ancestry, marital status, religion, sex, handicap, age or national origin. The Marketplace Lessee will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, ancestry, marital status, color, religion, sex, handicap, age or national origin. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer, recruitment or

recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship. The Marketplace Lessee agrees to post in conspicuous places, available to employees and applicants for employment, notices setting forth the provisions of this nondiscrimination clause;

(b) The Marketplace Lessee will, in all solicitations or advertisements for employees placed by or on behalf of the Marketplace Lessee, state that all qualified applicants will receive consideration for employment without regard to race, ancestry, marital status, color, religion, sex, handicap, age or national origin;

(c) The Marketplace Lessee will send to each labor union or representative of workers with which the Marketplace Lessee has a collective bargaining agreement or other contract or understanding, a notice advising the labor union or workers' representative of the Marketplace Lessee's commitments under Section 202 of Executive Order 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment;

(d) The Marketplace Lessee will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations and relevant orders of the Secretary of Labor;

(e) The Marketplace Lessee will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by the rules, regulations and orders of the Secretary of Labor or the Secretary of Housing and Urban Development pursuant thereto, and will permit access to and the copying of the Marketplace Lessee's books, records and accounts by ATDC, the Secretary of Housing and Urban Development and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations and orders;

(f) In the event of the Marketplace Lessee's noncompliance with the nondiscrimination clauses of this section 13.2., or with any of the said rules, regulations or orders, this Marketplace Lease may be canceled, terminated or suspended in whole or



in part and the Marketplace Lessee may be declared ineligible for further government contracts or federally assisted construction contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation or order of the Secretary of Labor, or as otherwise provided by law; and

(g) The Marketplace Lessee will include the provisions of subsections (a) through (f) of this section 13.2. in every contract or purchase order, and will require the inclusion of these provisions in every subcontract entered into by any of its contractors, unless exempted by rules, regulations or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each such contractor, subcontractor or vendor, as the case may be. The Marketplace Lessee will take such action with respect to any construction contract, subcontract or purchase order as ATDC or the Department of Housing and Urban Development may direct as a means of enforcing such provisions, including sanctions for noncompliance; provided, however, that in the event the Marketplace Lessee becomes involved in, or is threatened with litigation with a subcontractor or vendor as a result of such direction by ATDC or the Department of Housing and Urban Development, the Marketplace Lessee may request the United States to enter into such litigation to protect the interests of the United States. For the purpose of including such provisions in any construction contract, subcontract or purchase order, as required hereby, the first (1st) three (3) lines of this section 13.2. shall be changed to read "During the performance of this Contract, the Contractor agrees as follows: and the term "Marketplace Lessee" shall be changed to 'Contractor'.

**Section 13.3. Applicability of Provisions.** The foregoing provisions of section 13.2. shall be applicable only to the extent that the various rules, regulations and

orders referred to therein are in force and effect with respect to the construction and operation of the Marketplace.

## **ARTICLE XIV**

### **HOUSING FUND**

**Section 14.1. Establishment of Housing Fund.** As a means of creating additional benefits for the people of Hawaii through development of the Project, the Developer has established a not-for-profit foundation to assist residents of Hawaii in obtaining affordable housing (the "Housing Foundation"). The Housing Foundation is endowed and sustained by the development of the Project as follows:

(a) The Developer has created the Housing Foundation and will contribute TWO MILLION AND NO/100 DOLLARS (\$2,000,000.00) in working capital to be used to undertake its purposes. The Marketplace Lessee's Allocated Share of such contribution is ONE HUNDRED THOUSAND AND NO/100 DOLLARS (\$100,000.00).

(b) Commencing upon the Substantial Completion but terminating upon the Component First Sale, the Marketplace Lessee shall contribute to the Housing Foundation (i) five percent (5%) of its annual Net Cash Flow Before Payments to the Housing Foundation; (ii) five percent (5%) of the Housing Foundation Component First Sale Proceeds (the "Housing Foundation First Sale Participation"); and five percent (5%) of the Work Product Proceeds. Such contributions with respect to Net Operating Income and the Housing Foundation First Sale Participation shall be deducted before calculation of any distributions to be made to ATDC under this Marketplace Lease, including, without limitation, with respect to Additional Lease Rent - Profit Participation and ATDC First Sale Participation. Distributions of the Housing Foundation First Sale Participation shall be made to the Housing Foundation on the

same basis as provided for in section 2.9. of this Marketplace Lease with respect to distributions to ATDC of Component First Sale Proceeds.

(c) The Equity Financing Return shall be paid prior to the contribution to the Housing Foundation of five percent (5%) of Net Cash Flow Before Payments to the Housing Foundation and prior to the distribution of the Housing Foundation First Sale Participation in section 14.1.(b) and prior to the distribution of five percent (5%) of the Work Product Proceeds.

(d) All Lenders providing debt financing to the Marketplace Lessee, excluding construction lenders, shall be required, on an annual basis, to donate five percent (5%) of their interest earnings (but not commitment fees, loan origination fees or other processing fees customarily charged by such Lenders), with respect to such debt financing to the Housing Foundation. A Component First Sale shall terminate any obligation of the Lender to make the five percent (5%) contributions called for hereinabove, and such Lender shall have no further obligation whatsoever to the Housing Foundation. The requirements of this section may be met by the Marketplace Lessee paying directly to the Housing Foundation an amount equal to five percent (5%) of the total interest paid to a Lender on an annual basis.

(e) ATDC shall have authority to reasonably approve all articles of incorporation, by-laws, rules and policies of the Housing Foundation, and to appoint at least one (1) member of the board of directors of the Housing Foundation. The Housing Foundation shall not be considered a State Agency and shall receive no funding from the State. ATDC, DOT and the State, and their directors, agents, attorneys and employees, shall have no liability for any act or omission of the Housing Foundation.

## ARTICLE XV

### **HAZARDOUS SUBSTANCES**

**Section 15.1. Condition of Property.** ATDC and the Marketplace Lessee acknowledge that there are Hazardous Substances on the Land on which the Project will be developed (the "Project Land"). The parties now know of the following Hazardous Substances and conditions:

Subsurface contaminated soil with petroleum-related contaminants, heavy metals and pesticides are found in limited areas in soil between the ground surface and the water table. Most of the contaminated soil likely contains residual petroleum-related compounds. Ten percent (10%) of the contaminated soil may contain metals or other hazardous chemicals and, if found, might be required to be treated as hazardous waste.

Such other Hazardous Substances and conditions as revealed in any surveys or investigations conducted by or on behalf of the Marketplace Lessee.

The responsibility for the removal and treatment (which, for the purposes of this Article XV, include disposal) of Hazardous Substances and the costs associated therewith shall be as hereinafter set forth in this Article XV.

**Section 15.2. Warranties and Representations Concerning Hazardous Substances.** The parties make the following representations and warranties to each other with respect to Hazardous Substances:

**15.2.1. ATDC's Representations and Warranties to the Marketplace Lessee.** ATDC hereby represents and warrants to the Marketplace Lessee that, to the best of its knowledge, information and belief, except as set forth in section 15.1., (a) there are no Hazardous Substances on or under the Leased Property; (b) there

have not been, and are not occurring, any spills, releases, emissions, discharges, or disposal of Hazardous Substances on or under or onto the Leased Property; (c) there have not been and are not occurring any spills or disposal of Hazardous Substances off the Leased Property as a result of any construction on or operation and use of the Leased Property; (d) there is no equipment on the Leased Property containing PCBs; (e) there is no asbestos in use or located on the Leased Property; and (f) there are no tanks, lines or other storage or transmission facilities for Hazardous Substances on the Leased Property.

**15.2.2. The Marketplace Lessee's Representations and Warranties to ATDC.** The Marketplace Lessee hereby represents and warrants to ATDC that: (a) through a duly qualified contractor, the studies and surveys required by paragraph 8.d. of the Development Agreement, including, without limitation, a thorough geotechnical investigation of the Leased Property, core drillings, soil sampling, site investigations and other studies and surveys necessary to determine the presence of Hazardous Substances on the Leased Property, have been completed and such studies and surveys have not disclosed any Hazardous Substances and related conditions except as set forth in section 15.1.; (b) the cost estimates set forth in section 15.1. are good faith estimates current as of the Commencement Date of the total cost required to remove and treat the Hazardous Substances referred to in section 15.1.; and (c) to the best of the Marketplace Lessee's knowledge, information and belief, there are no Hazardous Substances on the Leased Property other than those described in section 15.1.

**Section 15.3. Disclaimer.** Except as set forth in this Article XV, (a) neither ATDC nor the Marketplace Lessee shall have any liability to the other for the cost to remove or clean up any Hazardous Substances on or around the Leased Property and (b) neither party makes any express or implied warranty or representation with respect to the presence of Hazardous Substances on the Leased Property.

**Section 15.4. Responsibility for Hazardous Substances.** With respect to those Hazardous Substances located in, under or upon the Leased Property, the parties shall have the following responsibilities:

**15.4.1. Studies.** The Marketplace Lessee, by itself and/or by and/or through the Developer shall obtain and pay for all geotechnical studies and hazardous materials analyses, except that ATDC shall participate in the cost to perform any surveys (other than those contained in the environmental impact statement or other reports prepared by the Developer prior to the commencement date of this Marketplace Lease) required by the State Department of Health on the basis set forth in section 15.5.

**15.4.2. Excavation, Removal and Transportation.** The Marketplace Lessee shall at its own cost excavate, remove and transport all soil or other excavated material not containing Hazardous Substances on the Leased Property to a site or sites provided to, provided by or available to the Marketplace Lessee. To the extent necessary, the Marketplace Lessee shall excavate, remove and transport any soil or other excavated material on the Leased Property containing Hazardous Substances to a site or sites located within the State designated by ATDC. Except as set forth in section 15.4.3., the Marketplace Lessee shall pay all costs of such excavation, removal and transportation.

**15.4.3. Costs of Extraordinary Excavation, Removal and Transportation.** To the extent that the cost of excavation, removal and transportation of excavated material containing Hazardous Substances exceeds the cost of excavation, removal and transportation of material which does not contain Hazardous Substances (which excess in cost is estimated by the Marketplace Lessee to be TEN AND NO/100 DOLLARS (\$10.00) per cubic yard), ATDC and the Marketplace Lessee shall participate in the payment of such excess cost on the basis set forth in section 15.5.; provided, however, that if any Hazardous Substances are required to be transported to a site or sites not located within the State, any responsibility of the Marketplace Lessee,

except participation in costs pursuant to section 15.5., shall terminate with respect to such Hazardous Substances at such time that the Marketplace Lessee delivers such Hazardous Substances to ATDC at a site within the State designated by ATDC.

**15.4.4. Acquisition of Site for Treatment.** If it is not reasonably practicable to treat on the Leased Property excavated material which is contaminated with Hazardous Substances, ATDC shall be responsible, at its sole cost and expense, for acquisition of a site for treatment of such contaminated material (the "Treatment Site").

**15.4.5. Preparation of Treatment Site.** ATDC shall be responsible for preparation of the Treatment Site, except that the Marketplace Lessee shall participate in the cost of such preparation on the basis set forth in section 15.5.

**15.4.6. Treatment of Material at Treatment Site.** ATDC shall be responsible for the treatment at the Treatment Site of excavated material which is contaminated with Hazardous Substances, except that the Marketplace Lessee shall participate in the cost of such treatment on the basis set forth in section 15.5. ATDC shall bear sole responsibility for such material after delivery to the Treatment Site, including any liability to other Persons related to the use or disposal of such material, except to the extent that such liability shall have been caused by the negligence or other wrongful act or omission of the Marketplace Lessee, its agents or contractors.

**15.4.7. Asbestos in Structures.** Notwithstanding anything to the contrary herein, the Marketplace Lessee shall have sole responsibility for the removal and treatment of any and all asbestos in the existing structures and any structures constructed by the Marketplace Lessee on the Leased Property. The presence of such asbestos has been disclosed to the Marketplace Lessee.

**Section 15.5. Allocation of Costs.** If ATDC or the Marketplace Lessee incurs any costs under sections 15.4.1., 15.4.3., 15.4.5., or 15.4.6., with respect to which ATDC and the Marketplace Lessee are required to participate, the responsibility

for such costs shall, subject to the terms and provisions of section 15.7., be allocated between ATDC and the Marketplace Lessee as follows: (a) ATDC shall be solely responsible for and pay the first TWO MILLION FIVE HUNDRED THOUSAND AND NO/100 DOLLARS (\$2,500,000.00) of such costs; (b) ATDC and the Marketplace Lessee shall each pay fifty percent (50%) of the next TWENTY MILLION AND NO/100 DOLLARS (\$20,000,000.00) of such costs; (c) ATDC shall be solely responsible for and pay the next SEVEN MILLION FIVE HUNDRED THOUSAND AND NO/100 DOLLARS (\$7,500,000.00) of such costs; and (d) the Marketplace Lessee shall be solely responsible for and pay the next FIVE MILLION AND NO/100 DOLLARS (\$5,000,000.00) of such costs. In the event that the aforesaid costs with respect to which ATDC and the Marketplace Lessee are required to participate exceed, in the aggregate, THIRTY-FIVE MILLION AND NO/100 DOLLARS (\$35,000,000.00), ATDC and the Marketplace Lessee shall negotiate in good faith to reach agreement as to the terms and conditions upon which such excess costs shall be allocated among such parties and upon the terms and conditions upon which this Marketplace Lease shall be amended to reflect the impact upon ATDC and the Marketplace Lessee of such excess costs. If ATDC and the Marketplace Lessee are unable, within one hundred and twenty (120) days after notice by either party that such costs have exceeded such THIRTY-FIVE MILLION AND NO/100 DOLLARS (\$35,000,000.00) limit, to reach agreement on the terms and conditions under which such additional costs shall be absorbed by the parties, then the parties agree to submit the matters of allocation of such excess costs and lease amendments to a mediation process acceptable to both parties.

