

Shall the Authority Authorize the Executive Director to Extend a Right of Entry for Hawaiian Dredging Construction Company for an Additional Two (2) Years for an Approximately One-Acre Portion of Tax Map Key No. (1) 2-1-060: 002 (Por.) Commonly Referred to as the Former City and County Wastewater Lot in Accordance with the Terms and Conditions Recommended by the Hawaii Community Development Authority Staff Report?

Staff Report

June 3, 2015

Background: On August 3, 2012, the original Right-of-Entry (“ROE”) was issued to Hawaiian Dredging Construction Company (“HDCC”), for a construction base yard for HECO Ductline Project from Fort Street to Kalakaua Avenue and other smaller projects in the Honolulu area. The parcel is the former City and County of Honolulu Department of Wastewater Management Lot at the corner of Koula and Olomehani Street TMK: (1) 2-1-060: 002. The lot has been identified as containing contaminated soil and/or groundwater by the Hawaii Department of Health, Long-Term Management of Petroleum Contaminated Soil and Groundwater June 2007 report. Due to the soil contamination the lot has limited capacities without major investment in remediation. The lot has been covered with 6-inches of gravel to encapsulate the contamination to the satisfaction of the Department of Health for base yard use.

The right of entries HDCC has received from the Hawaii Community Development Authority (“HCDA”) since August 2012 for the lot are outlined below:

Right of Entry	Term and Duration	Monthly Rent
ROE 25-12 (Original)	08/06/2012-12/31/2012	\$10,000.00
ROE 6-13	01/01/2013-06/30/2013	\$2,000.00
ROE 6-13 First Extension	01/01/2013-12/31/2013	\$2,000.00
ROE 6-13 Second Extension	01/01/2013-03/31/2014	\$2,000.00
ROE 5-14	04/01/2014-09/30/2014	\$2,000.00
ROE 5-14 Extension	04/01/2014-03/31/2015	\$2,000.00
<i>ROE 08-15 (Proposed)</i>	<i>04/01/2015-03/31/2017</i>	<i>\$6,500.00 as of 07/01/2015</i>

The monthly rent decreased from \$10,000.00 (~\$0.23 sf) to \$2,000.00 (~\$0.47 sf) because HDCC project was delayed. The HCDA has struggled with leasing this lot due to area homeless, site contamination, and the gravel fill.

Since 2012, HDCC has brought their own water connection for their two (2) portable office trailers and actively maintains security and the 6-inch gravel encapsulation for the lot.

HDCC use has been ideal, primarily for the storage of construction materials resulting in low traffic and minimal disturbance of the gravel cap.

Long-term leasing prospects have also been limited due to required remediation.

Discussion: The HCDA has negotiated a rent increase with HDCC closer to market rents for base yards in Kakaako Makai. As of July 2015 HDCC will pay \$6,500.00 per month (~\$0.15) for the same area and terms as previous rights of entry. The ROE will also require one month's worth of rent as a refundable-security deposit. The full draft of the proposed ROE is attached in Exhibit A and includes the standard terms and conditions.

The HCDA continues to look for possible development opportunities that align with the Kakaako Makai Master Plan. The ROE will include a re-development clause, allowing the HCDA to terminate the ROE early with six (6) month advance written notice.

Recommendation: Staff recommends that the Authority authorize the Executive Director to extend a Right of Entry for Hawaiian Dredging Construction Company for an additional two (2) years for an approximately one-acre portion of Tax Map Key Parcel No. (1) 2-1-060: 002 (Por.) commonly referred to as the former City and County Wastewater Lot in accordance with the terms and conditions recommended by the Hawaii Community Development Authority staff report.

Attachment: Exhibit A – Draft Revocable Right of Entry (ROE 08-15)

REVOCABLE RIGHT OF ENTRY (ROE 08-15)

By this agreement executed this _____ day of June 2015, the HAWAII COMMUNITY DEVELOPMENT AUTHORITY (“HCDA”), a body corporate and a public instrumentality of the State of Hawaii, hereby grants to Hawaiian Dredging Construction Company (“HDCC”) (collectively, “Parties”) a nonexclusive right of entry upon and subject to the following terms and conditions:

1. **Grant of Right-of-Entry.** HCDA hereby grants to HDCC and all of its members, employees, officers, directors, representatives, agents, invitees, guests, and independent contractors (collectively, “Permitted Persons”) a nonexclusive Right of Entry to enter upon the premises (defined below) for the sole purpose of using the premises as a construction material and vehicle storage site (“ROE”). HDCC is responsible for communicating and explaining the terms and conditions of this ROE to all Permitted Persons.

