

DEPARTMENT OF AGRICULTURE

Adoption of Chapter 4-158
Hawaii Administrative Rules

October 23, 2007

SUMMARY

Chapter 4-158, Hawaii Administrative Rules,
entitled "Non-Agricultural Park Lands Program Rules",
is adopted.



HAWAII ADMINISTRATIVE RULES

TITLE 4

DEPARTMENT OF AGRICULTURE

SUBTITLE 8

DIVISION OF AGRICULTURAL RESOURCE MANAGEMENT

CHAPTER 158

NON-AGRICULTURAL PARK LANDS PROGRAM RULES

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SUBCHAPTER 1

GENERAL PROVISIONS

S4-158-1 Definitions. As used in this chapter:

"Abandoned property" means any and all property, unless the context clearly indicates otherwise, including personal property, items, materials, equipment, fixtures, motor vehicles, or vessels, that have been left unattended on land owned or controlled by the State without authority for a continuous period of more than twenty-four hours.

"Administrator" means the head of the division of agricultural resource management, department of agriculture, or any officer or employee to whom authority has been duly designated.

"Agricultural activities" means the care and production of livestock, livestock products, poultry, or poultry products, or apiary, horticultural, or floricultural products, or the planting, cultivating, and harvesting of crops or trees; has the same meaning as defined in section 166E-2, HRS.

"Agricultural commodity" means any agricultural product, including but not limited to, horticultural (including floriculture), nuts, coffee, whether cherry, parchment, or green beans, fresh fruits and fresh vegetables of every kind and character, whether or not frozen or packed in ice, whether produced in the State or imported, products, livestock and livestock products, bees and honey, poultry and poultry products, egg and egg products, timber and Christmas trees, fish and fish products either in their natural state or as processed by the producer thereof or by a processor, as defined in this section.

"Agricultural processing" means the processing of agricultural produce or products, including dairying, grown, raised, or produced in Hawaii.

"Agriculture or agricultural" means the planting, cultivating, harvesting, and processing of crops, including those planted, cultivated, harvested, and processed for food, ornamental, grazing, or forestry

purposes, and including aquatic life farmed or ranched.

"Animal unit" means one mature cow or horse; two yearling steers or heifers; five mature sheep; twelve weaned lambs; or two colts.

"Applicant" means any person or entity, which acts to acquire or obtain a lease or any interest therein, including a sublease, or an interest in an association or a partnership which either holds the lease or owns the stock in a corporation which holds the lease.

"Aquacultural activities" means the farming or ranching of any plant or animal species in a controlled salt, brackish, or freshwater environment; provided that such farm or ranch is on or directly adjacent to land; has the same meaning as defined in section 166-2, HRS.

"Board" means the board of agriculture or its designated representative.

"Bona fide farmer" means a person who:

- (1) Was an owner-operator of an established farm conducting a substantial farming operation and for a substantial period of the person's life resided on a farm or depended on farm income for livelihood;
- (2) Has at least two years' experience as a full-time farmer or four years' experience as a part-time farmer and who, in the administrator's judgment, is likely to successfully operate a farm by reason of ability, experience, and training as a vocational trainee;
- (3) Has qualified for and received a commitment for a loan under the Bankhead-Jones Farm Tenant Act, as amended, or as may hereafter be amended, for the acquisition of a farm; or
- (4) Is a member of the Hawaii Young Farmer Association or a Future Farmer of America graduate with two years of training with farming projects.

The term "bona fide farmer" includes agricultural cooperatives organized under chapter 421, HRS, or other agricultural associations or partnerships, at

least seventy-five per cent of the members of which would qualify individually as bona fide farmers. It also includes corporations incorporated primarily for agricultural production purposes where at least seventy-five per cent of its trustees, officers, stockholders, and members qualify individually, excluding a holder of record having a security interest. For the purposes of this chapter, "bona fide farmer" also includes "beekeeper", and "qualified aquaculturalist" as defined in section 219-2, HRS.

"Carrying capacity" means the maximum number of animal units which an area will support over a period of years without injury to the soil, forage resources, tree growth, watershed, or unwarranted interference with other services of the land.

"Chairperson" means the chairperson of the board of agriculture.

"Commercial exporter" means any person who is engaged in the business of exporting fresh or processed agricultural commodities to points outside the State.

"Consumer" means any person or firm purchasing agricultural commodities for human consumption or animal consumption.

"Conversion" means the extinguishing of an existing encumbrance and the issuance of a new long-term lease to the existing lessee.

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

"Department" means the department of agriculture.

"Displaced farmer" means a person who is or will be displaced from land that was condemned, taken, or repossessed by a governmental authority or private person within five years of application date.

"Division" means the agricultural resource management division of the department of agriculture.

"Economic unit" means the minimum size land area that is economically suitable for the operation of a farm.

"Encumbrance" means any instrument issued including but not limited to lease, permit, license, easement, grant, contract, or authorization to occupy and use non-agricultural park lands under terms and conditions of this chapter.

"Established date of operation" means the date on which the original farming operation first commenced operation. If the physical facilities of the farming operation are subsequently expanded or new technology adopted, the established date of operation for each change shall be the same as the established date of operation for the original operation, provided that this does not violate existing state law or county ordinances.

"Farm" also means "ranch" and "farmer" also means "rancher".

"Farm dwelling" means a single- or multiple-family dwelling or employee dwelling located on a farm and used in connection with agricultural or aquacultural activities.

"Farming operation" means a commercial agricultural or aquacultural facility or pursuit conducted, in whole or in part, including the care and production of livestock and livestock products, poultry and poultry products, and apiary, horticultural, or floricultural products; the planting, cultivating, and harvesting and processing of crops; and the farming or ranching of any plant or animal species in a controlled salt, brackish, or freshwater environment. "Farming operation" also includes, but shall not be limited to marketed produce at roadside stands or farm markets; noises, odors, dust, and fumes emanating from a commercial agricultural or an aquacultural facility or pursuit; operation of machinery and irrigation pumps; ground and aerial seeding and spraying; the application of chemical fertilizers, conditioners, insecticides, pesticides, and herbicides; and the employment and use of labor. A farming operation that conducts processing operations or salt, brackish, or freshwater aquaculture operations on land that is zoned for industrial, commercial, or other non-agricultural use

shall not, by reason of that zoning, fall beyond the scope of this definition; provided that those processing operations form an integral part of operations that otherwise meet the requirements of this definition.

"Holder of record having a security interest" means a person who is the owner or possessor of a security interest in any land covered in section 4-158-36 and who has filed a copy of the interest with the department and the bureau of conveyances of the State.

"Land" includes all interests therein and natural resources including water, minerals, and all such things connected with land, unless otherwise expressly provided.

"Land agent" means the land agent of the public lands of the district where the land is situated, and is interchangeable with "property manager".

"Land license" means a privilege granted to enter land for a certain special purpose such as the removal of timber, soil, sand, gravel, stone, hapuu, and plants. "Land license" does not include ground or surface water rights, or removal of minerals.

"Land patent" means a government grant of real estate in fee simple.

"Lease" means the right to possess and use land for a term of years.

"New farmer" means a person who is:

- (1) A college or community college graduate in agriculture, aquaculture, or beekeeping who has less than two years' experience as a full-time farmer or less than four years' experience as a part-time farmer; or
- (2) A person who by reason of ability, experience, and training as a vocational trainee is likely to successfully operate a farm, as determined by the administrator.

"Non-conforming use" means a use formerly permitted but presently incompatible with the permitted land use in a zoning district.

"Offgrade" is a descriptive term applicable to agricultural commodities which have a market value,

and designates a quality lower than the lowest applicable grade in Hawaii, or other states in the Union for each agricultural commodity.