The formula enumerated above will be adjusted contingent upon expenditures made by prior Project Component Lessees. The allocation is cumulative for all Project Component Leases. For example, if Article XV costs have been incurred under the prior Project Component Leases which total TWO MILLION AND NO/100



DOLLARS (\$2,000,000.00), then under item (a) of this section 15.5 above, ATDC would be responsible for and shall pay the first FIVE HUNDRED THOUSAND AND NO/100 DOLLARS (\$500,000.00) of such costs incurred under this Marketplace Lease, and items (b) through (d) of this section 15.5 above would apply to any amounts in excess of FIVE HUNDRED THOUSAND AND NO/100 DOLLARS (\$500,000.00). ATDC's allocated share of costs under this section 15.5 shall not exceed the total amount of Fixed Rent collected from the Marketplace Lessee and any other Project Component Lessee and not expended by ATDC for its allocated share of costs under any prior Project Component Lease. In the event that ATDC's allocated share of costs under this section 15.5 exceeds the total amount of Fixed Rent collected from the Marketplace Lessee and all other Project Component Lessees and not expended by ATDC for its allocated share of costs under any prior Project Component Lease, the Marketplace Lessee shall pay for ATDC's allocated share and shall recover such costs from future Fixed Rents to be collected from subsequent Project Component Lessees, and the remainder, if any, in accordance with section 15.7.

**Section 15.6. Incurring of Costs.** In the event that either ATDC or the Marketplace Lessee intends to incur costs under sections 15.4.1., 15.4.3., 15.4.5., or 15.4.6., with respect to which it expects the other party to participate, the party intending to incur such costs shall so notify the other party prior to incurring such costs. With respect to those costs actually so incurred by ATDC, the Marketplace Lessee shall, pursuant to the terms and conditions of section 15.5., reimburse ATDC for such costs, which reimbursement shall be made within thirty (30) days after the Marketplace Lessee shall have received a written request for such reimbursement from ATDC. With respect to those costs actually so incurred by the Marketplace Lessee, ATDC shall, pursuant to the terms and conditions of section 15.5., reimburse the Marketplace Lessee for ATDC's share of such costs, which reimbursement shall be made within thirty (30)

days after ATDC shall have received a written request for such reimbursement from the Marketplace Lessee.

**Section 15.7. Cost Recovery.** With respect to any and all costs incurred, or reimbursed to ATDC, by the Marketplace Lessee, in which ATDC and the Marketplace Lessee are required to participate under sections 15.4.1., 15.4.3., 15.4.5. and/or 15.4.6., which are not otherwise reimbursed to the Marketplace Lessee by ATDC pursuant to section 15.6. and until such time as the Marketplace Lessee has been reimbursed for all such costs pursuant to the terms and provisions of this section 15.7., the Marketplace Lessee shall be entitled to effect the following offsets against the following amounts to be paid by the Marketplace Lessee to ATDC pursuant to the terms and provisions of this Marketplace Lease: (a) the Marketplace Lessee shall be entitled to offset against seventy-five percent (75%) of "ATDC's interest" in Additional Lease Rent - Profit Participation, the ATDC Refinancing Participation and the ATDC First Sale Participation and (b) the Marketplace Lessee shall be entitled to offset against fifty percent (50%) of "ATDC's interest" in Fixed Rent, Standard Annual Base Rent, Scheduled Annual Base Rent and Annual Additional Rent (as these terms are defined in this Marketplace Lease). As used in this section 15.7., "ATDC's interest" means the net amount of the applicable item to be paid to ATDC, after deduction of any payments that ATDC may make, directly or indirectly, to the Office of Hawaiian Affairs, DOT, ATDC's staff or consultants, or for other operating expenses. With respect to any such offset, ATDC shall provide to the Marketplace Lessee an itemized statement of the amount of the offset to be made and of the balance of any amounts to which the Marketplace Lessee shall thereafter be entitled.

**Section 15.8. Miscellaneous Provisions Concerning Hazardous Material.** ATDC and the Marketplace Lessee each recognizes the need to expedite the removal, transportation and treatment of Hazardous Substances and to minimize the cost related thereto. Each party recognizes that the need to so expedite and minimize

will require prompt action by the other and agrees to cooperate with the other and to act promptly upon any request from the other with respect to Hazardous Substances.

**Section 15.9. Hazardous Substances Defined.** "Hazardous Substances" means any substance or material defined or designated as hazardous or toxic waste, hazardous or toxic material, a hazardous or toxic substance, controlled or regulated substances, PCBs, or other similar term, by any federal, State or local environmental statute, regulation or ordinance presently in effect or that may be promulgated in the future, as such statutes, regulations and ordinances may be amended from time to time.

**Section 15.10. Rights Against Third Parties.** ATDC shall have the option, in its discretion, to seek recovery of any costs incurred by either party in connection with this Article XV from any Person or Persons responsible for contamination of the Leased Property, and the Marketplace Lessee hereby assigns its rights, if any, against such Persons to ATDC. ATDC agrees that, to the extent that the Marketplace Lessee has paid and not recovered costs incurred under sections 15.4.1., 15.4.3., 15.4.5., and/or 15.4.6., the Marketplace Lessee shall share in any net recovery against such Persons, after deduction of attorneys' fees and costs. ATDC shall have the right to prosecute any litigation against such parties and to settle such claims or litigation without the consent of the Marketplace Lessee. The Marketplace Lessee's interest in such litigation shall be limited to its share of any recovery against such third parties. ATDC shall act expeditiously in determining whether to prosecute any such litigation and, once commenced, ATDC shall prosecute such litigation in a diligent and timely manner. Unless otherwise agreed to by ATDC and the Marketplace Lessee, this section 15.10. shall not apply to the Marketplace Lessee's right to seek recovery for any costs incurred by the Marketplace Lessee which are not subject to the cost-participation provisions of section 15.5.

**Section 15.11 Limitation of ATDC's Liability.** Prior to the execution of this Marketplace Lease, the Marketplace Lessee has estimated that ATDC's share of the

total cost of removal and treatment of Hazardous Substances from the Leased Property required for construction of the Improvements will be TWO HUNDRED TWENTY-FIVE THOUSAND AND NO/100 DOLLARS (\$225,000.00). No payments shall be made or credits allowed to the Marketplace Lessee under this Article XV beyond the approved budgeted amount unless approved by ATDC which approval shall not be unreasonably withheld. ATDC shall have no liability to make any payment under this Article XV during any period, and the Marketplace Lessee shall not be permitted to assert any offset against any Rent under this Article XV for any period, if the amount of such payment or offset exceeds "ATDC's interest" in the Rent (as defined in section 15.7.) paid to ATDC during such period.

## **ARTICLE XVI**

### **DOT**

**Section 16.1. DOT Schedule.** DOT has prepared an estimate of its expenses and losses in revenues as a result of Developer's Project. This estimate is entitled the "Schedule for DOT Expenses and Losses in Revenues" and is attached hereto as Exhibit L.

**Section 16.2. Payments of DOT Expenses and Losses in Revenues.** The Marketplace Lessee shall pay DOT in advance for any action by the Marketplace Lessee occurring prior to or during the Development Period which causes DOT to incur DOT Relocation Expenses, Maritime Relocation Costs, or losses in revenues (collectively "DOT Expenses and Losses in Revenues"). The procedure for payment shall be as provided in sections 16.2.1. and 16.2.2. In addition, the Marketplace Lessee guarantees payment of all DOT Expenses and Losses in Revenues caused by the Marketplace Lessee prior to termination of the Development Agreement.

**16.2.1. Payments for Full State Fiscal Years.** If the Marketplace Lessee initiates any action which will result in DOT Expenses and Losses in Revenues

on or after July 1, but on or before July 15 of the year in which such action is initiated, or continues any action which will result in DOT Expenses and Losses in Revenues on or after July 1, the Marketplace Lessee shall make payment in advance to DOT of DOT Expenses and Losses in Revenues for the full fiscal year, currently running from July 1 to June 30 ("State Fiscal Year"). Payment for a full State Fiscal Year shall be made to DOT no sooner than July 1 and no later than July 15 of the affected State Fiscal Year. DOT shall determine and advise the Marketplace Lessee by March 31 of each year as to the projected amounts of DOT Expenses and Losses in Revenues for the Marketplace for the following State Fiscal Year, showing in reasonable detail how such projected amounts were derived. When the Development Period ends prior to the end, but no later than June 15, of a State Fiscal Year, the Marketplace Lessee shall be reimbursed by DOT on a pro rata basis as described in section 16.2.2. for the remaining portion of the State Fiscal Year. Such reimbursement shall be made within thirty (30) days after DOT has received notice of the end of the Development Period.

**16.2.2. Payments for Partial State Fiscal Years.** If the Marketplace Lessee initiates any action which will result in DOT Expenses and Losses in Revenues after July 15, but on or before June 30, of the State Fiscal Year in which such action is initiated, the Marketplace Lessee shall pay DOT in advance the DOT Expenses and Losses in Revenues on a pro rata basis for the period between the date of the initiation of such actions and June 30 of the State Fiscal Year in which such actions are initiated. Pro rata payments for DOT Expenses and Losses in Revenues shall be based on the number of affected days in a three hundred sixty-five (365) day fiscal year beginning July 1 and ending on June 30. Payments with respect to partial State Fiscal Years shall be made to DOT five (5) days prior to the initiation of actions which will result in DOT Expenses and Losses in Revenues, but in no case later than June 15 of the affected State Fiscal Year. After receiving at least thirty (30) days notice from the Marketplace Lessee of its intent to initiate actions resulting in DOT Expenses or Losses

in Revenues, DOT shall determine and advise the Marketplace Lessee as to the projected pro rata amounts of DOT Expenses and Losses in Revenues for the Marketplace from the date of initiation of actions to June 30 of the State Fiscal Year in which such actions are initiated showing in reasonable detail how such projected amounts were derived.

**Section 16.3. Provision of Interim Office.** With respect to the offices of DOT presently located within the area comprising Piers 9 to 11, the Marketplace Lessee shall, at its sole expense, provide, or cause to be provided, the following (hereinafter, the costs and expenses incurred in connection with the provision of the following are collectively referred to as the "DOT Relocation Expenses"): office space equal in area to the space displaced within the area comprising Piers 9 to 11 and all parking and other facilities required by the DOT for temporary relocation of its administrative office and other facilities until DOT takes occupancy of its replacement office facilities, and shall agree to pay all rent, common area maintenance and other charges for such space directly to the lessor of such space ("Interim Office"). Such Interim Office facilities must be reasonably accessible to the public and maritime users and be in reasonably close proximity to the harbor, between Kewalo Basin and Pier 40, and shall meet all other requirements established by DOT as set forth in ATDC's request for proposals. ATDC may reasonably withhold approval of any proposed temporary office facilities. The Marketplace Lessee shall provide DOT with not less than ninety (90) days' written notice before DOT shall be required to commence any office relocation. The Marketplace Lessee will undertake no demolition or construction activities which would, in DOT's sole judgment, disrupt DOT's office operations prior to the relocation of all or a portion of its office operations. Both marine traffic controller's office located at the Aloha Tower and the range boards and navigational lights located at Piers 7 and 8 shall remain in operation during the entire Development Period.

**Section 16.4. DOT Set-Aside Provisions.** Before undertaking any construction on the Leased Property, the Marketplace Lessee shall directly pay for (and arrange for a set-aside provision in the construction loan to cover out of loan proceeds) all costs of relocating the DOT's offices located within the area comprising Piers 9 to 11 during construction, including rental of interim space, rental of parking space, all costs of relocating such offices to the permanent office facilities after completion, and all costs of relocating maritime facilities to other piers during construction. The Marketplace Lessee shall locate and make arrangements for all relocation, interim space acquisition and moving, subject to approval by DOT.

**Section 16.5. Opportunity to Lease Space.** In the event that the construction of the Marketplace Improvements shall directly result in the displacement of existing office and retail/service tenants of DOT, then, upon completion of the Marketplace Improvements, such displaced office and retail/service tenants shall have the opportunity to lease office and retail/service space within the Marketplace Improvements, upon terms and provisions which are no less favorable than the terms and provisions that the Marketplace Lessee is then quoting to other tenants for comparable space within the Marketplace Improvements.

**Section 16.6. Dockage and Waterfront Fees.** All revenues from dockage, wharfage and other maritime activities shall belong to DOT.

**Section 16.7. Marketplace - DOT Capital Improvements, Maintenance, Operations and Security Agreement and Jurisdiction of Piers, Etc.** Upon the execution of this Marketplace Lease, the Marketplace Lessee and DOT shall enter into an agreement concerning capital improvements, maintenance, operations and security of the maritime facilities and common facilities treated therein (the "Marketplace - DOT Capital Improvements, Maintenance, Operations and Security Agreement") in the form attached hereto as Exhibit M. DOT shall maintain exclusive jurisdiction of all piers, wharves and ship servicing areas that may be located within the boundaries of the

Marketplace, subject to the Marketplace - DOT Capital Improvements, Maintenance, Operations and Security Agreement. DOT shall have priority of use and access to such piers, wharves and ship servicing areas at all times.

**Section 16.8. Minimal Disruption of Harbor Operations.** The Marketplace Lessee's construction of the Improvements, including dredging and reclamation of lands, shall be carried out with minimal disruption of harbor operations. All work that may affect harbor operations shall be coordinated with DOT, which shall maintain continuing exclusive control over harbor operations. During construction of the Marketplace, the Marketplace Lessee shall ensure that at least two (2) cruise vessel terminals remain in operation serving two (2) berths at Piers 9, 10 and 11. At all other times, the Marketplace Lessee shall take no action which would prevent DOT from operating cruise vessel terminals serving two (2) berths at Piers 9, 10 and 11.