2. **Premises.** This ROE shall pertain to an approximately one (1) acre mauka side portion of the lot bounded on all sides by a six-foot chain fence commonly referred to as the former City and County Waste Water Lot, located at 98 Koula St., Honolulu, Hawaii 96813 and identified as TMK (1) 2-1-60-2 (por.) (“Premises”). The Premises is depicted on the map attached to this ROE as Exhibit “A” and made a part hereof. The Premises is approximately 245’ long (mauka and makai) by 175’ wide (Ewa and Diamond Head).

3. **Term and Duration.** The term of this ROE granted hereby shall be applicable from 7:00 a.m. on April 1, 2015 (“Commencement Date”) through 10:00 p.m. on March 31, 2017 (“Termination Date”). This ROE shall automatically terminate on the Termination Date, unless earlier revoked as provided below. HDCC agrees to be bound by the terms and conditions of the ROE and any amendments to this ROE.

4. **Use of Premises.** The ROE granted hereby shall be for the sole purpose of using the Premises as a construction material and vehicle storage site. The base yard use will include, but is not limited to, the storage of construction materials and vehicles. HDCC shall not obstruct or impede any driveways or entrances leading to the Premises.

5. **Acknowledgement of Use By Other Persons.** HDCC acknowledges that other persons or entities have the right to enter and/or use the Premises with the approval of HCDA, and with the exception of the uses specified in paragraph 4 above, shall not otherwise interfere with their use and enjoyment of the Premises.

6. **Due Care and Diligence.** HDCC will exercise due care and diligence in entering upon the Premises and will not disrupt or disturb in any way or in any manner whatsoever the activities customary to the operations of HCDA or its agents, and HDCC shall exercise due care for public safety. At all times during the term of this ROE and upon the termination of this ROE, HDCC shall be responsible for: (a) removing any

debris or trash deposited by Permitted Persons on the Premises; (b) repairing any damage to the Premises caused by its use by Permitted Persons; and (c) restoring the Premises to its original or better than original condition. This provision shall survive the termination of this ROE.

7. **Indemnity**. HDCC shall defend, indemnify and hold harmless HCDA and the State of Hawaii, and their respective officials, directors, members, employees, and agents from and against any and all claims, actions, penalties, damages, liabilities, costs and expenses for loss or damage, including property damage, personal injury and wrongful death, based upon or arising out of or in connection with: (a) HDCC's breach of this ROE; (b) a Permitted Person's tortious conduct or violation of law; (c) any injury sustained or suffered by a Permitted Person while on the Premises; and (d) any other act or omission in any way relating to or arising out of this ROE (collectively, "Covered Claims"). HDCC shall also reimburse HCDA for all its costs and expenses, including reasonable attorneys' fees, incurred in connection with HCDA's defense of any Covered Claims. This provision shall survive the termination of this ROE.

8. **Insurance**. (a) HDCC shall obtain and maintain at all times during the term of this ROE, at its own expense, insurance coverage of the kinds and in amounts greater than or equal to those set forth below:

Commercial General Liability:

\$1,000,000 per occurrence and \$2,000,000 in the aggregate
\$1,000,000 Completed Operations Aggregate Limit
\$1,000,000 Each Occurrence Limit
\$1,000,000 Personal & Advertising Limit

Umbrella Liability: \$2,000,000 Aggregate

Worker's Compensation:

Coverage A: As required by Hawaii Laws
Coverage B: Employer's Liability
\$1,000,000 Bodily Injury by Accident Each Accident
\$1,000,000 Bodily Injury by Disease
\$1,000,000 Policy Limit and \$1,000,000 Each Employee

Automobile \$1,000,000 per accident and \$2,000,000 in aggregate

(b) Prior to first entry onto the Premise, HDCC shall provide to HCDA an insurance binder to show compliance with subsection (a) above.