"Partner" means a person, firm, corporation, partnership, association, trust, or other legal entity, or a combination of any thereof, who or which has experience in the development and subdivision of land for agricultural or aquacultural uses and has the financial ability satisfactory to the board to develop and subdivide land and enter into a joint venture as provided in this section.

"Processed" means canned, preserved, frozen, pickled, dried, or otherwise prepared with or without any ingredients added thereto.

"Processor" means any person engaged within this State in the operation of producing for processing, or in the operation of receiving, grading, packing, canning, fermenting, distilling, extracting, preserving, grinding, crushing, or changing the form of an agricultural commodity for the purposes of marketing such product, in the intrastate commerce, but excludes a person engaged in manufacturing from an agricultural commodity, so changed in form, to another and different product. Examples: wine maker, kukui nut oil extractor, taro flour maker, etc.

"Produce dealer" means any person other than a producer who is engaged in the selling, marketing, or distributing of any agricultural commodity or in the business of soliciting.

"Producer" means any person engaged within this State in the growing or producing for market of any agricultural commodity, or any cooperative association of such persons.

"Product" means an agricultural commodity which has been produced by the producer and placed in condition for sale or distribution by the producer, distributor, or handler.

"Public lands" means all lands which have been given the status of public lands under chapter 171, HRS, and excluded by section 171-2, HRS; including all of the transferred non-agricultural park lands collectively and individually under chapter 166E, HRS,

and to which the department of agriculture holds title by way of foreclosure, voluntary surrender, or otherwise, to recover moneys loaned or to recover debts otherwise owed the department under chapter 167.

"Public purpose" as used in this chapter, unless the context clearly indicates otherwise, includes but shall not be limited to all public uses, the straightening of boundaries of public lands, acquisition of access to landlocked public lands, the consolidation of the holdings of public lands, development of houselots, farmlots, and industrial parks.

"Qualified aquaculturalist" means a person who:

- (1) Is actively engaged in aquaculture farming, aquacultural produce processing, or aquacultural product development activities; and
- (2) Is a bona fide farmer or new farmer as defined in this chapter.

"Seized property" or "property seized" means any and all property, including personal property, items, materials, equipment, fixtures, motor vehicles, or vessels, that has been seized by the State as the result of an unauthorized use of or encroachment on land owned or controlled by the State.

"State" means the State of Hawaii.

"Unencumbered public lands" means any lands defined as public lands by section 171-2, HRS, and which have not been:

- (1) Set aside for any purpose, by statute, executive order, or other means to a governmental agency; or
- (2) Encumbered by lease, license, permit, easement, or other document issued by the department.

Unencumbered public lands include, but are not limited to, beach and coastal areas, submerged lands, and mountainous nonforest reserve, wildlife, or park areas. [Eff **DEC 06 2007**] (Auth: HRS §166E-6)
(Imp: HRS §§166E-2, 166E-6)

S4-158-2 Powers and general duties. (a) In addition to the powers and function granted to the board under chapter 26, HRS, the board shall have the power to:

- (1) Prescribe forms of instruments and documents;
- (2) Establish restrictions, requirements, or conditions, not inconsistent with those prescribed in chapter 166E, HRS, and this chapter, relating to the use of particular land being disposed of, the terms of lease, license, or permit, and the qualifications of any person to draw, bid, or negotiate for public land;
- (3) Reduce or waive the lease rental at the beginning of the lease on any lease of public land to be used for any agricultural or pastoral use where the land being leased requires substantial improvements to be placed thereon; provided that such reduction or waiver shall not exceed two years for land to be used for any agricultural or pastoral use;
- (4) Delegate to the chairperson or employees of the department, subject to the board's control and responsibility, such powers and duties as may be lawful or proper for the performance of the functions vested in the board;
- (5) Set, charge, and collect reasonable fees in an amount sufficient to defray the cost of performing or otherwise providing for the inspection of activities permitted upon the issuance of a land license involving an agricultural purpose;
- (6) Appoint hearing officers to conduct public hearings as provided by law and under such conditions as the board by rules shall establish;
- (7) Approve of plans to develop public lands;
- (8) Award and cancel leases, issue revocable permits, easements, and rights of entry

covering lands for use consistent with its purposes;

- (9) Approve the transfer, assignment, or sublease of a lease or any interest therein, including the transfer of stock of a corporation including a limited liability corporation holding the lease, or the interest in an association or partnership including a limited partnership holding the lease. To the extent the board reserves such a right in the lease, upon the transfer, assignment, or sublease of a lease or any interest therein, the board may establish additional restrictions, terms, or conditions not inconsistent with this chapter to insure and promote the purposes of the demised lands;
 - (10) Waive rental payments due to natural catastrophes and other external factors beyond the lessee's control and determine the period for the waiver;
 - (11) Establish lease rentals as provided in section 4-158-21;
 - (12) Bring such actions as may be necessary to remove or remedy encroachments upon public lands; and
 - (13) Do any and all things necessary to carry out its purposes and exercise the powers granted in Chapter 166E, HRS, and this chapter.
- (b) Except as provided by law, the board through the chairperson shall:
- (1) Enter into joint venture agreements or development contracts for development and infrastructure improvements of non-agricultural park lands; or contract for subdivision, and installation of infrastructure improvement as provided for in this chapter;
 - (2) Prevent illegal activities on, unlawful occupation of, or trespassing on public lands;
 - (3) Cause all trespassers and persons unlawfully

- occupying public lands, and their effects, and all animals trespassing on the lands to be removed therefrom and to impound the seized effects and animals according to law;
- (4) Enter on any public land in order to take possession thereof, and to resume possession of any public land in case of surrender, default, forfeiture, or escheat; and
- (5) Recover money due the State for damage done to any public lands by wrongful entry and occupation or by wrongful removal therefrom or destruction of any property or asset.
- (c) The administrator shall have the power to:
 - (1) Fine any person causing an encroachment upon public land as allowed by law and the person shall be liable for administrative costs incurred by the department and for payment of damages;
 - (2) Approve other lands for development pursuant to section 166E-10, HRS, and section 4-158-15, HAR, and lands acquired by the department by way of foreclosure, voluntary surrender, or otherwise pursuant to section 155-4(12), HRS;
 - (3) Accept and process applications for leases;
 - (4) Disapprove lease applications when the prospective applicant is unable to meet the requirements of the program or the criteria for the particular disposition;
 - (5) Recommend for board action the disposition of lands to qualified applicants;
 - (6) Collect rents, assessments, and other fees and charges;
 - (7) Recommend for board action cancellation of leases where due notice of breach or default has been provided;
 - (8) Issue non-renewable dispositions granting easements, permits, and rights of entry for a period not in excess for fourteen days for use consistent with the purposes of this chapter;
 - (9) Administer and manage the non-agricultural

- park lands special fund;
- (10) Recommend for board action lease rentals as provided in section 4-158-21;
 - (11) Set, charge, and collect interest and a service charge on delinquent payments due on leases, permits, or other accounts. The rate of interest shall not exceed one per cent a month and the service charge shall not exceed \$50 a month for each delinquent payment; provided that the contract shall state the interest rate and the service charge and be signed by the party to be charged;
 - (12) Set, charge, and collect additional rentals for the unauthorized use of public lands by a lessee, licensee, grantee, or permittee who is in violation of any term or condition of a lease, license, easement, or revocable permit, retroactive to the date of the occurrence of the violation. Such amounts shall be considered delinquent payments and shall be subject to interest and service charges as provided in paragraph (11);
 - (13) Maintain an accurate inventory of transferred lands;
 - (14) Enforce contracts respecting leases, licenses, permits, or other disposition of public lands;
 - (15) Conduct all public auctions and drawings pertaining to the disposition of public lands and other property authorized by the board;
 - (16) Keep a record of all official transactions, relating to public lands within the chairperson's jurisdiction and such record shall be a public record;
 - (17) Establish, operate, maintain, and improve public lands infrastructure;
 - (18) Establish additional criteria for the selection of applicants not inconsistent with those prescribed in this chapter, relating to the intended use of particular

land being disposed of, the financial feasibility of lot development, or the terms of the disposition, the criteria to be included in the public notice of disposition; and