IN WITNESS WHEREOF, the parties hereto have duly executed this Marketplace Lease as of the day and year first above written.

**ALOHA TOWER DEVELOPMENT CORPORATION**

By

  
John P. Spiering, Its Chairman

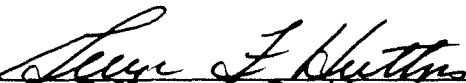
Lessor



**ALOHA TOWER ASSOCIATES PIERS 7, 8  
AND 9 LIMITED PARTNERSHIP**

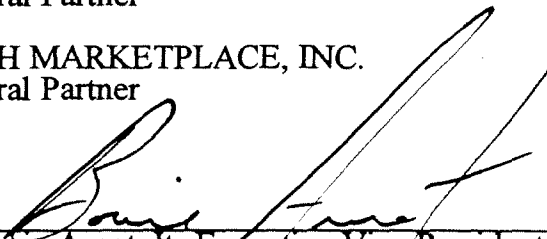
By: ATA PIERS 7, 8 AND 9 LIMITED PARTNERSHIP  
Its General Partner

By ATA 7-8-9 INC.  
Its General Partner

By   
George F. Hutton, Its President

By: ATEH MARKETPLACE LIMITED PARTNERSHIP  
Its General Partner

By ATEH MARKETPLACE, INC.  
Its General Partner

By   
Bowie Arnot, Its Executive Vice President

Marketplace Lessee

APPROVED AS TO FORM:

**CHUN, KERR, DODD & KANESHIGE**

  
Counsel for Aloha Tower  
Development Corporation

**TAKUSHI FUNAKI WONG & STONE**

  
Counsel for the Marketplace Lessee

## LIST OF EXHIBITS

<u>Exhibit</u>	<u>Description</u>	<u>Section</u>	<u>Page</u>
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B	Marketplace Parking Range	1.3	9; 16
C	Location of Parking Stalls	2.1.1.	25
D	Short Term Lease	2.1.2.	27
E	Public Improvements	Recital 1; 1.3; 2.1.; 2.1.1	1; 21; 25 25
F	Declaration of Covenants, Conditions and Restrictions for the Aloha Tower Complex (the "DCCR")	2.4.	30
G	Allocation of Expenditures for Public Improvements and Fixed Rent	3.1.	41
H	Marketplace Public Improvements	3.1	41
I	Construction Right-of-Entry Agreement	3.1.; 3.12.	41; 56
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K	Consent to Marketplace Lease; Attornment and Nondisturbance Agreement	12.13.2.	100
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## SCHEDULE I

# **Exhibit 2**

## AGREEMENT REGARDING ALOHA TOWER PIER REPAIRS

THIS AGREEMENT REGARDING ALOHA TOWER PIER REPAIRS (this "*Agreement*") is made as of this 21 day of June 2010 ("*Effective Date*") by and between AHI ALOHA ASSOCIATES LLC, a Delaware limited liability company ("*AHI*"), and the DEPARTMENT OF TRANSPORTATION, HARBORS DIVISION, STATE OF HAWAII, ("*DOT*").

### Recitals:

- A. On September 29, 1993, DOT and Aloha Tower Associates Piers 7, 8 and 9 Limited Partnership ("*ATA*"), as "Marketplace Lessee," entered into a certain Agreement titled "Marketplace – DOT Capital Improvements, Maintenance, Operations and Security Agreement" (the "*CIMOSA*").
- B. By various assignments, AHI has succeeded to the interest of ATA under, *inter alia*, the CIMOSA and the Marketplace Lease (as such term is defined in the CIMOSA) and the Extension Agreement, dated November 17, 1995 (the "*Extension Agreement*").
- C. Unless otherwise specified herein, all capitalized terms used in this First Amendment shall be deemed to have the meanings assigned to such terms in the CIMOSA.
- D. Various disagreements have arisen between DOT and the Marketplace Lessee, as to outstanding punchlist items that AHI is responsible for under a certain May 10, 1995 letter from DOT to Aloha Tower Development Corporation (ATDC) and the Extension Agreement.
- E. The Parties hereto wish to resolve the outstanding punchlist items that AHI is responsible for under the May 10, 1995 letter from DOT to Aloha Tower Development Corporation (ATDC) and the Extension Agreement.

### Agreement:

NOW, THEREFORE, in consideration of the premises aforesaid, the covenants hereinafter set forth and other good and valuable consideration in hand paid by AHI to DOT, the receipt and sufficiency of which are hereby acknowledged, DOT and AHI agree as follows:

#### 1. Punchlist Items.

(a) **Background.** On May 10, 1995, Thomas Fujikawa, Chief of the Harbors Division, on behalf of DOT, submitted to Ronald Hirano, the then-Executive Director of the Aloha Tower Development Corporation ("*ATDC*"), a memorandum titled "Unfinished Items of Work," and at various times thereafter DOT has updated such list in memoranda titled, variously, "Construction Related Defaults" and "Construction Punchlist Items Outstanding" (collectively, the "*Marketplace Punchlist*"). DOT and AHI

agree to resolve all matters relating to the Marketplace Punchlist as described in this Section.

(b) **Actions to be Taken by AHI.** DOT continues to require, and AHI agrees promptly after the execution of this Agreement, to commence and diligently proceed to correct the conditions described on *Exhibit A* hereto. No other actions shall be required of AHI with respect to items heretofore listed on the Marketplace Punchlist except as described in Section 1(d) below.

(c) **Payment by AHI.** Within \_\_\_\_\_ ( ) days after the execution of this Agreement, AHI shall pay to DOT the sum of \$6,000 on account of, and in full satisfaction of any DOT claims for, items heretofore listed in the Marketplace Punchlist performed by DOT and/or waived, as requirements of AHI, by DOT.

(d) **Pier Apron Repairs.** The Marketplace Punchlist included an item, number D.1., listed as "Pier 8 Repairs – Reconstruction of fender beam connections, waterlines, the bulkhead repairs and clean-up of concrete rubble from the bottom of the water area deposited by the contractor during the repair of Piers 8 and 9" and having an estimated cost on said punchlist of \$400,000 (the "*Pier Apron Repairs*"). The parties acknowledge that portions of such work have been done by DOT, and that additional work under said item is contemplated, all at an aggregate cost (both actual and estimated) in excess of \$6,500,000. AHI shall have no obligation to perform said Pier Apron Repairs, but AHI agrees, in consideration of DOT's agreement to release AHI from any further obligation for Pier Apron Repairs, to pay to DOT amounts aggregating a value of \$3,500,000 in accordance with the following terms and conditions:

(i) Any payments made by AHI to DOT on account of Pier Apron Repairs on or before the sixth anniversary of the Effective Date shall be deemed to have a value of twice the amount so paid;

(ii) Any payments made by AHI to DOT on account of Pier Apron Repairs after the sixth anniversary of the Effective Date shall be deemed to have a value of one and one-half times the amount so paid;

(iii) The obligation to make such payments will be binding upon AHI's successors and assigns, and will be binding upon AHI notwithstanding any amendment, restatement or replacement of the Marketplace Lease.

*Example: If AHI pays DOT \$1,000,000 on or before the sixth anniversary of the Effective Date (having a value for the purposes of this Section of \$2,000,000) then the remainder to be paid under this Section at or prior to the expiration of the Marketplace Lease shall be \$1,000,000 (having a value of \$1,500,000 for the purpose of this Section).*

## **2. Encroachment Agreement.**

(a) **Background.** The open-air stage (previously used by Kapono's) encroaches outside the area leased to AHI by ATDC and into DOT's pier apron. DOT has agreed to permit the continuation of such encroachment (the "*Encroachment*") on the terms and conditions described in this Section.

(b) **Continuation of Encroachment.** Except as provided in this Section, DOT agrees that the Encroachment may continue so long as the structure giving rise to the Encroachment remains standing. Notwithstanding the foregoing, if access for maintenance or operation of the pier by DOT requires removal of the Encroachment, then AHI shall, at its cost, remove the Encroachment.

(c) **Maintenance and Repair.** The Encroachment is the sole property and responsibility of AHI, and AHI alone shall be solely responsible for all necessary maintenance, repair and upkeep of the Encroachment and the structure of which it is a part. AHI shall keep and maintain the Encroachment and said structure in good order and condition, reasonable wear and tear excepted. AHI shall have a right to enter upon the pier apron in order to maintain, repair and care for said structure.

(d) **Indemnification.** AHI shall indemnify and save harmless DOT against any loss or damage to DOT or the property of others, and from liability for injury to or death of persons, arising out of or in connection with the Encroachment, the breach of any covenant contained in this Section, or by reason of the quality, condition or repair of the Encroachment or the structure of which it is a part when such loss, damage, injury or death arises out of or proximately results from the negligence, wrongful act or failure to act of AHI or anyone claiming by, through or under AHI.

(e) **Removal of Encroachment.** If at any time AHI removes the structure of which the Encroachment is a part, or if the portion of said structure that constitutes the Encroachment is substantially damaged or destroyed, and AHI elects to replace or repair said structure, then AHI shall replace or rebuild said structure without encroachment wholly within the area leased to AHI by ATDC.

(f) **DOT Maintenance and Repairs.** AHI acknowledges that DOT has responsibility for, and control over, its pier aprons, and in connection with the maintenance and repair of such areas may be required to disturb the Encroachment. AHI shall have no claim against DOT for the consequences of any such maintenance or repair so long as DOT, in effecting the same, makes reasonable efforts to preserve, and restore, the Encroachment in connection with such activities by DOT.

3. **ATDC Agreements.** AHI is discussions with ATDC for the purpose of entering into (i) an amendment to that certain Parking License Agreement originally made between ATA and ATDC substantially as described on Exhibit B attached hereto (the "***Parking License Amendment***") and (ii) an amendment to the Marketplace Component Lease effecting changes substantially as described on Exhibit C attached hereto (the "***Marketplace Lease Amendment***"). DOT agrees (i) concurrently with the execution of this Agreement, to execute and deliver a Non-Disturbance Agreement substantially in the form of Exhibit D attached hereto (the "***Parking Non-Disturbance***") and (ii) if ATDC shall execute either or both of the Parking License Amendment and/or the Marketplace Lease Amendment in forms reasonably acceptable to DOT, to execute and deliver confirmations of the Parking Non-Disturbance and the existing Non-Disturbance Agreement relating to the Marketplace Component Lease, as so amended, all in form and substance reasonably satisfactory to AHI and DOT.

4. **Costs of Collection.** In any action brought to enforce this Agreement, the prevailing party will also be entitled to collect, in addition to the amount due and interest thereon, all reasonable costs of collecting, securing, or attempting to collect sums payable hereunder, including, without limitation, court costs and reasonable attorneys' fees.

5. **Notices.**

(a) **Notices, Generally.** All notices and other communications under this Agreement shall be in writing and shall be hand delivered or sent by a courier or express service guaranteeing overnight delivery, addressed to the parties at the addresses set forth after their respective signatures to this Agreement. All notices shall be deemed effective upon delivery to such addresses; provided, however, that if delivery shall be refused, notice shall be deemed effective upon attempted delivery.

(b) **Facsimile Copies.** Simultaneous copies of all notices shall be simultaneously sent by facsimile transmission.

6. **Miscellaneous.**

(a) **No Waiver.** No waiver of any party to any breach hereunder shall be deemed a waiver of any other or subsequent breach.

(b) **No Oral Modifications.** This agreement may not be altered, amended, changed, waived, terminated or modified in any respect or particular unless the same shall be in writing and signed by or on behalf of the party to be charged therewith.

(c) **Successors and Assigns.** This agreement shall be binding upon and inure to the benefit of the parties hereto and to their respective heirs, executors, administrators and successors and assigns, it being the intention of the parties not to confer any benefits hereunder upon any other persons, firms, corporations or other entities. For the purposes hereof, any successor "Marketplace Lessee" shall succeed to AHI's interest hereunder.

(d) **Entire Agreement.** This agreement contains all of the terms agreed upon between the parties with respect to the subject matter hereof and supersedes all prior understandings, if any, with respect thereto. Except as expressly provided herein, the terms of the CIMOSA and the Extension Agreement, and any other documents that may be amended by this Agreement, shall remain unchanged and unaffected.

(e) **Choice of Law.** This agreement shall be construed, governed and enforced in accordance with the internal laws of the State of Hawaii without giving effect to principles of conflict of laws.

(f) **Counterparts.** This agreement may be executed in several counterparts, each of which shall be an original, but all of which shall constitute but one and the same instrument.

(g) **Captions.** The use of headings or captions for articles, paragraphs or subparagraphs herein shall in no way expand or limit the scope or intent of any provision of this Agreement.

(h) **No Party Deemed Drafter.** This Agreement has been negotiated extensively by the parties hereto with and upon the advice of their respective counsel, all of whom have participated in the drafting hereof. Consequently, the usual rule of construction, which provides that the document is to be interpreted against the interests of the party who has primarily drafted the language in an agreement, shall not be applicable.

[SIGNATURES ON FOLLOWING PAGES]



IN WITNESS WHEREOF DOT and AHI have duly executed and delivered the within Agreement as of the day and year first hereinabove set forth.