- (c) The insurance policy obtained by HDCC in accordance with subsection (a) above shall name the Hawaii Community Development Authority and the State of Hawaii and their respective officials, directors, officers, members, employees and agents as additional insureds.
- (d) HCDA shall be notified at least fifteen (15) days prior to the termination, cancellation or material change in HDCC's insurance coverage.
- (e) HDCC shall cover all injuries, losses or damages arising from, growing out of or caused by any acts or omissions of HDCC or Permitted Persons in connection with HDCC's use or occupancy of the Premises.
- (f) The procuring of such required policy or policies of insurance shall not be construed to limit HDCC's liability under this ROE or to fulfill the indemnification provisions and requirements of this ROE. Notwithstanding said policy or policies of insurance, HDCC shall be obligated for the full and total amount of any damage, injury, or loss caused by negligence or neglect connected with this ROE.
- (g) HDCC shall keep such insurance in effect and the certificate(s) on deposit with HCDA during the entire term of this ROE. Upon request by the HCDA, HDCC shall furnish a copy of the policy or policies.
- (h) Failure of HDCC to provide and keep in force such insurance shall be regarded as a material default under this ROE and HCDA shall be entitled to exercise any or all of the remedies provided in this ROE for default of HDCC.
- (i) HCDA is a self insured State agency. HDCC's insurance or self-insurance shall be primary. Any insurance maintained by the State of Hawaii shall apply in excess of, and shall not contribute with insurance provided by HDCC.

HCDA reserves the right to inspect and review all coverage, form, and amount of the insurance required by the above. If, in HCDA's sole discretion, the above insurance does not provide adequate protection for HCDA, it may require HDCC to obtain insurance sufficient in coverage, form, and amount to provide adequate protection.

9. **Condition of Premises/Assumption of Risk.** HDCC hereby agrees and acknowledges that HCDA has not made any representation or warranty, implied or otherwise, with respect to the condition of the Premises, including any dangerous or defective conditions existing in or on the Premises, whether or not such conditions are known to HCDA or reasonably discoverable by HDCC. HDCC agrees that HCDA shall not be held responsible for any injury or damage to HDCC or Permitted Persons due to the presence of hazardous materials on or in the Premises. HDCC further agrees that any property left on the Premises during the term of this ROE shall be left there at the sole risk of HDCC.

10. **Compliance with Laws and Regulations.** HDCC shall, at all times during the term of this ROE, observe and comply with all applicable laws, rules and regulations, whether County, State or federal, including but not limited to, the laws applicable to the use of the Premises and the securing of any and all necessary governmental and other approvals and permits for use of the Premises.

11. **Prohibited Use.** Any use of the Premises not authorized in Paragraph 4 above shall constitute a material breach of this ROE and upon such breach, HCDA may terminate this ROE forthwith without notice and pursue any other remedies to which HCDA is entitled to by law or under this ROE.

12. **Improvements:** HDCC shall not construct any improvements of any kind or nature upon the Premises or any other properties of HCDA without HCDA's express prior written consent, which consent may be granted or withheld in HCDA's sole discretion. Any improvements, including but not limited to structures, erected on or moved onto the Premises by HDCC shall remain the property of HDCC and HDCC shall have the right, prior to the termination or revocation of this ROE, or within an additional period HCDA in its discretion may allow, to remove the improvements from the Premises; provided, however, that in the event the HDCC shall fail to remove the improvements prior to the termination or revocation of this Permit or within an additional period HCDA may, in its sole discretion, elect to retain the improvements or may remove the same and charge the cost of removal and storage, if any, to HDCC. This provision shall survive the termination of this ROE.

13. **No Lien.** HDCC shall not: (a) create, incur, or assume any attachment, judgment, lien, charge, or other encumbrance on the Premises or any improvements thereon; or (b) suffer to exist any such encumbrance other than one created, incurred, or assumed by HCDA.

14. **Non-transferrable.** This ROE or any rights hereunder shall not be sold, assigned, conveyed, or otherwise transferred or disposed of without HCDA's express prior written consent.

15. **Additional Terms and Conditions.**

- (a) HDCC shall pay HCDA a usage fee of \$6,500 per month during the term of this ROE. Payments are due on the 1st day of each month with checks payable to the HCDA.
- (b) HDCC shall provide a Security Deposit to HCDA in the amount of \$6,500 which shall be refundable to HDCC upon termination of the ROE after both HCDA and HDCC have conducted a walk-through of the Premises and HDCC has restored the Premises to a condition meeting HCDA's satisfaction.