- (19) Establish conditions of award which shall be met to the satisfaction of the administrator prior to document execution, the conditions to be included in the public notice of disposition. [Eff **DEC 06 2007**]
(Auth: HRS \$166E-3) (Imp: HRS \$166E-6)

\$4-158-3 Fees and charges. Fees for the processing of lease or permit documents and records shall be charged as follows:

- (1) Lease, permit, assignment of lease, sublease, consent to mortgage, collateral agreement, and all other documents:
\$30/document

- (2) Copy of document: \$.50/page

The cost of appraisals, surveys, public notices, lease closing and other services relating to lot disposition, reopening, or assignment which are incurred by the department shall be charged to the lessee upon completion of the relevant lease or permit transaction and any other fees or charges incurred by the department. [Eff **DEC 06 2007**] (Auth: HRS \$166E-6) (Imp: \$166E-8)

\$4-158-4 Penalties. (a) The chairperson may set, charge, and collect administrative fines and costs, as allowed by law, or bring legal action to recover administrative fees and costs as documented by receipts or affidavit, including attorneys' fees and costs; or bring legal action to recover administrative fines, fees, and costs, including attorneys' fees and costs, or payment for damages resulting from a violation of chapter 166E, HRS, or any rule adopted pursuant to chapter 166E, HRS.

- (b) Any criminal action against a person for any

violation of chapter 166E, HRS, shall not be deemed to preclude the State from pursuing civil legal action against that person. Any civil legal action against a person to recover administrative fines and costs for any violation of chapter 166E, HRS, or any rule adopted pursuant to chapter 166E, HRS, shall not be deemed to preclude the State from pursuing any criminal action against that person. Each day of each violation shall constitute a separate offense. [Eff

DEC 06 2007] (Auth: HRS §166E-3) (Imp: HRS §166E-6)

§4-158-5 Covenants against discrimination. The board shall provide in every patent, deed, lease, agreement, license, or permit that the use and enjoyment of the premises being granted shall not be in support of any policy which discriminates against anyone based upon race, creed, color, national origin, sex, or a physical handicap. The board shall not dispose of any public land to any person who practices discrimination based upon race, creed, color, national origin, sex, or a physical handicap. As used in this section, "physical handicap" means a physical impairment which substantially limits one or more of a person's major life activities. [Eff

DEC 06 2007] (Auth: HRS §166E-6; §166E-8)
(Imp: HRS §171-64; §166E-8)

§4-158-6 Irrigation projects. In any encumbrance or similar agreement, a condition may be provided requiring the inclusion of the land being disposed in any irrigation project formed or to be formed by the state agency responsible therefor and making the land subject to assessments made or to be made for such project and constituting such assessments a first lien upon the land which if not paid shall result in the forfeiture of the land subject to notice of default as provided in section 4-158-33. [Eff DEC 06 2007]
(Auth: HRS §171-25) (Imp: HRS §166E-6)

§4-158-7 Prohibitions. The mining or taking of sand, dead coral or coral rubble, rocks, soil, or other marine deposits is prohibited with the following exceptions:

- (1) The taking of such materials, not in excess of one gallon per person per day for reasonable, personal, noncommercial use;
- (2) For the replenishment or protection of public areas and adjacent public lands or construction or maintenance of state approved reservoirs, harbors, launching ramps, or drainage channels with a permit authorized under chapter 183C, HRS;
- (3) The clearing of such materials from existing drainage pipes and canals and from the mouths of streams including clearing for the purposes under section 46-11.5, HRS; provided that the materials removed shall be placed on adjacent areas unless this placement would result in significant turbidity; or
- (4) The cleaning of areas for state or county maintenance purposes including the purposes under section 46-12, HRS; provided that the materials removed shall be placed on adjacent areas unless such placement would result in significant turbidity. [Eff

DEC 06 2007] (Auth: HRS §171-58.5)
(Imp: HRS §166E-6)

SUBCHAPTER 2

TRANSFER OF NON-AGRICULTURAL PARK LANDS

§4-158-8 Conversion of qualified and encumbered lands. (a) The board may offer to convert an existing encumbrance on those lands transferred into new long-term leases. Prior to the board making an

offer to convert an existing encumbrance to a long-term lease, the board shall determine that it is in the public interest to assist those holding encumbrances, who presently operate or operated a viable agricultural activity for a livelihood. Further, by allowing conversion of existing encumbrances into new long-term leases, the State would realize greater returns and reduce disruptions to current ongoing farming operations. The lessee may request conversion of the lease if the remaining term is less than ten years, but more than five years. For land with encumbrances, conversion shall be limited to those lands:

- (1) Not needed by any state or county agencies for any other public purpose; and
 - (2) Zoned, classified, or leased for agricultural activity.
- (b) The board may negotiate and enter into a new lease of not less than fifteen years and not more than sixty-five years. In issuing the new leases the department shall:
- (1) Require appraisal of the parcel in accordance with section 4-158-21;
 - (2) Impose other lease terms, provisions, restrictions, and conditions as provided in this chapter as may be required to protect the State's interests;
 - (3) Recover from the new lessees the costs of subdividing the parcel as may be required;
 - (4) Require the payment of annual lease rent by appraisal and a premium computed at twenty-five per cent of annual base rent, with the premium to be added to the lease rent for each year of lease equal to the number of years that person occupied the land, but not to exceed seven years. For example, if land is occupied for ten years, the twenty-five per cent premium shall be paid for seven years, the maximum term; and
 - (5) Require those qualifying under subsection (a) to meet the bona fide farmer criteria as defined in section 4-158-1.

(c) The department may negotiate the conversion into the new lease without regard to section 4-158-30. [Eff DEC 06 2007] (Auth: HRS §166E-4) (Imp: HRS §166E-6)

§4-158-9 Extension of encumbered non-agricultural park lands. This section shall apply to those existing encumbrances that meet the following:

- (1) The tenant must hold a current lease for use of lands transferred to the department;
- (2) The holder of an encumbrance shall be satisfactorily performing in full compliance with the terms and conditions of the existing lease, permit, or license;
- (3) The holder of an encumbrance shall not be in arrears in the payment of taxes, rents, or other obligations owed to the State or any county; and
- (4) The holder of an encumbrance's agricultural activity or farming operation shall be fully and economically viable as specified in section 4-158-11.

Upon request, the administrator shall evaluate the existing encumbrance to determine whether the farming operation and the holder of encumbrance meets the qualification and eligibility requirements, as outlined in section 4-158-11. The department on a case-by-case basis may recommend to the board the option to renegotiate or amend for extension each existing encumbrance. The board may review the recommendation and shall approve a course of action. The encumbrances deemed not qualified shall continue unabated until the encumbrance termination date expires. [Eff DEC 06 2007] (Auth: HRS §166E-5) (Imp: HRS §166E-6)

§4-158-10 Term, rent, and condition of extension.

(a) Terms of extension shall not be for a longer term period than sixty-five years, that includes the aggregate of the existing term period with the

extension term period cumulatively summed.

(b) All extensions shall require the determination of the base rent and additional rents. The rental value of the existing lease shall be based on the appraisal conducted by a disinterested appraiser or appraisers contracted by the administrator. Should the lessee disagree with the rental value, the lessee may invoke provisions of section 4-158-21. In no case shall the base annual rent of the existing encumbrance be reduced from its current rate.

(c) Conditions of the lease extension shall remain the same or not less restrictive than those conditions specified in subchapters four and five. The board may impose certain lease requirements or condition the extension provisions to make whole any holders of security interest in order that any outstanding loan status shall not be jeopardized or foreclosed upon as a result of the extension.