AHI ALOHA ASSOCIATES, LLC

a Delaware limited liability company

By: AHI Aloha Limited Partnership,  
a Delaware limited partnership, its sole member

By: AP-GP Aloha Partners, LLC  
a Delaware limited liability company, its general partner

By: Kronus Property III, Inc.  
A Delaware corporation, its Manager

By: John R.S. Jacobson  
Name: John R.S. Jacobson  
Title: Vice President and Assistant Secretary  
Address: 60 Columbus Circle, 20<sup>th</sup> floor  
New York, New York 10023  
Attn: John Jacobsson  
Facsimile: (212) 515-3283

With a copy to:  
Starn O'Toole Marcus & Fisher  
733 Bishop Street, 19<sup>th</sup> floor  
Honolulu, Hawaii 96813  
Attn: Kenneth B. Marcus, Esq.  
Facsimile: (808) 537-5434

STATE OF HAWAII,  
By its Director of Transportation

APPROVED AS TO FORM:

By: \_\_\_\_\_  
Name:  
Title:

\_\_\_\_\_  
Allan Chock, Deputy Attorney General

Address:

Address: 465 South King Street,  
Room 300  
Honolulu, Hawaii 96813

Facsimile: (808) \_\_\_\_ - \_\_\_\_

Facsimile: (808) \_\_\_\_ - \_\_\_\_

IN WITNESS WHEREOF DOT and AHI have duly executed and delivered the within Agreement as of the day and year first hereinabove set forth.

**AHI ALOHA ASSOCIATES, LLC**

a Delaware limited liability company

By: **AHI Aloha Limited Partnership,**  
a Delaware limited partnership, its sole member

By: **AP-GP Aloha Partners, LLC**  
a Delaware limited liability company, its general partner

By: **Kronus Property III, Inc.**  
A Delaware corporation, its Manager

By: \_\_\_\_\_

Name:

Title:

Address: 60 Columbus Circle, 20<sup>th</sup> floor  
New York, New York 10023

Attn: John Jacobsson

Facsimile: (212) 515-3283

With a copy to:

**Starn O'Toole Marcus & Fisher**

733 Bishop Street, 19<sup>th</sup> floor

Honolulu, Hawaii 96813

Attn: Kenneth B. Marcus, Esq.

Facsimile: (808) 537-5434

**STATE OF HAWAII,**

By its Director of Transportation

fn  
By: \_\_\_\_\_

Name:

Title:

Address:

Facsimile: (808) \_\_\_\_-\_\_\_\_

**APPROVED AS TO FORM:**

\_\_\_\_\_  
*Allan Chock*

Allan Chock, Deputy Attorney General

Address: 465 South King Street,  
Room 300  
Honolulu, Hawaii 96813

Facsimile: (808) \_\_\_\_-\_\_\_\_

***Exhibit A  
To  
AHI-DOT Agreement***

**AHI Construction/Remediation Items**

**A. PIER 11 PASSENGER TERMINAL**

1. Reconnect water line in furred wall to lawn sprinkler outside terminal.
2. Reconnect drain at Makai end of sidewalk at Pier 11 Terminal to another drain line that will adequately handle additional flow.

**B. PIER 10 PASSENGER TERMINAL**

1. Pier 10 shed Makai stairwell walls to be reconstructed with suitable weatherproof material, painted and illuminated to ensure safe operations.

**C. OTHER**

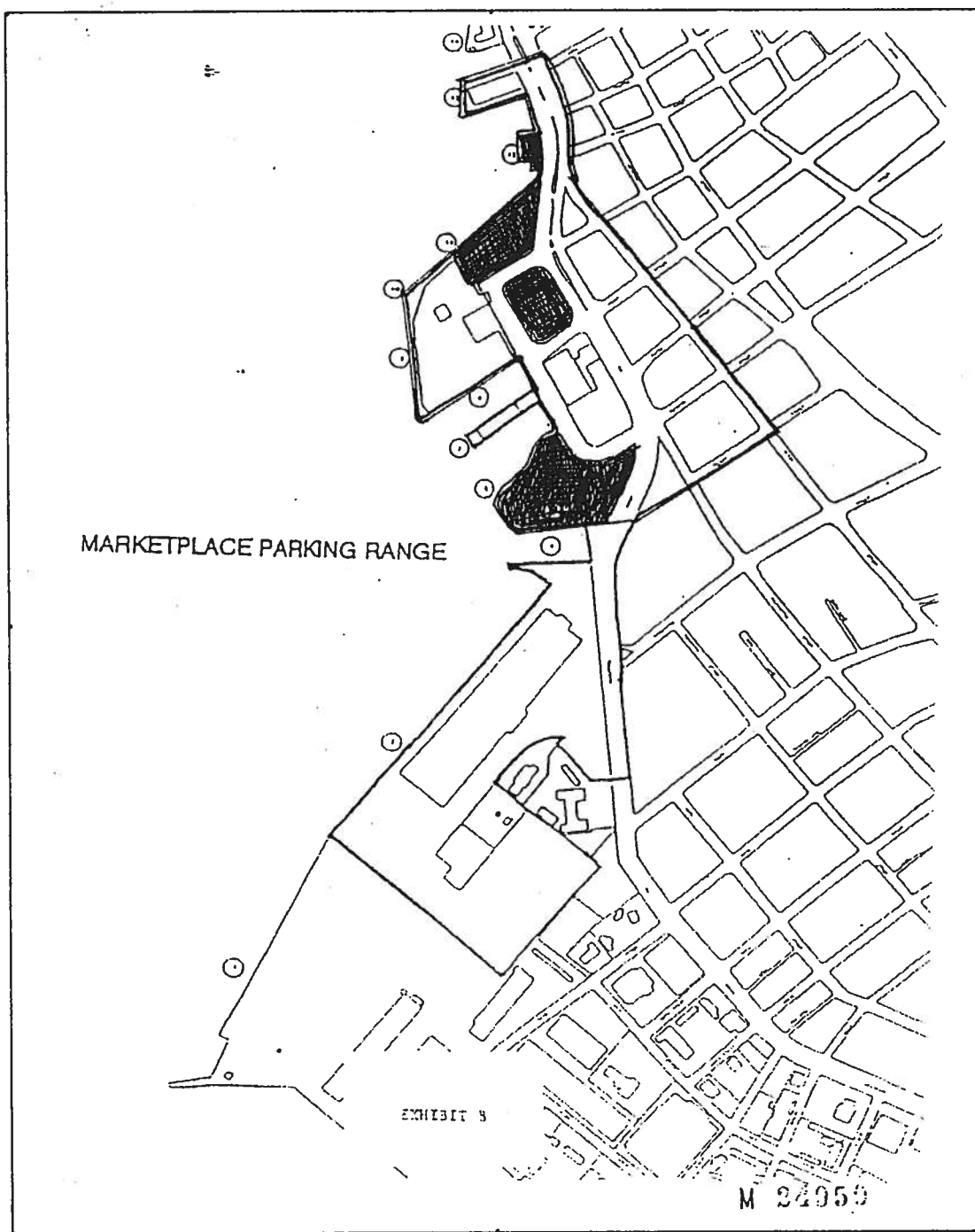
1. There is an unauthorized door on the Makai-east wall of Pier 10 terminal; AHI shall bring the same into compliance with applicable fire code regulations.
2. Piers 8 & 9 – Safety ladders are needed. AHI will submit the ladder design that is stamped by a Hawaii-licensed engineer to DOT for review and approval.

***Exhibit B  
To  
AHI-DOT Agreement***

**Parking License Amendment Terms**

1. ATDC agreement to record memorandum of Parking License Amendment.
2. AHI right to construct new on-grade parking lot at Piers 5-6 and Ala Moana mini-park substantially in accordance with the original plans for construction of such parking by the Marketplace Component Lease lessee.
3. ATDC's right to relocate parking under the Parking License Agreement limited to the areas shown below. ATDC obliged to provide temporary parking during period of relocation.
4. Mortgagee protection provisions of Marketplace Component Lease incorporated in Parking License Agreement.

Areas for relocation of parking (outlined in red):



***Exhibit C***  
***To***  
***AHI-DOT Agreement***

**Terms of Permitted Amendment to Marketplace Component Lease**

- I. **Phase One** (Existing Discussions)
- A. Settlement Agreement
- i. Dismiss pending lawsuit (State Circuit Court)
  - ii. AHI gets right to elect to do parking field per original plans
  - iii. If AHI so elects within 6 months, gets \$200,000 per annum reduction in rent for 10 years (to help defray cost of construction)
  - iv. Parking License Agreement amended to restrict relocation area
- B. AHI settles with DOT
- i. Electricity billing switched to AHI
  - ii. AHI discharges electricity charges owing to DOT (approximately \$300,000) by paying DOT's share of electric bills until fully amortized.
  - iii. DOT signs SNDA regarding Parking License Agreement.
  - iv. Punchlist items waived.
  - v. DOT will give AHI a proposal within 30 days as to how much it will seek to recoup for pier apron repairs, and how it seeks to recoup them.
  - vi. DOT agrees not unreasonably to withhold approval of Phase Two amendments to Marketplace lease, if, as and when concluded between ATDC and AHI.
- II. **Phase Two** (Marketplace Lease restructure)
- A. As of January 1, 2010.
- B. AHI presents 2010 business plan for ATDC approval.
- C. AHI will present similar business plan for future calendar years for ATDC approval, not to be unreasonably withheld or delayed.
- D. No fixed rent.

E. AHI to pay rental calculated as "Landlord's Share" (i.e., 50%) of Net Operating Cash Flow.

F. "Net Operating Cash Flow" means excess of (1) all revenues and receipts from operation and ownership of the Marketplace (including the parking areas) over (2) all operating and ownership expenditures and reserves (or expenditures as appropriate) for capital items as described in approved business plan, such as (i) tenant improvements, (ii) leasing commissions, (iii) capital improvements, (iv) if, as and when deemed prudent, expanded parking plan approved per Settlement Agreement and (v) sums owing to DOT.

G. AHI to pay ATDC Landlord's Share of any net proceeds from sale or refinancing not reserved for capital items per business plan.

H. DOT to approve amendment to ATM lease (i.e., continue SNDA rights with regard to lease, as amended).

I. Extension of unexpired portion of term to sixty-five years.

The foregoing may be accomplished by new lease, amended and restated lease or amendments as agreeable to all concerned.

**Exhibit D  
To  
AHI-DOT Agreement**

**Form of SNDA Relating to Parking License Agreement**

LAND COURT

REGULAR SYSTEM

AFTER RECORDATION,

RETURN BY MAIL ( )

PICK-UP ( )

Kenneth B. Marcus, Esq.

Starn O'Toole Marcus & Fisher

733 Bishop Street, 19<sup>th</sup> Floor

Honolulu, Hawaii 96813

Total No. of

Pages: \_\_\_\_\_

dot snda

12

80348



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TMK Nos.:

TCT No.:

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TITLE OF DOCUMENT:

**CONSENT TO PARKING LICENSE AGREEMENT;  
ATTORNMEN AND NONDISTURBANCE AGREEMENT**

---

**THIS CONSENT TO PARKING LICENSE AGREEMENT; ATTORNMEN AND NONDISTURBANCE AGREEMENT** (this "*Agreement*") made this \_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, by and among the **STATE OF HAWAII**, by its **Director of Transportation** (the "*Ground Lessor*"), whose principal place of business and post office address is 79 South Nimitz Highway, Honolulu, Hawaii 96813, **ALOHA TOWER DEVELOPMENT CORPORATION**, a public body corporate and politic, a public instrumentality and an agency of the State of Hawaii ("*ATDC*"), whose principal place of business and post office address is 600 Ala Moana Boulevard, Honolulu, Hawaii 96813, and **AHI ALOHA ASSOCIATES, LLC**, a limited liability company organized under the laws of the State of Delaware ("*AHL*"), whose principal place of business and post office address is 315 S. Beverly Drive, Suite 315, Beverly Hills, California 90212.

**RECITALS:**

A. Pursuant to that certain Lease (the "**Ground Lease**") dated September 29, 1993 by and between the Ground Lessor and ATDC, the Ground Lessor demised to ATDC those certain parcels of land (including certain submerged portions thereof) located in the Aloha Tower area of the City and County of Honolulu, State of Hawaii, generally known as Piers 5 through 14 of Honolulu Harbor.

B. Pursuant to that certain Marketplace Lease (as amended, the "**Marketplace Lease**") dated September 29, 1993, by and between ATDC and Aloha Tower Associates Piers 7, 8 and 9 Limited Partnership (the "**Original Marketplace Lessee**"), ATDC demised to Original Marketplace Lessee certain premises described on **Exhibit A** attached hereto and forming a portion of the premises demised pursuant to the Ground Lease.

C. Pursuant to that certain Parking License Agreement dated September 29, 1993, by and between ATDC and the Original Marketplace Lessee, ATDC licensed to Original Marketplace Lessee certain premises described on **Exhibit B** attached hereto constituting further portions of the premises demised pursuant to the Ground Lease for use, *inter alia*, as parking areas and as ingress and egress to the premises leased pursuant to the Marketplace Lease. Said Parking License Agreement has been amended by First Amendment to Parking License Agreement of even date herewith and the Parking License Agreement, as so amended, is hereinafter referred to as the the "**Parking License**."

D. The interests of the Original Marketplace Lessee in The Marketplace Lease and Parking License have been assigned to and assumed by AHI by *mesne* assignments heretofore consented to by ATDC.

E. In connection with the settlement of certain litigation arising among the parties hereto, the parties have agreed to enter into this Agreement.

NOW, THEREFORE, it is mutually agreed by and among the Ground Lessor, ATDC and AHI as follows:

1. Consent. The Ground Lessor hereby consents to the Parking License.

2. Non-Disturbance. The Ground Lessor hereby agrees that in the event of the termination of the Ground Lease prior to the expiration of the stated term thereof, and if the Parking License is then in effect, the Parking License shall remain in full force and effect for the

full term thereof as a direct agreement between the Ground Lessor and AHI, upon and subject to the following express conditions:

a. That AHI shall thereupon forthwith attorn to the Ground Lessor and the Ground Lessor hereby agrees to accept such attornment;

b. That AHI shall thereafter pay all sums payable under the Parking License to the Ground Lessor in the amounts and in the manner provided in the Parking License;

c. That AHI shall perform and faithfully observe and fulfill thereafter for the remainder of the term of the Parking License for the benefit of the Ground Lessor all of the covenants and conditions on the part of AHI to be performed and observed as AHI under the Parking License; and

d. That the Ground Lessor shall only be obligated to perform the obligations of ATDC, as licensor under the Parking License, to the extent permitted by law and to the extent that the Ground Lessor is not so permitted, the Ground Lessor shall have no obligation to perform said obligations of ATDC as licensor under the Parking License. This provision is not intended to permit the Ground Lessor (i) to disclaim the Parking License, or (ii) to relocate parking pursuant to Section 7 of the Parking License unless and until the Ground Lessor has effectively designated "Replacement Parking Facilities" under that section.