- (c) No one may reside on the premises, and the premises may not be accessed for any other purpose except as authorized.
- (d) Animals, plants, rocks, dirt, asphalt and other materials that are on or part of the Premises shall not be harmed or removed from the Premises.
- (e) The Premises has been identified as containing contaminated soil and/or groundwater by the Hawaii Department of Health June 2007 document, Long Term Management of Petroleum-Contaminated Soil and Groundwater. The HCDA has taken measures to encapsulate the soil to the satisfaction of the Department of Health and has obtained its approval for HDCC's use of the Premises as described in paragraph 4 above. The Premises has been covered with 6 inches of gravel to encapsulate the contamination. The gravel shall not be removed for any reason during the term of this ROE. If, at any time, the 6-inch level of gravel is disturbed or is reduced to a level less than 6 inches, HDCC shall immediately notify the HCDA. Attached is a summary of the Environmental Hazardous Plan and identified as Unit 2, for your review. A complete report of the report is available for review at the HCDA Office during normal business hours, Monday through Friday from 7:45am to 4:30pm except for State Holidays. HDCC must return the parcel back to its original status and replace the gravel with similar or identical gravel to the satisfaction of the HCDA.
- (f) The HDCC shall install a fence to utilize as ingress/egress access from Olomehani Street as their primary access to the property. The HDCC shall bear all costs incurred in the construction/installation of the fence and shall obtain the proper permits to install the fence. When HDCC vacates the property, the fence will become the property of HCDA.
- (g) If HDCC continues to enter or remain on the Premises after the Termination Date, HDCC shall pay HCDA as liquidated damages \$500.00 for each calendar day (or part thereof) that such unlawful entrance and occupation of the Premises continues beyond the Termination Date. Such damages are not a penalty, but rather are reasonable estimates of the losses that HCDA would suffer and that the Parties acknowledge would be difficult to ascertain under the circumstances triggering the damages and are HCDA's exclusive remedy, other than equitable relief (such as an injunction barring HDCC from entering and remaining on the Premises) or legal relief (in the form of eviction of HDCC from the Premises or similar legal relief, but not damages) for such entrance or use.

- (g) HCDA reserves the right to impose additional terms and conditions, if deemed necessary.

16. **Termination.** HCDA may terminate this ROE at any time by notice to HDCC in accordance with Paragraph 17 below.

17. **Notices.** Any notice, request, demand, or other communication required or permitted to be given or made under this ROE by either party hereto shall be in writing and shall be deemed to have been duly given or served if: (a) personally delivered; (b) sent by mail, postage prepaid and certified with return receipt requested; (c) transmitted by facsimile, or (d) sent by e-mail with request for delivery confirmation, at the address, facsimile number, or e-mail address given below:

Hawaii Community Development Authority
Attention: Anthony Ching, Executive Director
461 Cooke Street
Honolulu, Hawaii 96813
Telephone: (808) 594-0300
Facsimile: (808) 594-0299
E-mail: tony@hcdaweb.org

Hawaiian Dredging Construction Company
Attention: Creighton S. Q. Chang, Senior Project Manager
201 Merchant Street
Honolulu, HI 96813
Telephone: (808) 735-3211
Cell: (808) 479-0463
E-mail: cchang@hdcc.com

18. **Headings/Captions.** The headings and captions of paragraphs or other parts hereof are for convenience of reference only and are not to be used to construe, interpret, define, or limit the paragraphs to which the respective headings and captions may pertain.

19. **Governing Law.** This ROE shall be governed by and construed under the laws of the State of Hawaii.

20. **Counterparts.** This ROE may be executed in several duplicate counterparts and such counterparts, when executed, shall constitute a single agreement.

21. **Entire Agreement.** This ROE constitutes the entire Agreement and understanding between the Parties and shall supersede any and all prior communications, representations, or agreements, both verbal and written, between the Parties regarding the use of the Premises this ROE cannot be modified except by a written instrument signed by both parties.

IN WITNESS WHEREOF, HCDA have caused this ROE to be executed as of the day and year first above written.

Hawaii Community Development Authority

By: _____

Anthony J.H. Ching
Executive Director

Hawaiian Dredging Construction Company

By: _____

Name: _____

Title: _____

APPROVED AS TO FORM:

Deputy Attorney General