(d) An extension may be granted to extend the term of the lease to the extent necessary to qualify the lease for mortgage lending or guaranty purposes with any federal mortgage lending agency, to qualify the lessee for any state or private lending institution loan, private loan guaranteed by the State, or any loan in which the State and any private lender participates, or to amortize the cost of substantial improvements to the demised premises that are paid for by the lessee without institutional financing, such extension being based on the economic life of the improvements as determined by the administrator or an independent appraiser; provided that the approval of any extension shall be subject to the following:

- (1) The demised premises are developed and utilized according to a plan of utilization and development approved by the department;
- (2) The lessee is otherwise in compliance with lease terms;
- (3) The aggregate of the initial term and any extension granted shall not be for more than sixty-five years;

- (4) Proceeds of any mortgage or loan shall be used solely for the operations or improvements on the demised premises;
- (5) Where improvements are financed by the lessee, the lessee shall submit receipts of expenditures within a time period specified by the board, otherwise the lease extension shall be canceled;
- (6) The rules of the board, setting forth any additional terms and conditions, which shall ensure and promote the purposes of the demised lands;
- (7) The board may increase the rent and adjust the rental period; and
- (8) Additional restrictions, terms, and conditions to insure and promote the purposes of the demised lands, to the extent the board has reserved this right in the lease. [Eff **DEC 06 2007**] (Auth: HRS §166E-5) (Imp: HRS §166E-6)

§4-158-11 Eligibility for extension. (a) The existing agricultural activity or farming operation shall meet at least three of the following criteria to qualify for extensions under this section:

- (1) Conforms with provisions of the Hawaii State Plan or the State Functional Plan for Agriculture;
- (2) Supports enhancement or expansion of locally grown replacement crops for sugar;
- (3) Protects and conserves suitable agricultural lands within the land district;
- (4) Promotes diversified agriculture industry and development of new crops;
- (5) Increases the State's self-sufficiency of agricultural commodities and products;
- (6) Produces an agricultural commodity that contributes to reducing imported produce;
- (7) Ensures the continued availability of suitable agricultural lands in the land district; or

- (8) Conforms with any other agricultural uses that the board may deem worthwhile for the preservation of the diversified agricultural industry for the land district.

Upon request, the administrator shall evaluate each encumbrance and determine whether or not a recommendation to the board for permission to negotiate a lease extension is justified.

(b) Eligibility requirements. Holders of existing encumbrances shall meet at least four of the following requirements:

- (1) Has filed a general excise tax (state) G-49 form for the past seven years either with the state tax department or the Internal Revenue Service showing farming revenues;
- (2) Possesses an general excise tax license from the state tax department and has filed tax returns on it;
- (3) Has maintained a viable farming operation or produced an agricultural commodity for the past seven years in the land district;
- (4) Has operated a family farming operation or employs a minimum of two unrelated farm workers;
- (5) Has not filed for bankruptcy during the term of the existing lease or not in default of more than six months rent or cited to be in violation of any lease terms, conditions, or covenants;
- (6) Possesses a farm business financial plan or conservation plan, or both; or
- (7) Is an approved co-operator with the state soil and water conservation district program under chapter 180, HRS.

The administrator shall request each lessee or permittee to file an affidavit showing that existing holders of encumbrance meet the above criteria or submit proof, whichever is acceptable. Any wilful violation of this requirement shall be cause for the cancellation of the existing encumbrance and forfeiture of the land to the department without due course. [Eff DEC 06 2007] (Auth: HRS §166E-5)

(Imp: HRS §166E-6)

§4-158-12 Extension restrictions. The board may impose the following restrictions on any lease extensions:

- (1) No aggregate term period shall be less than fifteen years nor exceed sixty-five years;
- (2) The purpose of the extension shall be for a specific agricultural activity(ies) and may include waste or unusable lands for preservation of the surrounding environment and continuity of farming operations; and
- (3) The lease shall not be in violation of existing lease terms or conditions or be in arrears of rents due at the date of extension. [Eff **DEC 06 2007**] (Auth: HRS §166E-5) (Imp: HRS §166E-6)

SUBCHAPTER 3

POLICY, PLANNING, AND DEVELOPMENT

§4-158-13 Planning. (a) The division from time to time shall:

- (1) Reassess the non-agricultural park lands program and define new directions and priorities for the program;
- (2) Identify and analyze potential non-agricultural park lands required to support the development of agricultural industries in the State; and
- (3) Select and recommend suitable sites for future non-agricultural park lands projects to meet the needs of agricultural commodity industries.

(b) Prior to the development of a non-agricultural park lands project, and subject to section 166E-10, HRS, the administrator shall prepare or cause to be prepared plans and specifications as a

package for board action, including but not limited to:

- (1) Site selection analysis, including preliminary site inspection and boundary mapping, sufficient to establish the suitability of the land for its intended uses;
- (2) Development plan and preliminary engineering report, including alternative land use plans and infrastructure requirements, configurations, and costs required to service the project area, and schedule of governmental permits and approvals required to implement the project;
- (3) Agricultural feasibility analysis, including agronomic suitability and production capability of the project area, identification of potential markets, costs and economic returns to farm production at the site, and recommended lot sizes;
- (4) Environmental impact statement prepared in accordance with chapter 11-200 (Department of Health);
- (5) Land use district boundary amendment and county plan and zoning amendments as required for the project;
- (6) Survey and cadastral work, including topographic and feature map, profile and cross section survey, preliminary and final subdivision map, parcel descriptions, and installation of property pins for individual lots;
- (7) Design of project improvements (such as roads and irrigation facilities), including construction drawings and specifications, cost estimates, soils and drainage reports, quantity takeoffs, approval signatures from permitting agencies, and arrangements for utilities installations; and
- (8) Consultation and advice during construction phase, including resolution of problems due to unforeseen conditions, approval of

substitutions by the contractor, and as-built drawings.

(c) If the non-agricultural park land improvements are to be developed exempt from county zoning and subdivision requirements pursuant to section 166E-10, the project plans and specifications shall include detailed information on the method and costs of maintaining the exempt improvements. [Eff

DEC 06 2007

] (Auth: HRS §§141-1, 166E-6)

(Imp: HRS §166E-6; §§166E-9, 166E-10)

§4-158-14 Development. The division shall cause non-agricultural park lands infrastructure improvements approved by the board to be established, improved, operated, and maintained. [Eff

DEC 06 2007

] (Auth: HRS §§141-1, 166E-6)

(Imp: HRS §166E-6; §§166E-9, 166E-10)

§4-158-15 Development by joint ventures. Any non-agricultural park lands developed by the department in partnership with a federal agency, a county, or a private party shall be subject to a partnership agreement approved by the board of agriculture, which agreement shall provide, at a minimum:

- (1) A determination by the board that it is in the public interest to enter into the partnership agreement;
- (2) Long-term assurance that the land will be utilized for agricultural or aquacultural purposes;
- (3) Board approval of the non-agricultural park lands development plans and specifications;
- (4) Selection and management of lessees in a manner approved by the board; and
- (5) Conditions to ensure a public benefit from any state funds expended for the project.