Subject to the foregoing, and upon and after such termination of the Ground Lease:

i. The Ground Lessor shall have the same remedies, by entry, action or otherwise, for the breach of any covenant or condition contained in the Parking License as ATDC had or would have had if the Ground Lease had not been terminated; and

ii. AHI shall have the same remedies against the Ground Lessor for the Ground Lessor's breach of any covenant or condition contained in the Parking License as AHI would have had against ATDC if the Ground Lease had not been terminated, provided that the Ground Lessor shall not be (1) liable for any act or omission of ATDC, (2) subject to any offsets or defenses which AHI might have against ATDC, (3) bound by any license fees or other payments which AHI might have paid in advance to ATDC, except to the extent required to be paid in advance by the terms of the Parking License, or (4) bound by any amendment or modification of the Parking License made without the Ground Lessor's consent.

The holder or holders of any mortgage covering AHI's interest under the Parking License shall have and be entitled to all of the rights, privileges and protections with respect to the Parking License as are herein provided to AHI.

3. Attornment. AHI, in consideration of the premises, hereby covenants and agrees with the Ground Lessor that in the event of the termination of the Ground Lease prior to the expiration of the stated term thereof, and if the Parking License is then in effect, AHI will thereupon forthwith attorn to the Ground Lessor with respect to the Parking License and the premises thereby licensed, and thereafter be the direct licensee of the Ground Lessor under the Parking License, and will cure any defaults or breaches of the Parking License by AHI occurring prior to such attornment and will thereafter, for the remainder of the term of the Parking License, faithfully perform and observe for the benefit of the Ground Lessor all of the covenants and conditions on the part of AHI to be observed and performed under the Parking License.

4. Effect of Ground Lease Termination. ATDC does hereby agree that in the event of termination of the Ground Lease prior to the expiration of the stated term thereof, all of the right, title and interest of ATDC in and to the Parking License shall thereupon forthwith cease and determine, and AHI, or its permitted assigns, may thereupon attorn to the Ground Lessor under the Parking License and thereafter be considered in all respects the direct licensee of the Ground Lessor, and may thereafter render to or for the benefit of the Ground Lessor any payment or other performance to be made by AHI under the Parking License.

5. Counterparts. This Agreement may be executed in several counterparts, each of which shall be an original, but all of which shall constitute but one and the same instrument. An executed counterpart of this Agreement transmitted and received by facsimile shall be deemed for all purposes to be an original, executed counterpart hereof. Duplicate unexecuted pages of the counterparts (whether original or received by facsimile) may be discarded and the remaining pages assembled as one document.

This Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors and assigns.

IN WITNESS WHEREOF, the parties have executed this Agreement the day and year first above written.

**STATE OF HAWAII**

By \_\_\_\_\_  
Its Director of Transportation  
Ground Lessor

**ALOHA TOWER DEVELOPMENT CORPORATION**

By \_\_\_\_\_  
Its Chairman  
ATDC

**AHI ALOHA ASSOCIATES, LLC,**  
a Delaware limited liability company

By: AHI Aloha Limited Partnership,  
a Delaware limited partnership,  
its Sole Member

By: AP-GP Aloha Partners, LLC,  
a Delaware limited liability  
company,  
its General Partner

By: Kronus Property III, Inc.  
a Delaware corporation,

its Manager

By: \_\_\_\_\_

Richard Ackerman

Its Vice President

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

On this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, before me appeared \_\_\_\_\_, to me personally known, who, being by me duly sworn, did say that he is the Director of Transportation of the STATE OF HAWAII; that said instrument was signed in behalf of the State by appropriate authority given to said Director and said \_\_\_\_\_ acknowledged said instrument to be free act and deed of the DEPARTMENT OF TRANSPORTATION OF THE STATE OF HAWAII.

\_\_\_\_\_  
Type or Print Name: \_\_\_\_\_

Notary Public, State of Hawaii

My commission expires: \_\_\_\_\_

STATE OF HAWAII

)

)

SS.

CITY & COUNTY OF HONOLULU

)

On this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, before me appeared \_\_\_\_\_, to me personally known, who, being by me duly sworn, did say that he is the \_\_\_\_\_ of ALOHA TOWER DEVELOPMENT CORPORATION, a public body and a body corporate and politic of the State of Hawaii; that said instrument was signed in behalf of said ALOHA TOWER DEVELOPMENT CORPORATION by authority of its Commissioners, and said \_\_\_\_\_ acknowledged said instrument to be free act and deed of said ALOHA TOWER DEVELOPMENT CORPORATION.

\_\_\_\_\_  
Type or Print Name: \_\_\_\_\_

Notary Public, State of Hawaii

My commission expires: \_\_\_\_\_



STATE OF CALIFORNIA

)

)

SS.

COUNTY OF LOS ANGELES

)

On this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, before me appeared RICHARD ACKERMAN, to me personally known, who, being by me duly sworn affirmed, did say that such person executed the foregoing instrument as the free act and deed of such person, and if applicable in the capacity shown, having been duly authorized to execute such instrument in such capacity

\_\_\_\_\_

Type or Print Name: \_\_\_\_\_

Notary Public, State of California

My commission expires: \_\_\_\_\_

**Exhibit A**

**Ground Lease Premises**

**Exhibit A**

**Page 1 of 1**

**Exhibit A**

**Ground Lease Premises**

# **Exhibit 3**

## SUCCESSOR MEMORANDUM OF UNDERSTANDING

This SUCCESSOR MEMORANDUM OF UNDERSTANDING (this "**SMOU**") is made as of this 30th day of October, 2014 (the "**Effective Date**") by and between the **STATE OF HAWAII**, by its Director of Transportation ("**DOT**"), the **ALOHA TOWER DEVELOPMENT CORPORATION**, a public body corporate and politic, public instrumentality, and agency of the State of Hawaii, whose business address is 869 Punchbowl, Honolulu, Hawaii 96813 ("**ATDC**") and **HAWAII LIFESTYLE RETAIL PROPERTIES LLC**, a Hawaii limited liability company, whose business address is 1164 Bishop Street, 8<sup>th</sup> Floor, Honolulu, Hawaii 96813 ("**HLRP**"). DOT and ATDC may sometimes hereinafter be referred to collectively as the "**State**".

### **RECITALS:**

A. **WHEREAS**, pursuant to Executive Order No. 3542 ("**Order**"), DOT has the operating and management jurisdiction of those certain parcels of land (including certain submerged portions thereof) located in the vicinity of the historic Aloha Tower ("**Aloha Tower**") of the City and County of Honolulu, generally known as Piers 5 through 11 of Honolulu Harbor, more particularly described in the Order and subsequent amendments thereto and amendments to Chapter 206J, Hawaii Revised Statutes ("**HRS**"), identified and hereinafter referred to as the "**Aloha Tower Complex**";

B. **WHEREAS**, ATDC was established in 1981 to redevelop the Aloha Tower Complex. The Aloha Tower Complex is part of a master plan created as a stimulus for economic activities on the ocean-front State lands within Honolulu Harbor and to achieve economic growth by balancing community and tourism development, enhancing the beauty of the waterfront, better serving the maritime users, and providing public access to the ocean and transforming the area to a "people place";

C. **WHEREAS**, DOT and ATDC entered into that certain indenture of lease dated September 29, 1993, wherein DOT demised and leased to ATDC all of the leasehold interest in and to part of the Aloha Tower Complex (the "**Aloha Tower Ground Lease**") to allow ATDC to redevelop the area in question as allowed by applicable law;

D. **WHEREAS**, ATDC entered into that certain Marketplace Project Component Lease dated September 29, 1993, with Aloha Tower Associates Piers 7, 8 and 9 Limited Partnership ("**ATA**"), as amended by that certain First Amendment to Marketplace Project Component Lease dated March 31, 1998, and as further amended by that certain Second Amendment of Marketplace Lease; Second Amendment of Marketplace Pier 10 Space Lease; and Second Amendment of Parking License Agreement dated May 6, 2013 (as so amended, the "**Marketplace Lease**") whereby ATA leased from ATDC those portions of the Aloha Tower Complex more specifically set forth therein, including the retail buildings located on Piers 8 and 9 currently known as "Aloha Tower Marketplace" ("**ATM**");



E. **WHEREAS**, ATDC and ATA entered into that certain Marketplace Pier 10 Space Lease dated September 29, 1993, which has a lease term that expires concurrently with the Marketplace Lease. The Marketplace Pier 10 Space Lease was subsequently amended by the First Amendment to Marketplace Pier 10 Space Lease dated February 29, 2012 and was further amended by the Second Amendment thereof (as so amended, the "**Pier 10 Space Lease**"). The space thereby demised is referred to hereinafter as the "**Pier 10 Space**";

F. **WHEREAS**, ATDC and ATA also entered into a Parking License Agreement dated September 29, 1993, as amended by First Amendment to and Memorandum of Parking License Agreement dated June 29, 2010, and as further amended by the Second Amendment thereof (as so amended, the "**Parking License**") covering the areas identified therein as Pier 10-11 Shed, Irwin Park, Piers 5-6, including Ala Moana Mini (sometimes collectively referred to as the "**Parking Areas**");

G. **WHEREAS**, DOT and ATA entered into various agreements affecting the maintenance and management of operational areas within ATM, including, but not limited to the Marketplace – DOT Capital Improvements, Maintenance, Operations And Security Agreement ("**CIMOSA**"), dated September 29, 1993;

H. **WHEREAS**, by mesne assignments, AHI ALOHA ASSOCIATES, LLC, a Delaware limited liability company ("**AHI**") became the holder of the leasehold interest to those portions of the Aloha Tower Complex demised under the Marketplace Lease, the Pier 10 Space Lease and the Parking License;

I. **WHEREAS**, DOT and AHI entered into the following agreements affecting the maintenance and management of operational areas with the ATM: the Agreement Relating to Aloha Tower Pier Repairs, dated June 29, 2010, and the Agreement Relating to Aloha Tower Utilities, dated June 29, 2010 (the CIMOSA and the agreements referenced within this recital shall hereinafter collectively be referred to as the "**DOT Agreements**");

J. **WHEREAS**, the Marketplace Lease, Pier 10 Space Lease, Parking License and the DOT Agreements are hereinafter referred to as the "**Marketplace Rights**";

K. **WHEREAS**, AHI, as Seller, and HLRP, as Buyer, entered into that certain Purchase and Sale Agreement dated as of April 11, 2011, as amended, for the sale and purchase of the Marketplace Rights;

L. **WHEREAS**, by written consent dated July 13, 2011, ATDC consented to the transfer of the Marketplace Rights to HLRP. The Marketplace Rights were assigned by AHI to HLRP by Instruments of Conveyance dated December 30, 2011 and April 27, 2012;

M. **WHEREAS**, pursuant to the redevelopment guidelines set forth in Chapter 206J, HRS, as amended, and subchapters 6, 7 and 8, Title 19, Subtitle 7, Chapter 170, Sections 19-170-51 through 19-170-149, Hawaii Administrative Rules (collectively

**"Aloha Tower Guidelines"**), HLRP initially proposed, under the terms of the Memorandum of Understanding between the State and HLRP dated December 15, 2011 (the **"Original MOU"**), to redevelop the waterfront land consistent with the goals for the Aloha Tower Complex, and with additional, specific goals to rebrand the entire downtown Honolulu waterfront, create a mixed use district, allow for new mixed uses, create boardwalks and outside waterfront eateries, and expand services for maritime users along Piers 7-9;

N. **WHEREAS**, under the terms of the Original MOU, HLRP was obligated to make good faith efforts to complete certain Required Improvements (as defined therein) by December 31, 2012, as a condition precedent to the issuance by ATDC of New ATDC Lease (as defined therein). The renovation of the ATM and the Required Improvements required that the administrative rules of ATDC be modernized and more flexible to include residential and educational uses in addition to traditional commercial and restaurant uses. In recognition and furtherance thereto, in 2013, the Department of Business, Economic Development and Tourism commenced the process to repeal the administrative rules of ATDC under Title 15, Subtitle 5, Chapter 26, and the Department of Transportation commenced the process to adopt the administrative rules of ATDC under Title 19, Subtitle 7, Chapter 170, Hawaii Administrative Rules (**"ATDC Rules"**). The said repeal and adoption, respectively, were effective on May 5, 2013. HLRP further made good faith efforts to complete the Required Improvements, consistent with the ATDC Rules, by applying for and obtaining \$120,000,000 in State Special Purpose Revenue Bonds pursuant to Act 305, Session Laws of Hawaii, 2012 Regular Session; a portion of which was designated for use in the repair and renovation of the ATM;

O. **WHEREAS**, ATDC has approved an amendment to the Aloha Tower Project Area Plan to incorporate and address uses as permitted by the ATDC Rules (as so amended, the **"Project Area Plan"**).

P. **WHEREAS**, HLRP has entered into an understanding with its tenant, Hawai'i Pacific University (**"HPU"**), to convert the upper floors of the ATM into residential lofts for use by students and faculty of HPU as well as to utilize other spaces in Piers 8, 9 and 10, consistent with the Project Area Plan and the ATDC Rules, for educational purposes consistent with HPU's role as an institution of higher education; and

Q. **WHEREAS**, by the agreements set forth below, the parties hereto desire to memorialize their current understandings with respect to the various aspects of the parties' expectations in wake of the many changes between the time that the Original MOU was executed and the present day.

### **AGREEMENT**

NOW THEREFORE, in consideration of the promises, covenants and agreements contained herein, DOT, ATDC and HLRP agree as follows:



I. HLRP.

1. HLRP Improvements. HLRP, or through its tenant and parent, HPU, shall expend not less than FORTY MILLION and NO/100 Dollars (\$40,000,000.00) to renovate, modernize and revitalize Piers 8, 9, and 10 to create student and faculty residences and various university spaces, including a learning commons, dining hall, meeting and lecture rooms, as well as community gathering spaces, in addition to ongoing commercial retail and restaurant uses (the "HLRP Improvements"). HLRP, or through its tenant and parent, HPU, shall use good faith efforts to complete the HLRP Improvements on or before December 31, 2015.

II. ATDC.

1. Marketplace Lease Renewal. ATDC and HLRP agree to consider renewing the existing Marketplace Lease, the Pier 10 Space Lease and the Parking License (together the "Renewed Leases") for a term of 65 years from the effective date of the renewal (the "Lease Effective Date"), to update the legal description of the Aloha Tower Complex, and to update the terms by deleting provisions no longer applicable. ATDC and HLRP agree that any such renewal or option to extend shall incorporate a rent structure which takes into account the new uses of the leased premises.
2. Construction Period Rent. ATDC and HLRP agree that notwithstanding anything in the Marketplace Lease to the contrary, rent under the Marketplace Lease during the Construction Period, defined hereinbelow, shall be as follows:

Construction Period Rent. In consideration of the construction of the HLRP improvements, rent as set forth in the Marketplace Lease shall be retroactively abated commencing on July 1, 2014, for a period of 12 months, until June 30, 2015 (the "Construction Period").

3. Terms of Renewed Leases to Control. If the Renewed Leases are issued, to the extent the terms or conditions under any existing Marketplace Documents are inconsistent with the terms of the Renewed Leases, the terms of the Renewed Leases shall control.

III. Further Agreements.

1. Amendment of CIMOSA. As soon as practical, the CIMOSA shall be analyzed by DOT, ATDC and HLRP and to the extent terms and concepts in the CIMOSA are no longer applicable to the HLRP Improvements, the parties agree to expeditiously work in good faith to amend the CIMOSA so that it reflects the current status of the Aloha Tower Complex and sets



forth obligations and rights in a manner that is mutually agreeable to the parties.

2. Passenger/Cruise Ship Operations Regarding Piers 10 and 11. HLRP and DOT agree to mutually cooperate to reduce congestion at Piers 10 and 11 by adopting reasonable guidelines relating to managing the operations at ATM and passenger/cruise ship moorings (also known as "**Boat Days**") at the same time. HLRP agrees to comply with existing operating and parking restrictions during Boat Days. Pier 2 is currently the primary berthing for passenger/cruise ships.

3. Aloha Tower Drive.

HLRP agrees to be responsible for coordinating with the State, ATDC and/or other applicable governmental agency to analyze whether a redesign or reconfiguration of Aloha Tower Drive may be necessary to enhance traffic flow. HLRP agrees to pay for all reasonable costs associated with a mutually agreeable redesign and/or reconfiguration of Aloha Tower Drive necessitated by its use of the ATM.

4. Nondisturbance Agreements. DOT agrees: (a) to provide an NDA to HLRP upon issuance of any Renewed Leases (including any restatement thereof as contemplated by this SMOU) and thereafter to such mortgagees of HLRP as may request the same, and (b) to provide an NDA to any Major Tenant of the ATM that requires it upon execution of a lease by such Major Tenant and to any mortgagee of such Major Tenant upon request by such mortgagee. A "**Major Tenant**" means a tenant that holds a lease for at least 5,000 square feet of space in the ATM. Similarly, upon execution of a lease by a Major Tenant (whether before or after the issuance of any Renewed Leases), ATDC agrees to provide an NDA to such Major Tenant and to any mortgagee of such Major Tenant upon request by such mortgagee. As used herein, "**NDA**" means a nondisturbance and attornment agreement similar to the nondisturbance and attornment agreement applicable to the Marketplace Lease dated September 29, 1993 recorded as Document No. 93-161410.

#### IV. Miscellaneous.

1. Cooperation in Zoning and Permitting. DOT, ATDC and HLRP agree to cooperate in good faith to process any necessary zoning, permit and development approvals consistent with the intent of this SMOU, provided that HLRP complies with all laws and regulations. Notwithstanding the foregoing, DOT and ATDC shall have no obligation to expend monies or make any appearances in furtherance of such processing of zoning, permitting and development approvals except as otherwise required by the multijurisdictional requirements of the ATM.

2. Compliance with Laws. HLRP shall comply with all Federal, State, county and other laws, ordinances, rules and regulations including without limitation all ATDC Rules, building codes requirements, and any environmental reviews under any applicable Federal or State law, statute and regulation, and obtain all necessary permits and approvals, that may be required for the HLRP Improvements, at HLRP's sole cost.
3. Binding. Upon execution of this SMOU by the parties, this SMOU shall become binding and enforceable in accordance with its terms. Except as specifically set forth herein, the rights and obligations of each party named in this SMOU shall bind and inure to the benefit of each party and their respective successors and assigns.
4. HLRP's Right to Assign. HLRP shall not assign, transfer (including by sale of assets, sale or transfer of membership interest in HLRP, merger, consolidation, or operation of law), pledge or hypothecate any of its rights or obligations under this SMOU to any other person or entity without the prior written consent of ATDC (and/or DOT where applicable), which consent ATDC (or DOT as applicable) may grant or withhold in its (their) sole discretion, and any such assignment without such consent shall be null and void *ab initio*.
5. Authority. Each party warrants and represents to the other that the individual executing this SMOU on behalf of the respective parties are authorized to do so.
6. Entire Agreement. This SMOU embodies the entire agreement of the parties and supersedes any other agreements and understandings with respect to the subject matter hereof that may have existed between the parties.
7. Counterparts. The parties hereto agree that this SMOU may be executed in counterparts, each of which shall be deemed an original, and said counterparts shall together constitute one and the same instrument, binding on all of the parties hereto, notwithstanding that all parties are not signatories to the original or the same counterparts. For all purposes, including, without limitation, delivery of this SMOU, duplicate, unexecuted and unacknowledged pages of the counterparts may be discarded and the remaining pages assembled as one document.
8. Interpretation/Construction. The parties agree that no party shall be deemed to be the drafter of this SMOU and further that in the event that this SMOU is ever construed by a court of law, such court shall not construe this SMOU or any provision of the same against any party as the drafter of the SMOU.



9. Remedies. If any party to this SMOU fails to fulfill or perform any of its obligations hereunder, the non-defaulting parties shall be entitled to all remedies available at law or in equity, including damages, specific performance and injunctive relief.
10. Governing Laws. This SMOU shall be governed and construed in accordance with the laws of the State of Hawaii.
11. Amendments. This SMOU shall not be modified except by an instrument in writing signed by all of the parties hereto.
12. HLRP's Payment Obligations. The parties hereto agree that in consideration of the ATDC undertaking to issue any Renewed Leases, HLRP shall pay to DOT the sum of One Million Seven Hundred Fifty Thousand and no/100 Dollars (\$1,750,000.00) on or before December 31, 2021, to satisfy AHI's obligation under that certain Agreement Regarding Aloha Tower Piers Repair dated June 29, 2010. This obligation is binding upon and shall inure to the benefit of the parties hereto and their respective heirs, executors, administrators and successors and assigns. For the purposes hereof, any successor "Marketplace Lessee" shall succeed to HLRP's obligations hereunder. HLRP agrees to execute and record a memorandum of this payment obligation against HLRP's leasehold interest at the Bureau of Conveyances of the State of Hawaii and/or the Office of the Assistant Registrar of the Land Court of the State of Hawaii.
13. Waiver, Release and Indemnity. HLRP acknowledges and agrees that it is proceeding with the HLRP Improvements at its own risk, with full knowledge of the risk factors associated with development. HLRP has represented that it has incurred substantial costs in pursuing this opportunity, and that it will incur substantial additional costs in pursuing the HLRP Improvements. HLRP agrees that ATDC, DOT and/or the State shall in no way be deemed liable or responsible for payment or reimbursement of any of such costs and expenses, including, but not limited to, costs and expenses incurred by, through, or under HLRP, including any contractors, consultants, advisors, or others in any way associated with the HLRP Improvements and/or the development thereof, and HLRP does hereby waive, release, indemnify, and forever hold ATDC, DOT and the State harmless from and against any and all claims made for such payment or reimbursement.
14. Force Majeure. If HLRP's performance of any obligation or condition hereunder (other than the payment of money) is delayed as the result of a Force Majeure event, the time or times for performance of such obligation or condition will be extended for the period of the delay. "**Force Majeure**" means events that cause delays in the performance of HLRP's obligations or satisfaction of a condition under this SMOU, due to causes beyond


HLRP's control, including, but not restricted to: acts of God or of the public enemy; fires; floods; tidal waves; freight embargoes; earthquakes; unusually severe weather; delays of contractors or subcontractors due to any of these causes; the unanticipated presence of hazardous materials or other concealed conditions that would materially and adversely impair HLRP's ability to perform its obligations or satisfy a condition hereunder; archeological finds; discovery of the presence or habitat of a threatened, candidate or endangered species protected by the Federal Endangered Species Act; strikes, and substantial interruption of work because of labor disputes; and inability to obtain materials or reasonably acceptable substitute materials (provided that HLRP has ordered such materials on a timely basis and the acts or omissions of HLRP are not otherwise at fault for such inability to obtain materials); and delays in obtaining required governmental permits and/or approvals.

(The remainder of this page is intentionally left blank)

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed as of the day and year first above written.

APPROVED AS TO FORM:


**STATE OF HAWAII**  
**DEPARTMENT OF TRANSPORTATION**

  
\_\_\_\_\_  
**Marjorie A. Lau, Esq.**  
Deputy Attorney General

By:   
\_\_\_\_\_  
**Ford N. Fuchigami**  
Its Interim Director of Transportation

APPROVED AS TO FORM:

**ALOHA TOWER DEVELOPMENT  
CORPORATION**

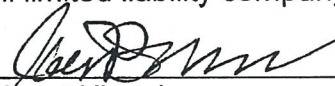
  
\_\_\_\_\_  
**Gregg J. Kinkley, Esq.**  
Deputy Attorney General

By:   
\_\_\_\_\_  
Randy Grune  
Acting Chief Executive Officer and  
member

APPROVED AS TO FORM:

**HAWAII LIFESTYLE RETAIL  
PROPERTIES LLC,**  
a Hawaii limited liability company

  
\_\_\_\_\_, Esq.  
Attorney for HLRP

By:   
\_\_\_\_\_  
Janet Kloenhamer  
Its Manager

By: \_\_\_\_\_  
Scott Hayashi  
Its Manager



Hawaii Lifestyle Retail Properties LLC

Signature Authority Resolution

The undersigned being the Managers of Hawaii Lifestyle Retail Properties, LLC, (the Company) a limited liability company formed under the laws of the State of Hawaii, do hereby certify that the following Resolutions were duly adopted in accordance with the procedures set forth in the Operating Agreement of the Company and that said Resolutions have not been amended, rescinded or revoked and are in no way in conflict with any of the provisions of the Company's Operating Agreement.

WHEREAS, the Company is a manager managed LLC, and the current duly appointed and authorized managers are Janet Kloenhamer and Scott Hayashi; and

WHEREAS pursuant to Section 4.2, of the Operating Agreement, the signatures of both Managers are required to sign contracts and other documents with third parties unless they determine otherwise; and

WHEREAS the Company has determined that it is in the Company's best interest to allow either Manager to sign on behalf of the Company subject to the limitations set forth in Section 5.3 of the Operating Agreement, the terms of which are hereby incorporated by reference:

Now therefore, it is RESOLVED that either Scott Hayashi, or Janet Kloenhamer, signing alone may bind the Company, subject to the limitations set forth in Section 5.3 of the Operating Agreement which require the written approval of the Sole Member, HPU, for certain transactions, the terms of which are hereby incorporated by reference; and

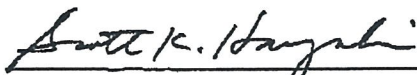
RESOLVED FURTHER that the State of Hawaii and other entities relying upon this Resolution are entitled to rely upon the Resolutions herein and act upon the authority of these Resolutions until written revocation has been actually received.

We further certify that the Company is duly organized and existing under the laws of the State of Hawaii, that the company has the power to effect the transactions contemplated hereby.

In WITNESS WHEREOF, we have subscribed our names on behalf of the Company as its Managers below.

HAWAII LIFESTYLE RETAIL PROPERTIES, LLC

By:   
Janet S. Kloenhamer 8/7/14  
Its Manager

By:   
Scott Hayashi 8/7/14  
Its Manager

# **Exhibit 4**

**From:** [Kaimuloa, Kamakana K](#)  
**To:** [Manglallan, Eduardo P](#)  
**Subject:** FW: HLRP's Payment Obligations  
**Date:** Friday, December 17, 2021 3:45:48 PM

---

Aloha Ed,

Per our discussion, I've forwarded HPU's response regarding the payment obligation in question. Please see it below.