[Eff

DEC 06 2007

]

(Auth: HRS

§141-1; §166E-9) (Imp: HRS §166E-6)

S4-158-16 Planning; joint ventures. (a) Prior to entering into a partnership agreement, the board shall:

- (1) Determine:
 - (A) Whether the lands shall be developed by disposition or contract;
 - (B) The location, area, and size of the lands to be developed;
 - (C) The use or uses to which the lands shall be put;
 - (D) The estimated period of time to construct and complete the development;
 - (E) Minimum requirements for on-site and off-site improvement, if any; and
 - (F) Such other terms and conditions as shall be deemed necessary by the board;
- (2) Set the minimum or upset rental and additional rental, if any, on the basis of an appraisal report prepared by an appraiser for the board, determining the rental value of the lands for the use or uses for which they are to be developed using generally accepted appraisal methods; the appraised value may be adjusted as provided in section 4-158-21;
- (3) Give notice of the proposed partnership agreement by publication at least once in each of three successive weeks in a newspaper of general circulation in the State. The notice shall invite interested persons to submit applications to be selected as the partner for the project. The notice shall also state in general terms the size, location, the minimum rental and additional rent, if any, of the area to be developed, the minimum requirements for any required off-site and on-site improvement, the maximum estimated period of time to install and complete the construction of any required improvement, the use or uses to which such lands shall be put, the last date on which applications will be received by the

department, which date shall not be less than thirty days or more than ninety days after the last date of publication of such notice, and the times and places at which more detailed information with respect to the partnership agreement may be secured by interested persons;

- (4) Require each interested person to include a financial statement, and performance and experience records in agricultural or related development; provided that the board may also, in its discretion, require the interested person to submit answers, under oath, to questions contained in a questionnaire prepared by the department;
- (5) Require each interested person to submit a sealed bid, which shall include a development plan in as much detail as possible including but not limited to the following: the interested person's proposal as to how and when the person intends to develop the land in partnership with the board, including any permitted incremental development, the amount of money the person intends to commit to the total project, the method of recovery of the interested person's costs and profits, the amount the person agrees to pay to develop the land, and the income the board will receive from leases;
- (6) Establish reasonable criteria for the selection of a private party or parties as a partner; and
- (7) Determine within forty-five days of the last day for filing applications the person or persons who meet the criteria for selection set by the board, and notify all persons who submitted applications of the board's determination within seven days of such determination. Any person may examine the basis of the determination, which shall be in writing, to ascertain whether or not the

conditions and criteria established by the board were followed; provided that if any person does not notify the board of any objections and the grounds therefore, in writing, within ten days of such notice, the person shall be barred from proceeding to seek legal remedy for an alleged failure of the board to follow the conditions and criteria.

(b) If only one person meets the criteria for selection as the partner, the board then may enter into a partnership agreement with that person; provided that the terms of the partnership agreement shall not be less than those proposed by the partner in the application. If two or more persons meet the criteria for selection, the board shall consider all of the relevant facts of the partnership agreement, the proposals submitted by each person, the experience and financial capability of each person, and shall within forty-five days from the date of selection of the persons that met the criteria, select the person who submitted the best proposal. The board then may negotiate the details of the partnership agreement; provided that the terms of the agreement shall not be less than those proposed by the partner in the application. [Eff DEC 06 2007] (Auth: HRS §141-1; §166E-9) (Imp: HRS §166E-6)

§4-158-17 Terms of joint venture. Any partnership agreement for a joint venture shall be approved by the board and shall be in conformity with section 4-158-15. The terms of a partnership agreement for joint venture shall include the following, wherever appropriate:

- (1) The development and subdivision shall comply with appropriate state and county zoning and subdivision requirements; provided that, pursuant to section 166E-10, the development and subdivision may be exempt from the requirements;
- (2) The partners shall file with the department

a good and sufficient bond conditioned upon the full and faithful performance of all the terms, covenants, and conditions of the partnership agreement;

- (3) The dates on which the partner must submit to the board for approval the preliminary plans and final plans and specifications for the total development. No construction shall commence until the board has approved the final plans and specifications, provided that with board approval, construction on an incremental basis may be permitted;
- (4) The date of completion of the total development, including the date of completion of any permitted incremental development;
- (5) The minimum requirements for off-site and onsite improvements that the partner must install, construct, and complete by the date of completion of the total development. The board may permit incremental development and establish the minimum requirements for offsite and on-site improvements that must be installed, constructed, and completed prior to the date of completion of the total development;
- (6) A partnership agreement may provide that the board shall issue a lease to the nominees of the partner, including the partner, pursuant to the terms previously negotiated and agreed upon between the partner and the board, including lease rent to the lessee and method of recoupment of expenses by the partner;
- (7) In the event of a lease, the partner may be permitted, after the partner has completed construction of any required offsite improvement, to assign or sublease with board approval portions of the leased lands in which the construction of any offsite improvement has been completed to an assignee or sublessee who shall assume the

- obligations of the partner relative to the parcel being assigned or subleased, including the construction of any onsite improvement. The board may permit a partner to share in the lease rent for a fixed period in order to recover costs and profit;
- (8) The board may include in any partnership agreement or lease, provisions concerning notice of breach or default, rights of a holder of a security interest, and consent to mortgage as set forth in this chapter; and
 - (9) Other terms and conditions set by the board.
- [Eff **DEC 06 2007**] (Auth: HRS §141-1; §166E-9) (Imp: HRS §166E-6)

SUBCHAPTER 4

DISPOSITION OF NON-AGRICULTURAL PARK LANDS

§4-158-18 Lease provisions, generally. Every lease issued by the board shall contain:

- (1) The specific use or uses to which the land is to be employed, provided that the use or uses shall be for agricultural or aquacultural activities only;
- (2) The improvements required, provided that a minimum reasonable time shall be allowed for the completion of the improvements, and provided further that the board may permit the lessee to offset the cost of any improvements to the leasehold against not more than two years of lease rental. This provision shall not apply to lease conversions as defined in section 4-158-8;
- (3) Restrictions against alienation as set forth in section 4-158-5;
- (4) The rent as established by the board or at public auction, which shall be payable not more than one year in advance, in monthly,

- quarterly, semiannual, or annual payments;
- (5) Where applicable, adequate protection of forests, watershed areas, game management areas, wildlife sanctuaries, and public hunting areas; reservation of rights-of-way and access to other public lands, public hunting areas, game management areas, or public beaches; and prevention of nuisance and waste; and
- (6) Such other terms and conditions as the board deems necessary to preserve and protect non-agricultural park lands and to effectuate the purposes of the state constitution and chapter 166E, HRS. [Eff. DEC 06 2007]
] (Auth: HRS §166E-6;
§166E-8) (Imp: HRS §166E-6; §166E-8)

§4-158-19 Lease restrictions, generally. (a)
Except as otherwise provided, the following restrictions shall apply to all leases:

- (1) No lease shall be for a term of less than fifteen years nor more than sixty-five years, including any extension granted for mortgage lending or guarantee purposes;
- (2) No lease shall be made to any person who is in arrears in the payment of taxes, rents, or other obligations owing the State or to any person who, during the five years preceding the date of disposition, has had a previous sale, lease, license, permit, or easement covering public lands canceled for failure to satisfy the terms and conditions thereof;
- (3) Any transferee, assignee, or sublessee of a non-agricultural park land lease shall first qualify as an applicant under this chapter. No lease or any interest therein, including corporate stock or interest in a partnership or association, shall be transferred or assigned without the consent of the board, except by devise, bequest, or intestate

- succession and upon the further condition that there is a dwelling on the property in which the devisee or heir resides or that more than fifty per cent of the devisee's or heir's income is derived from the productive use of the property. In the absence of or upon cessation of these conditions, the devisee or heir shall surrender the lease and improvements, or any interest therein, to the board pursuant to section 4-158-35;
- (4) With the approval of the board, and subject to the provisions of section 4-158-35, the assignment and transfer of a lease or any interest therein, including stock of a corporation holding the lease or an interest in a partnership or association holding the lease, may be made if:
- (A) The lessee becomes mentally or physically disabled;
 - (B) Extreme economic hardship is demonstrated to the satisfaction of the board; or
 - (C) The assignment is to the corporate successor of the lessee;
- (5) Prior to the approval of any assignment of lease permitted by this section, the board shall have the right to review and approve the consideration to be paid by the assignee and may condition its consent to the assignment of the lease on payment by the lessee of a premium based on the amount by which the consideration for assignment, whether by cash, credit, or otherwise, exceeds the depreciated cost of improvements and trade fixtures being transferred to the assignee; provided further that in the event of foreclosure or sale, the premium, if any, shall be assessed only after the encumbrances of record and any other advances made by the holder of a security interest are paid; provided further that the board may adjust the base and additional

rental pursuant to the method outlined in section 4-15-21;

- (6) The lessee shall not sublet the whole or any part of the demised premises without the approval of the board; provided that:
 - (A) Prior to the approval, the board shall have the right to review and approve the rent to be charged to the sublessee;
 - (B) In the case where the lessee is required to pay rent based on a percentage of its gross receipts, the rents paid by the sublessee shall be included as part of the lessee's gross receipts; and
 - (C) The board shall have the right to review and, if necessary, revise the rent of the demised premises based upon the rental rate charged to the sublessee including the percentage rent, if applicable, and provided that the rent may not be revised downward; and
- (7) The lease shall be for a specific use or uses, and shall not include wastelands unless it is impractical to provide otherwise.