Mahalo,  
Kamakana

---

**From:** Brooke Carroll <bcarroll@hpu.edu>  
**Sent:** Friday, December 3, 2021 3:39 PM  
**To:** Pillone, Peter <peter.pillone@hawaii.gov>; Kaimuloa, Kamakana K <kamakana.k.kaimuloa@hawaii.gov>  
**Cc:** Yoshina, Coleen F <coleen.f.yoshina@hawaii.gov>  
**Subject:** [EXTERNAL] Re: HLRP's Payment Obligations

Aloha Kamakana,

That provision is not applicable. It would only have been triggered if the parties had entered into any "Renewed Leases" for an additional 65 years.

Mahalo,

Brooke

Brooke Carroll  
Vice President of Advancement  
Hawaii Pacific University

---

**From:** Chow, Derek J <[derek.j.chow@hawaii.gov](mailto:derek.j.chow@hawaii.gov)>  
**Sent:** Tuesday, November 30, 2021 1:37 PM  
**To:** Brooke Carroll; Pillone, Peter; Kaimuloa, Kamakana K  
**Cc:** Yoshina, Coleen F  
**Subject:** RE: HLRP's Payment Obligations

**[CAUTION: External Sender]**

Sorry, meant page 7 of the attached.

-----  
V/R  
DEREK J. CHOW  
Deputy Director



*Department of Transportation, Harbors Division*  
*State of Hawaii*  
*79 S. Nimitz Hwy (Pier 11)*  
*Honolulu, HI 96813*  
*(808)587-3651*  
[Derek.j.chow@hawaii.gov](mailto:Derek.j.chow@hawaii.gov)

---

**From:** Chow, Derek J

**Sent:** Tuesday, November 30, 2021 1:33 PM

**To:** Brooke Carroll <[bcarroll@hpu.edu](mailto:bcarroll@hpu.edu)>; Peter Pillone ([peter.pillone@hawaii.gov](mailto:peter.pillone@hawaii.gov))  
<[peter.pillone@hawaii.gov](mailto:peter.pillone@hawaii.gov)>; Kamakana K Kaimulua ([kamakana.k.kaimulua@hawaii.gov](mailto:kamakana.k.kaimulua@hawaii.gov))  
<[kamakana.k.kaimulua@hawaii.gov](mailto:kamakana.k.kaimulua@hawaii.gov)>

**Cc:** Coleen F Yoshina ([coleen.f.yoshina@hawaii.gov](mailto:coleen.f.yoshina@hawaii.gov)) <[coleen.f.yoshina@hawaii.gov](mailto:coleen.f.yoshina@hawaii.gov)>

**Subject:** HLRP's Payment Obligations

Brooke-

In accordance with the Successor Memorandum of Understanding, Part III, Item 12, HLRP (page 4 of the attached and highlighted) is supposed to pay DOT \$1,750,000 by December 31, 2021. Please advise on the status of this payment to DOT.

Thanks. Derek

-----  
V/R

DEREK J. CHOW

Deputy Director

Department of Transportation, Harbors Division

State of Hawaii

79 S. Nimitz Hwy (Pier 11)

Honolulu, HI 96813

(808)587-3651

[Derek.j.chow@hawaii.gov](mailto:Derek.j.chow@hawaii.gov)

# **Exhibit 5**



David Y. Ige  
Governor

Eduardo P. Mangiallan  
Chair

## ALOHA TOWER DEVELOPMENT CORPORATION

79 S. Nimitz Highway, Honolulu, Hawaii 96813-4898 | (808) 587-3651

IN REPLY REFER TO: **ATDC 22-0022**

January 13, 2022

Brooke Carroll  
Vice President of Advancement  
Hawaii Pacific University  
1 Aloha Tower Drive  
Honolulu, HI 96813

Re: Hawaii Lifestyle Retail Properties LLC's ("HLRP") obligation to pay \$1,750,000.00 to DOT by December 31, 2021

Dear VP Carroll:

On November 30, 2021, my predecessor Derek Chow sent you an email setting forth that HLRP was obligated to pay DOT \$1,750,000.00 by December 31, 2021, pursuant to the Successor Memorandum of Understanding which was executed by all parties on October 30, 2014.

The specific language found in paragraph IV. Miscellaneous, Item 12. HLRP Payment Obligations, in pertinent part states:

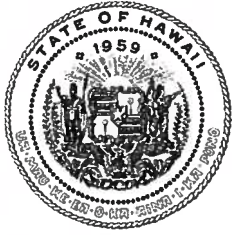
"The parties hereto agree that in consideration of the ATDC undertaking to issue any Renewed Leases, HLRP shall pay to DOT the sum of One Million Seven Hundred Fifty Thousand and no/100 Dollars (\$1,750,000.00) on or before December 31, 2021 . . . ."

Please make this payment by January 31, 2022.

Sincerely,

Eduardo P. Mangiallan  
Chair, ATDC

# **Exhibit 6**



## ALOHA TOWER DEVELOPMENT CORPORATION

79 S. Nimitz Highway, Honolulu, Hawaii 96813-4898 | (808) 587-3651

IN REPLY REFER TO: **ATDC 22-0024**

David Y. Iq  
Governor

Eduardo P. Manglallan  
Chair

February 25, 2022

### CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Brooke Carroll  
Vice President of Advancement  
Hawai'i Pacific University  
1 Aloha Tower Drive  
Honolulu, HI 96813

**Re: HPU/HLRP's Obligation to Pay \$1,750,000.00 by December 31, 2021**

Dear Brooke:

On January 13, 2022, Chair Manglallan wrote to you, inquiring whether HPU/HLRP intended to make the \$1,750,000.00 payment called for in the SMOU. Specifically, this payment was due on December 31, 2021.

To date, HPU/HLRP has not made this payment. This being the case, we construe this to mean that HPU/HLRP does not intend to make this payment and does not wish to renew the existing lease.

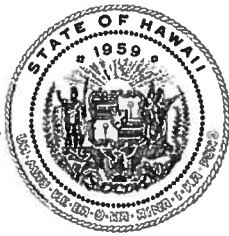
Please let us know in writing, by Friday, March 11, two weeks from today, whether we are correctly interpreting your intentions. If you do not respond to this letter, we will likewise assume that HPU/HLRP does not intend to make this payment and does not wish to extend the existing lease and we will plan accordingly.

Sincerely,

Ronald Y. Amemiya  
ATDC Program Specialist

Cc: Eduardo P. Manglallan  
Chair, ATDC

# **Exhibit 7**



## ALOHA TOWER DEVELOPMENT CORPORATION

79 S. Nimitz Highway, Honolulu, Hawaii 96813-4898 | (808) 587-3651

IN REPLY REFER TO: ATDC 22-0026

David Y. Ige  
Governor

Eduardo P. Manglallan  
Chair

### CERTIFIED MAIL, RETURN RECEIPT REQUESTED

April 6, 2022

Brooke Carroll  
Vice President of Advancement  
Hawaii Pacific University  
1 Aloha Tower Drive  
Honolulu, HI 96813

RE: Aloha Tower Marketplace Lease Agreement Obligations

Dear Brooke:

I am writing to you today concerning three matters: (1) your decision not to seek a lease renewal for the Aloha Tower Marketplace; (2) your outstanding balance of \$3.5 Million related to deferred pier apron repairs; and (3) ATDC's notice of entry of default on the Parking License Agreement if you fail to promptly make repairs.

- (1) On February 25, 2022, ATDC sent a letter addressed to you; ATDC 22-0024, Certified Mail Return Receipt Requested; wherein ATDC allowed HPU/HLRP an additional two-weeks extension to secure the lease renewal of Aloha Tower Marketplace. HPU/HLRP acknowledged receipt of the letter on March 16, 2022. As we did not receive the \$1,750,000 called for by the March 11, 2022 deadline, nor received any communications from you by the same date, we will assume that HPU/HLRP does not wish to secure said renewal. ATDC will commence taking necessary steps to find a successor to the Aloha Tower Marketplace.
- (2) Pursuant to the Agreement Regarding Aloha Tower Pier Repairs, dated June 29, 2010, paragraph 1. Punchlist Items, subparagraph (d) Pier Apron Repairs, HPU/HLRP (successor to AHI) is mandated to pay DOT \$3,500,000 in lieu of HPU/HLRP (AHI) making pier apron repairs called for in this subparagraph. As the record shows, HPU/HLRP (AHI) did **not** make any pier apron repairs. Please respond by email to Isaiah Shigematsu for a meeting regarding this matter.
- (3) On March 11, 2022, I emailed a letter to you, ATDC 22-0025, respectfully demanding that HPU/HLRP (successor to ATA 7-8-9) make the necessary repairs to the parking facilities at Irwin Park, Pier 10-11 Shed, Piers 5-6 including Ala Moana Mini, and the surrounding roadways. As you know, these parking facilities and surrounding area have

fallen into very noticeable disrepair. Photographs were attached, showing some of the affected areas. In the same email letter, we asked that you assign a staff member to contact Wil Estrada (our project engineer) by March 17, 2022 to conduct a walk through to identify the affected areas that needed repairs. To this day, no one from your staff has contacted Mr. Estrada.

Paragraph 3 of the Parking License Agreement (dated September 19, 1993), in pertinent part states:

“ATA (predecessor to HPU/HLRP) shall, at its sole expense, construct, operate and maintain all improvements necessary or appropriate to allow the Marketplace parking facilities. . .to be used as commercial parking facilities in connection with Aloha Tower Marketplace.... [and to] beautify Irwin Park, resurface existing streets and parking areas....”

Paragraph 17 of the agreement reads:

“Any of the following shall be an act of default:

e. if either party fails, refuses or neglects to perform any of its other obligations hereunder, and such failure continues for a period of thirty (30) days, or such additional time, not to exceed one hundred twenty (120) days, reasonably necessary to cure such default following written notification such failure to perform.”

Pursuant to these two paragraphs in the Parking License Agreement, ATDC gives notice to HPU/HLRP that, thirty days following the receipt of this letter upon no action being taken to contact Mr. Estrada and enact necessary repairs, they are in default of said agreement.

Sincerely,



Ronald Amemiya  
ATDC Program Specialist

cc: ATDC Board of Directors  
John Gotanda, HPU President



# **Exhibit 8**



April 12, 2022

VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED AND ELECTRONIC MAIL

Mr. Ronald Amemiya  
ATDC Program Specialist  
Aloha Tower Development Corporation  
79 S. Nimitz Highway  
Honolulu, Hawaii 96813  
[ronald.y.amemiya@hawaii.gov](mailto:ronald.y.amemiya@hawaii.gov)

Dear Mr. Amemiya:

We write in response to your letter dated April 6, 2022 regarding Aloha Tower Marketplace Lease Agreement Obligations. For ease of review, we will follow your numbered discussion of the issues.

1. Lease Renewal: HPU has not refused a lease renewal for the property. To the contrary, HLRP has on numerous prior occasions, reached out to ATDC and DOT-Harbors to initiate discussions and the requisite procedural approvals for a new or amended lease with ATDC. We recognize that these discussions may pre-date many of the current ATDC leadership and staff. Accordingly, we wish to clarify this point with this new administration. To date, our discussion efforts have not been reciprocated by the State. ATDC, to the contrary, has expressed that it would not engage in discussions with HLRP on any lease amendments pending HLRP's payment of amounts that are not due and owing to the State. In our February in person meeting with ATDC regarding repaving of Aloha Tower Drive, ATDC made clear its intentions to hold any lease negotiations hostage in exchange for a sum of money that is not owed by HLRP.

In fact, ATDC previously asserted its demand for \$1.75M under that certain Successor Memorandum of Understanding dated as of October 30, 2014, by and between DOT, ATDC and HLRP (the SMOU). We have responded in detail to correct the inaccuracies in your contention that this is an on-going obligation of HLRP. As previously outlined, that payment was expressly conditioned upon the issuance of the Renewed Leases, as defined in the SMOU, to be followed by certain actions to memorialize the debt. The payment obligation became effective only in the event that the parties executed the Renewed Leases. Because the Renewed Leases were not executed, no payment obligation was triggered. This is consistent with the fact that no memorandum of payment obligation was ever entered into between the parties, nor was such an instrument recorded against HLRP's leasehold interest in the land records at the Bureau of Conveyances of the State of Hawaii, all of which were set forth in the SMOU in the event that the Renewed Leases were finalized. Further consistent is the fact that neither ATDC nor DOT-H has ever pursued this payment from HLRP at any time over the many years since the signing of the SMOU. ATDC and/or DOT-H are now precluded from pursuing baseless and now-stale claims for payment. It is entirely unfair for ATDC to sit by without ever raising an inquiry as to this alleged obligation and now condition negotiations with its own tenant on lease matters. Landlord is estopped from making such a demand at this time due to the passage of time and its failure to take any reasonable steps to pursue this alleged claim over multiple years.

Despite the reference in your April 6<sup>th</sup> letter, we are unable to locate in our files any certified letter from your office dated on or around February 25, 2022. We did not confirm receipt of the same as mentioned in your letter. Would you kindly resend the February letter to my attention or reply to confirm that it is now withdrawn?



In any event, it would be unreasonable to set a two week deadline for the negotiation, agreement and drafting of a new lease document given the known complexities of this property and the related lease documents. As referenced in the SMOU, any renewed leases should update the documents with relevant terms and conditions to reflect the current use, including the University's multi-million dollar investment in the property, along with a new rent structure to reflect educational uses versus retail uses and to 'update the terms by deleting provisions no longer applicable,' including amendment of the CIMOSA to reflect the current status of the Aloha Tower Marketplace. To date, our efforts to enter into discussions with the State on any amendments have been ignored. To be clear, ATDC and DOT memorialized their commitment to issue a new ATDC lease with HLRP in both the original MOU and the SMOU, but have failed to honor this obligation, to the detriment of HLRP.