(b) The board may allow commercial agricultural operations for the processing, marketing, and displaying of agricultural crops or commodities, which may include any product created through value-added processes. The commercial activity may sell to the general public provided that the operations shall be owned and operated by a lessee in good standing with the department, provided that:

- (1) The demised premises shall be developed and utilized in accordance with the plan of utilization and development approved by the department;
- (2) The lessee shall derive the majority of the lessee's annual gross income from the cultivation of agricultural commodities on

- the demised premises; and
- (3) All products for sale from the premises must have at least fifty per cent of its contents made from commodities cultivated, grown, or produced on the demised premises. [Eff
DEC 06 2007] (Auth: HRS \$166E-6; \$166E-8) (Imp: HRS \$166E-6; \$166E-8)

\$4-158-20 Additional terms and conditions. (a) The lessee, within a reasonable period of time and in accordance with the plan of development and utilization provided for in subsection (d), shall derive the major portion of the lessee's annual income from the production of livestock, poultry, crops or products for which the land is granted to the lessee; provided that this restriction shall not apply if failure to meet the restriction results from mental or physical disability or the loss of a spouse, or if the premises are fully utilized in the production of crops or products for which the disposition was granted. The lessee shall promptly provide information and documents requested by the administrator, including but not limited to copies of income tax returns, to verify that the income requirement is being met.

(b) The lessee shall furnish the department, prior to the issuance of the executed lease, the following:

- (1) A certificate of comprehensive liability insurance to be maintained throughout the term of the lease with coverage in an amount to be determined by the administrator and approved by the board, subject to periodic review and adjustment at intervals specified in the lease. The certificate of insurance shall name the department as an additional insured and shall require a thirty-day notice to the department of any policy change or cancellation; and
- (2) A performance bond to be maintained throughout the term of the lease in an amount equal to two times the annual base

rental; provided that the bond requirement may be waived by the administrator upon evidence that the lessee is substantially in compliance with lease terms and the lessee's lot is substantially developed according to plans approved by the department; provided further that the department may reinstate the waived bond at any time during the term of the lease.

(c) The board, at its discretion, may permit a farm dwelling or dwellings on a leased lot if the need is clearly demonstrated. The farm dwelling or dwellings shall be used in connection with agricultural or aquacultural activities on the lot and shall not be used for rental purposes. The dwelling shall be subject to such additional terms and conditions as the board may require, including, but not limited to, adjustment of the base rental to reflect residential use.

(d) The lessee shall utilize the land only for the purposes specified in the lease, in accordance with a plan of development and utilization which shall be submitted for the administrator's approval prior to the issuance of the lease. The lessee shall not modify or deviate from the plan without the approval of the department and any unapproved modification or deviation from the plan may be cause for the termination of the lease.

(e) All construction on the leased lot shall be in accordance with plans approved by the administrator and shall be in accordance with all applicable federal, state, and county laws, ordinances, and rules, including but not limited to laws regarding environmental quality control.

(f) When a notice of lease disposition covers more than one lot or parcel, each lessee shall bear a pro rata share of the cost of the services referenced in subsection (b) and the pro rata share shall be determined by the administrator.

(g) The administrator or the administrator's authorized representative has the right to inspect, at reasonable hours, the leased property and the

improvements, crops, livestock, equipment, chattels, books, and records of the lessee in connection with the administration of the lease. [Eff

DEC 06 2007] (Auth: HRS §166E-6; §166E-8)
(Imp: HRS §166E-6; §166E-8)

§4-158-21 Appraisals and setting of lease rents.

(a) Public auction. The appraisal of lands for the determination of the upset lease rental at public auction may be made by an employee of the department qualified to appraise lands, or by one but not more than three disinterested appraisers contracted for by the administrator; provided that the upset lease rental shall be determined by disinterested appraisal when prudent management so dictates. Except as otherwise provided in this subchapter, no such lands shall be leased for a sum less than the rental value fixed by appraisal; provided that for any lease at public auction, the board may establish the upset lease rental at less than the appraisal value set by an employee of the department and the land may be leased at that price. The department shall be reimbursed by the lessee for the cost of any appraisal made by a disinterested appraiser or appraisers contracted for by the department.

(b) Drawing or negotiation. The base rental and additional rental lands to be disposed of by drawing or by negotiation shall, except as otherwise provided in this subchapter, be no less than the rental value determined by a disinterested appraiser or appraisers contracted by the administrator, and such appraisal, and any further appraisal which is made at the request of the lessee and with the approval of the department, shall be reimbursed to the department by the lessee.

(c) Reopening. In the case of reopenings of the rental for a lease, the base rental and additional rental for any ensuing period shall be the rental value at the time of reopening determined in conformance with the uniform standards of professional appraisal practice as adopted by national professional appraisal organizations. At least six months prior to

the time of reopening, the rental value of the land in the specific use or uses for which the disposition was made shall be determined by an appraiser whose services shall be contracted for by the administrator, and the lessee shall be promptly notified of the determination; provided that should the lessee disagree with the appraised rental, the lessee may appoint the lessee's own appraiser who together with the department's appraiser shall appoint a third appraiser, and the appraised rental shall be determined by arbitration as provided in chapter 658A, HRS. In that case the lessee shall pay for the lessee's own appraiser, the department shall pay for its appraiser, and the cost of the third appraiser shall be borne equally by the lessee and the department.

(d) Assignment of lease. In the event of an assignment of lease, the base rental and additional rental for any ensuing period may be redetermined by the board pursuant to appraisal conducted by a disinterested appraiser or appraisers contracted by the administrator; provided that the base rental and additional rental shall be the rental value at the time of assignment determined by generally accepted appraisal methods. The cost of redetermining the base rental and additional rental shall be borne by the lessee.

(e) When more than one appraiser is appointed, each shall prepare and submit an independent appraisal. All appraisal reports shall be available for review by the public.