We recommend reconsideration of your threatened action to seek a successor tenant. HLRP and ATDC remain parties to a long term lease agreement with over 35 years of remaining lease term. This lease is in full force and effect and fully enforceable. Accordingly, there is no basis for ATDC to pursue any successor tenant and ATDC is precluded from unilaterally terminating this Lease early or otherwise depriving HLRP of its quiet enjoyment of the property. Any attempt to terminate HLRP's lease rights on this basis is a material breach of the Lease and will be vigorously defended. Moreover, ATDC's continued, unreasonable and inaccurate demands for payment not owed as a condition to performing its existing lease obligations are unreasonable, bad faith business dealings and also violate the Lease. Lastly, your failure to negotiate with HLRP pending our payment of amounts that are not due and owing violates various landlord obligations established under the Lease, the related lease documents and otherwise.

2. Pier Apron Repairs: This demand relates directly to the \$1.75MM which was previously demanded by ATDC, which HLRP promptly responded, as set forth above, and received no response from your office. By its express terms, the SMOU payment of \$1.75MM was a substitute for and fully replaced the payment obligation under the Agreement Regarding Aloha Tower Pier Repairs, dated June 29, 2010. The parties deliberately and expressly amended and restated the payment obligations set forth in Section 1(d) of the Agreement Regarding Aloha Tower Pier Repairs. In particular, in the SMOU, the parties agreed upon an alternative commitment whereby HLRP, not otherwise obligated to make a payment, would pay to ATDC certain amounts in exchange for the parties entering into the Renewed Leases, as defined. As you know, the State never delivered the Renewed Leases. Accordingly, this payment obligation was never due from HLRP and any obligation is now null and void.

We are hopeful that this now fully resolves the issue and that ATDC will promptly cease any further actions to stall discussions with HLRP on valid lease-related matters. HLRP would have no choice but to invoke all available rights and remedies under the Lease and other documents and pursue all available claims at law and equity, including vigorously asserting related counter-claims in light of the significant investment by HLRP in the property and site development in accordance with the SMOU, while ATDC and DOT-H failed to deliver on its obligations. In particular, HLRP met its obligations to timely renovate and modernize the property with student residences and various university spaces. However, ATDC and DOT-H obligations to deliver the Renewed Leases were never met. HLRP has been uniquely damaged by the State's failure to act, but has continued to work in good faith to secure a Renewed Lease, as promised.

Notwithstanding the foregoing, we would be happy to meet with Mr. Shigematsu, if that will help to advance final resolution of this issue. To be clear, the continued demands by your office for amounts not owed by HLRP raise significant concerns about the State's intentions to honor its on-going Lease and other contractual obligations to HLRP. HLRP is owed a right of quiet enjoyment in the Leased Premises which is unraveled by recurring baseless demands for money without any legal grounds and without even a cursory review of the underlying documentation associated with this property.



3. Repaving: As communicated to you in my correspondence dated March 15, 2022 and March 23, 2022, HLRP is proceeding with the repaving and repair work in the areas as identified in the State's notice dated March 11, 2022.

We have kept your office updated on our progress and notified you that prior to commencing the work, we would be obtaining additional bids and finalizing the scope of work. We initiated the process to seek competitive pricing immediately and plan to commence work during the week of April 18, 2022. Following commencement of the work, we will diligently pursue the project work to completion.

Furthermore, Kevin Matsukado, our AVP of Facilities has been in touch with Mr. Wil Estrada, as requested. They are scheduled to meet and to walk the site on Thursday, April 18, 2022 and we expect that they can reach agreement as to final scope of work, phasing and scheduling. This will be the second meeting between these two.

To be clear, HLRP has worked with ATDC on recent maintenance and repair work to Aloha Tower Drive which was successfully and timely undertaken by HLRP, to the satisfaction of both parties. Over the years, HLRP has performed various on-going maintenance projects within the subject parking and common areas. We would be happy to provide a summary of that work, even over the last few years.

As you know, the Parking License allows for additional time as reasonably required to complete the work. Accordingly, the parties can work together to determine a final schedule for phasing and completion of the work in accordance with the allowable cure period as set forth in the Parking License Agreement.

Accordingly, we are making every effort to take the action as set forth in your April 6, 2022 letter including contacting Mr. Estrada and enacting the necessary repairs within thirty (30) days following the receipt of this letter.

If ATDC has any questions or concerns, please contact me to discuss further.

Sincerely,

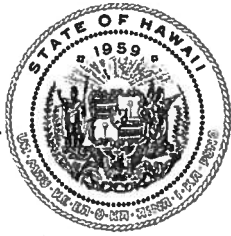
A handwritten signature in black ink that reads "Brooke Carroll". The signature is written in a cursive, flowing style.

Brooke Carroll  
Vice President of Advancement

cc: State of Hawaii, Department of the Attorney General  
Attention: Linda Chow, Supervising Deputy Attorney General, Land/Transportation Division  
425 Queen Street  
Honolulu, Hawaii 96813  
[Linda.l.chow@hawaii.gov](mailto:Linda.l.chow@hawaii.gov)

Jan Boivin, SVP and General Counsel, HLRP

# **Exhibit 9**



## ALOHA TOWER DEVELOPMENT CORPORATION

79 S. Nimitz Highway, Honolulu, Hawaii 96813-4898 | (808) 587-3651

IN REPLY REFER TO: **ATDC 22-0027**

David Y. Ige  
Governor

Eduardo P. Mangialian  
Chair

### CERTIFIED MAIL, RETURN RECEIPT REQUESTED

April 14, 2022

Brooke Carroll  
Vice President of Advancement  
Hawaii Pacific University  
1 Aloha Tower Drive  
Honolulu, HI 96813

RE: Aloha Tower Marketplace Lease Agreement Obligations

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Dear Ms. Carroll:

On behalf of ATDC, I am further responding to your April 12, 2022 letter. It appears you have misunderstood ATDC's intent in our April 6, 2022 letter. Further, we disagree with your novel construction of certain Aloha Tower Marketplace Lease obligations. Using the same numbered discussion, I hope this clarifies where we stand:

1. Lease Renewal. By "taking necessary steps to find a successor to the Aloha Tower Marketplace" we meant that since HPU/HLRP elected not to seek lease renewal, ATDC will plan for a new tenant at the expiration of the existing lease. As we understand the provisions of the Marketplace Project Component Lease dated September 29, 1993, as amended (Marketplace Lease), the term of the Marketplace Lease is to end on or about September 28, 2058. Because HPU/HLRP failed to pay the \$1,750,000 to preserve its ability to extend the Marketplace Lease, ATDC will proceed with its planning for development of the Marketplace Lease premises upon the return of the premises to ATDC on September 28, 2058. We did not state that failure to pay the \$1,750,000 constitutes a default of the Marketplace Lease.
2. Pier Apron Repair Debt. Because HPU/HLRP failed to pay the \$1,750,000 lease extension option, it likewise failed to satisfy the conditional release of the \$3,500,000 debt owed by the holder of the Marketplace Lease since 2010. You are incorrect to now characterize the \$1,750,000 lease extension option as a "substitute for and fully replaced the payment obligation" because you did not make that alleged substitute payment. By not paying the \$1,750,000, you did not satisfy the obligation to resolve the original \$3,500,000 debt. Nor is that debt stale, because the payment obligation has not yet come due. You have until the expiration of the Marketplace Lease to make full payment. Over the years, ATDC has given the Marketplace Lessee options to satisfy that debt without paying the full amount by encouraging early payments, including that \$1,750,000 lease

extension option you chose not to pay. But, since no payments have been received, then the full \$3,500,000 remains due and owing. We will continue to periodically remind you of this obligation as we approach September 28, 2058, to make sure we all understand this debt is not going to be forgotten or forgiven. Please plan accordingly.

3. Repaving. Notwithstanding our disagreement with your April 12, 2022 letter as to the two points above, we are pleased to see that HPU/HLRP intends to honor its repaving obligations under the Parking License Agreement. Assuming you follow through on those commitments, then we acknowledge you have cured the default noticed in our April 6, 2022 letter. Please proactively address maintenance concerns moving forward so that we do not need to send default letters to cause you to meet your ongoing maintenance responsibilities.

I hope this letter settles the discussion on these enumerated topics. If not, or if HPU/HLRP has any further questions or concerns, please let me know.

Sincerely,

A handwritten signature in blue ink that reads "Ronald Amemiya".

Ronald Amemiya  
ATDC Program Specialist

cc: ATDC Board of Directors  
John Gotanda, HPU President  
Jan Boivin, SVP and General Counsel, HLRP

# **Exhibit 10**





August 22, 2022

VIA CERTIFIED MAIL AND ELECTRONIC MAIL

Mr. Ronald Amemiya  
ATDC Program Specialist  
Aloha Tower Development Corporation  
79 S. Nimitz Highway  
Honolulu, Hawaii 96813  
[ronald.y.amemiya@hawaii.gov](mailto:ronald.y.amemiya@hawaii.gov)

Dear Mr. Amemiya:

We write in response to your letter dated April 14, 2022 regarding Aloha Tower Marketplace Lease Agreement Obligations.

We disagree that we have waived or failed to preserve our ability to extend the Marketplace Lease at its expiration on or about September 28, 2058. In fact, HLRP remains very interested in extending the Lease and the related License documents, as we have previously communicated to ATDC and DOT-Harbors. We would invite any opportunity to meaningfully explore this with ATDC, as our prior efforts in this regard have not been successful.

Thank you for confirming that failure to pay the requested \$1.75 million is not an event of default by HLRP under the Marketplace Lease or any other agreements. We agree that none of these amounts trigger an HLRP event of default at this time, under the Marketplace Lease or any of the agreements related to ATM.

Lastly, we appreciated confirmation that there is no current, uncured default under the Parking License Agreement.

If you should have any questions or concerns, please feel free to contact me to discuss further.

Sincerely,

Brittany Hopkins  
Senior Director of Finance and Risk Management

cc: ATDC Board of Directors

Jade T. Butay, Director, State of Hawaii, DOT-H

State of Hawaii, Department of the Attorney General  
Attention: Linda Chow, Supervising Deputy Attorney General, Land/Transportation Division  
425 Queen Street  
Honolulu, Hawaii 96813  
[Linda.l.chow@hawaii.gov](mailto:Linda.l.chow@hawaii.gov)

Jan Boivin, SVP and General Counsel, HLRP

# **Exhibit 11**



## ALOHA TOWER DEVELOPMENT CORPORATION

79 S. Nimitz Highway, Honolulu, Hawaii 96813-4898 | (808) 587-3651

IN REPLY REFER TO: ATDC 22-0028

David Y. Ige  
Governor

Eduardo P. Manglallan  
Chair

August 31, 2022

CERTIFIED MAIL, RETURN RECEIPT REQUESTED, ELECTRONIC MAIL, AND POSTAL MAIL

Brittany Hopkins  
Senior Director of Finance and Risk Management  
Hawai'i Pacific University  
1 Aloha Tower Drive  
Honolulu, HI 96813

RE: Hawai'i Pacific University/Hawai'i Lifestyle Retail Property Letter Dated August 22, 2022

Dear Ms. Hopkins:

On behalf of ATDC, I am responding to your August 22, 2022 letter that continued the dialogue our respective organizations started exchanging in April 2022. If HLRP is "very interested" in seeking a renewal of the Marketplace Lease as stated in your letter, then HLRP should make a detailed written proposal to ATDC. You suggest prior efforts have been unsuccessful, but I am unaware of any written proposal that HLRP made for a lease renewal.

ATDC has sole discretion whether to offer a lease renewal to HLRP, or to instead wait until the expiration of the current lease and select a new developer through direct negotiations, a request for proposals, a competitive bidding process, or any combination of those selection options. *See* Department of Transportation Hawai'i Administrative Rule §19-170-42. If HLRP wants to agree on a lease renewal now, then HLRP must be ready to meaningfully address the outstanding \$3,500,000 Pier Apron Repair debt that HLRP chose not to satisfy because it did not make the previously negotiated \$1,750,000 payment by December 31, 2021.

Please let me know if you have any questions or concerns regarding this letter or ATDC's intentions with the Marketplace Lease moving forward.

Sincerely,

Ronald Y. Amemiya  
ATDC Program Specialist

CC: Jade Butay, DOT Director  
Eduardo Manglallan, ATDC Chairperson  
ATDC Board of Directors

Enclosures: Hawai'i Administrative Rule §19-170-42

DEPARTMENT OF TRANSPORTATION

Adoption of Chapter 19-170  
Hawaii Administrative Rules

April 23, 2013

SUMMARY

Chapter 19-170, Hawaii Administrative Rules,  
entitled "Rules of Practice and Procedure" is adopted..

§§206J-5, 206J-11)

§19-170-42 Selection process. The development corporation, by itself or in conjunction with any public sector joint venturer, may select qualified persons to develop a development area pursuant to a process of direct negotiation, a request for proposals, a competitive bidding process, or a combination of any or all of the above. The development corporation shall determine the method for pursuing its objectives, either alone or in conjunction with a joint venturer, or through a cooperative arrangement with other governmental agencies. [Eff **MAY 5 2013** ] (Auth: HRS §206J-5(a)(5)) (Imp: HRS §§206J-5, 206J-10, 206J-11)

§19-170-43 Environmental assessment. Either before or after selection of a qualified person to develop a development area and prior to any actual construction or alteration of the Aloha Tower complex or related areas, the development corporation, by itself or in conjunction with any public sector joint venturer, shall cause an environmental assessment or environmental impact statement to be prepared in compliance with chapter 343, HRS. In the case where developer selection is accomplished through a request-for-proposal process or a process of direct negotiation, preparation of an environmental assessment or environmental impact statement may be one of the selection criteria. Where a developer is selected by competitive bidding, preparation of an environmental assessment or environmental impact statement may be a part of the subject matter of the bid, or may be accomplished by the development corporation alone or in conjunction with a public sector joint venturer at public expense, provided appropriations are available. [Eff **MAY 5 2013** ] (Auth: HRS §206J-5) (Imp: HRS §343-5)