(f) Notwithstanding anything to the contrary contained in this chapter, the administrator may recommend to the board for approval an adjustment of an appraised value. The administrator may recommend using any of the following adjustments:

- (1) An adjustment of the fee simple value determined through appraisal as necessary to maintain equitable fee simple values between, among, or throughout the department's land lease system for lands having the same designated use and which are

put out to lease within twelve months of each other;

(2) An adjustment of the rental value determined through appraisal by:

(A) Applying a percentage of the rate of return used in the appraisal instead of the appraisal's rate of return. An adjusted rate of return may be applied in the following cases:

- (i) For those uses which require extensive or large capital expenditures to meet lease terms and conditions;
- (ii) For those uses involving a crop of low yield value; and
- (iii) For those uses involving a crop or product which does not generate revenues for a substantial period of time after award of the lease, provided that the adjusted rate of return shall apply only for the period of time in which revenues are not generated;

(B) Factoring in a lot's unproductive acreage, e.g., drainageways, restricted easements, common usage, and uncontributory land areas, for those lots for which the specified use is for crops to be grown "in the soil or ground";

(C) Factoring in extraordinary start-up costs for those crops or uses which require heavy initial capital investments before any returns are realized, e.g., shadehouse crops, wetland crops, etc., or those crops or uses which have unusually little or no return during the initial years of the lease;

(D) Delaying collection of the rental for those crops or specific uses where no income is realized during the first

five to seven years. Generally, this adjustment would apply to orchard type crops where a tree must reach a certain maturity before bearing fruit, e.g., macadamia nut, guava, and other tropical fruit plants. The proposed rental structure may factor in the no revenue years with low rent and the revenue years with a "catch-up" rent, making a multi-tier rental structure during the initial rental period; or

- (3) An adjustment of the rental determined through appraisal at the time of reopening or conversion, as the case may be, by:
 - (A) Factoring in the income for a particular lessee using a percentage increase that reflects the increase in the agricultural use value of the leasehold since commencement of the lease;
 - (B) Using an appropriate index (e.g., consumer price index, producers' price index, etc.) to calculate an escalation of the rental over a specified period of time. [Eff **DEC 06 2007**]
(Auth: HRS §166E-6; §166E-8) (Imp: HRS §166E-6)

§4-158-22 Negotiation. (a) A lease of non-agricultural park lands may be disposed of through negotiation upon a finding by the board that the public interest demands the disposition as provided by section 171-18, HRS.

(b) After a determination is made to negotiate the disposition of a lease, the administrator shall:

- (1) Give public notice in accordance with the procedure set forth in section 4-158-30(d), of the department's intention to lease non-agricultural park lands through negotiation, setting forth the minimum conditions thereunder, and the uses for which the land

will be leased. Any person interested in securing the lease shall file an application with the administrator not later than forty-five days after the first publication of the notice.

- (2) Determine the applicants who meet the criteria for selection set by the board and notify all applicants of the administrator's determination. Any applicant may examine the basis of the determination, which shall be in writing, to ascertain whether or not the conditions and criteria established by the board were followed; provided that if any applicant does not notify the administrator of the applicant's objections, and the grounds therefor, in writing, within twenty days of the receipt of the notice, the applicant shall be barred from proceeding to seek legal remedy for any alleged failure of the department to follow the conditions and criteria.

(c) If only one applicant meets the criteria for selection of the lessee, the board may, after notice as provided in subsection (b)(2), dispose of the lease by negotiation.

(d) If two or more applicants meet the criteria for the selection of the lessee, the board shall select the lessee who submits the highest offer contained in a sealed bid deposited with the administrator.

(e) Disposition of non-agricultural park lands set aside for common use or for the processing of agricultural products may be negotiated without regard to the limitations set forth in this section and section 4-158-29; provided that the disposition encourages competition within the agricultural processing industry and shall not exceed a maximum term of thirty-five years.

(f) The lease shall be issued when conditions of the award of lease are fulfilled.

(g) Notwithstanding the provisions of this section and section 4-158-29, the board may

renegotiate leases as provided in section 4-158-2.

[Eff **DEC 06 2007**] (Auth: HRS §166E-6; §166E-8)
(Imp: HRS §166E-6)

§4-158-23 Drawing of lot. When the board determines that non-agricultural park lands are to be leased by drawing, the administrator shall give public notice inviting applications for the drawing as provided in section 4-158-29, with such details concerning the drawing as it deems necessary and desirable. Applications to participate in the drawing shall be filed with the department within two weeks after the last publication date of the notice. Within not more than one hundred twenty days after the closing date for applications, the administrator shall screen the qualifications of the applicants, select those qualified to participate, notify all applicants of the selection, and conduct a drawing. The date of the drawing shall be published as set forth in section 4-158-29. All applicants shall be notified of the results of the drawing, and the award of leases shall be made by the board at its next regularly scheduled meeting. The lease shall be issued when conditions of the award of lease are fulfilled. [Eff

DEC 06 2007] (Auth: HRS §166E-6; §166E-8)
(Imp: HRS §166E-6)

§4-158-24 Public auction. (a) Disposition of non-agricultural park lands may be made at public auction after public notice as provided in section 4-158-29. All public auctions shall be held at the department or at any other convenient place in the district in which the land is located, and shall be conducted by the administrator or by an authorized employee of the division under the direction of the administrator, who shall perform this service without extra compensation.

(b) To be eligible to bid in an auction for a non-agricultural park lands lease, a bidder shall qualify as a bona fide farmer or new farmer as defined

in this chapter. [Eff **DEC 06 2007**] (Auth: HRS
\$166E-6; \$166E-8) (Imp: HRS \$166E-6)

\$4-158-25 Conduct of drawing. (a) Qualified applicants shall be present in person or shall be represented by an agent with appropriate credentials authorizing representation. Applicants who are not present or arrive late at the drawing shall be disqualified.

(b) All qualified applicants shall be placed in the following groups:

- (1) Group I, All persons given preference pursuant to section 4-158-28; or
- (2) Group II, Bona fide farmers as defined in this chapter.

(c) The department may determine the order of lot selection as follows:

- (1) Within Group I, by prioritizing in any sequence the different preference categories identified in section 4-158-28(a)(1) through (a)(6).
- (2) Within the Group I preference categories and within Group II, by establishing subgroups of priority based on qualification for non-agricultural park land lots intended for restricted use. The department may also reserve or limit the number of intended restricted use lots designated to a subgroup and may determine the order in which lots for different restricted uses shall be drawn. If there is an insufficient number of qualified applicants for the first intended restricted use, the remaining lots may be made available for selection for an alternate intended restricted use, and thereafter for selection for nonrestrictive permitted use until all lots are selected.

(d) Within each group or subgroup, the applicant whose name is first drawn shall be the first to select a lot and the drawing of names shall continue until all lots are selected or all applicants have selected,

whichever occurs first. When subgroups have been established for intended restricted use lots, names of applicants from Group I subgroups shall be drawn first, in the sequence established pursuant to subsection (c), followed by Group II subgroups, then remaining Group I applicants, followed by remaining Group II applicants. When no such subgroups have been established, names of applicants from Group I shall be drawn before those from Group II, in the sequence established pursuant to subsection (c).

(e) After all lots have been selected, five additional names each may be drawn as alternates from Group I and Group II remaining applicants. In the event awards are canceled for failure to satisfy conditions of award or other reason, the lots made available shall be offered for award to the alternates, first from Group I and then from Group II in the order in which their names were drawn.

(f) The public notice of lease disposition shall identify intended restricted uses, if any, and the priority of the preference categories in Group I. "Restricted use" as used in this section means limited to use for a crop or agricultural product determined by the board to be the most appropriate use for the particular lot, based on consideration of the site selection analysis, development plan and preliminary engineering report and agricultural feasibility analysis. [Eff DEC 06 2007] (Auth: HRS §166E-6; §166E-8) (Imp: HRS §166E-6)

S4-158-26 Disposition of abandoned or seized property. The department may sell, donate, or otherwise dispose of property abandoned or seized on public land upon compliance with the requirements of section 171-31.5, HRS. [Eff DEC 06 2007] (Auth: HRS §171-31.5) (Imp: HRS §166E-6)

S4-158-27 Application requirements. (a) An applicant shall meet one or more of the following qualifications:

- (1) Qualifications as a bona fide farmer pursuant to section 4-158-1;
- (2) Qualifications as new farmer pursuant to section 4-158-1;
- (3) The person meets such other qualifications as the board may prescribe pursuant to 4-158-2; or
- (4) Citizenship or permanent status alien. Any person shall be eligible to apply for a non-agricultural park lands lease if the person:
 - (A) Is a citizen of the United States who has resided in the State for at least three years or is a permanent status alien who has resided in the State for at least five years; and
 - (B) Is a bona fide farmer or new farmer as defined in this chapter.

(b) All applicants. In addition to satisfying the requirements of subsection (a), all applicants shall demonstrate the ability to perform the lease terms and shall provide the following information, at a minimum, to the administrator:

- (1) A resume with periods of farming experience identified by month and year;
- (2) A preliminary plan of utilization and development of the land including a financial projection of the estimated cost of the development;
- (3) State and county tax clearances including general excise tax;
- (4) An affidavit that the applicant is not delinquent in any obligation to the State or any of its political subdivisions; and that the applicant has not had a sale, lease, license, permit or easement covering public land canceled for failure to satisfy any terms or conditions thereof;
- (5) A financial statement, in the format outlined in the application instructions, including a balance sheet current within six months; and
- (6) Copies of state income tax returns for the

last five years.

(c) Additionally, applicants which are partnerships including limited partnerships, corporations including limited liability corporations, associations, trusts, or agricultural cooperatives shall provide the following information:

- (1) In the case of a corporation, a copy of articles of incorporation reflecting date of filing, purpose of the corporation, and disclosure of all directors and officers;
- (2) In the case of an association, partnership, corporation, or agricultural cooperative, a resume of associates, partners, trustees, directors and officers, and members, with periods of farming experience identified by months and years.

(d) Whenever the board establishes additional criteria for the selection of lessees, pursuant to section 4-158-2(a)(2), in support of qualification, each applicant shall provide documentation to the satisfaction of the administrator. [Eff

DEC 06 2007] (Auth: HRS §166E-6) (Imp: HRS §166E-6)

§4-158-28 Preference right. (a) Any person otherwise qualified to take a lot shall have preference in any disposition by drawing of lots if the person:

- (1) Is a veteran who served in the military forces of the United States and who was honorably discharged therefrom;
- (2) Is a displaced farmer who within a five-year period preceding the application is the former owner or lessee of farm premises that were condemned, taken, or repossessed by a governmental authority or private person;
- (3) Is an owner or lessee in possession of farm premises that will be condemned, taken, or repossessed by a governmental authority or private person, for any reason, and will be a displaced farmer within five years

- following the application date for a lot;
- (4) Operates a farm located in a zoning district where agricultural use is a nonconforming use;
- (5) Is a new farmer as defined in this chapter that does not own fee simple or possesses a agricultural lease; or
- (6) Has been displaced by reason of any natural disaster as defined in this chapter.

After the above preference, any person who is a citizen of the United States and who is otherwise qualified shall be given preference over non-citizens.

(b) Proof of preference status. Any applicant claiming preference status shall furnish proof of veteran status, displacement or potential displacement, nonconformance to zoning, or new farmer qualification as called for in the instructions to applicants and which shall be submitted together with the application.

(c) Wilful sale or surrender of a farm shall disqualify an applicant as a displaced farmer. [Eff
 DEC 06 2007] (Auth: HRS §166E-6) (Imp: HRS §166E-6)

§4-158-29 Notices. (a) Any disposition of public lands shall require public notices as prescribed in the following paragraphs. In addition to giving public notice, any public notice required under this section shall also be posted on the Internet in an easily-located manner, or on the department's website.

(b) Each notice of proposed lease disposition shall contain the following information:

- (1) General information regarding all the parcels or lots offered for lease, such as time and place of disposition, terms and conditions of disposition, qualification of applicants, procedure for filing application, conditions of award, if any and time and place at which more detailed information regarding the lease disposition

may be obtained;

- (2) Specific information pertaining to the individual parcels or lots offered for lease such as the parcel or lot number, its description, location and area, minimum, base, or upset rental, basis for additional rent if any, method of payment, purpose for which leased, the term of lease, building requirement, and other such covenants and conditions; and
- (3) The lessee's responsibility for applicable lease disposition costs pursuant to section 4-158-3.

(c) Auctions. Public notice of any proposed disposition by auction shall be given at least once in the land district where the land being disposed of is located. Notice of the auction shall contain in addition to information in subsection (a) the following:

- (1) General description of the land, including the address and tax map key;
- (2) Specific use for which the disposition is intended;
- (3) Minimum upset price or rental; and
- (4) The maps showing the metes and bounds description and the classification of the land shall be kept in the division or its land agent in the land district in which the land is situated, and shall be available for inspection at normal business hours.

(d) Drawings. Whenever a disposition by drawing by lots is proposed, notice inviting applications to participate in the drawing shall be given at least once in the land district where the land being disposed of is located. The notice shall contain, in addition to information in subsection (a):

- (1) The qualifications required;
- (2) A general location and tax map key;
- (3) The specific use for which the disposition is intended;
- (4) Base rental to be charged, and basis for additional rent, if any; and

- (5) The date by which all applications shall be filed, which date shall be not less than fourteen days after the last publication date.

Within not more than one hundred twenty days after the closing date for applications, the administrator shall select those qualified to participate in the drawing, notify all applicants as to whether or not they qualified, and conduct the drawing. The notice of selection of applicants qualified to participate in the drawing, together with the notice of drawing, shall be mailed to each applicant, whether or not the applicant in fact qualified. The notice of the drawing shall state the time and place of the drawing. Upon completion of the drawing, the award of leases shall be announced at the next regularly scheduled meeting of the board and the lease issued when conditions of the award are fulfilled.

(e) Negotiation. Public notice of a proposed disposition by negotiation shall be given at least once in the land district where the land being disposed of is located; provided that the notices are not required for permits, and dispositions of remnants. The notice shall invite proposals and state in general the terms and conditions that will be negotiable and those terms which shall be predetermined and the last date on which application will be received by the department which date shall not be less than thirty days after the last date of the notice. The notice shall also state the times and places at which more detailed information with respect to the sale or lease may be secured by interested person. If more than one applicant qualifies then the administrator shall review and may recommend to the board for approval to negotiate the best terms. [Eff

DEC 06 2007] (Auth: HRS §§166E-6, 171-16;
\$166E-8) (Imp: \$166E-8)

§4-158-30 Ineligible applicants. (a) No person shall be eligible to lease public lands who has had during the five years preceding the date of

disposition a previous sale, lease, license, permit, or easement covering public lands canceled for failure to satisfy the terms and conditions thereof.

(b) No person shall be eligible to lease public land who is in arrears in the payment of taxes or other obligations to the State or any of its counties.

(c) No person shall be eligible to become an applicant who is not of legal age. [Eff
\$166E-6, DEC 06 2007] (Auth: HRS §166E-6) (Imp: HRS

§4-158-31 Expired leases; holdover. Upon expiration of the lease term, if the leased land is not otherwise disposed of, the board may allow the lessee to continue to hold the land for a period not exceeding one year upon such rent, terms, and conditions as the board may prescribe; provided that if, immediately prior to the expiration of the lease, the land was cultivated with crops having ratoons for at least one cycle, as defined hereinafter, the board may permit the lessee to continue to hold the leased land until the crops from the last remaining cycle have been harvested. The term "cycle" as used in this section means the period required to plant and cultivate the original crop, including the harvesting of the first ratoon, being a period exceeding two years.

Upon expiration of the one-year extension, if the board has not yet decided upon the re-lease of the land or reservation for other purposes, the department may issue a temporary permit to the lessee, subject to section 4-158-2 and the rent and such other terms and conditions as the board may prescribe. [Eff
DEC 06 2007] (Auth: HRS §§166E-6, 171-40)
(Imp: HRS §166E-6)

SUBCHAPTER 5

MANAGEMENT OF NON-AGRICULTURAL PARK LANDS

§4-158-32 Consent to mortgage. (a) Whenever under this chapter or under any lease, license, permit, or other instrument issued by the board, consent of the board is required as a condition precedent to the mortgage of, or the creation of a security interest in public land, the chairperson of the board may, upon due application, grant the consent, and if the mortgage or security interest is to a recognized lending institution authorized to do business as a lending institution in either the State or elsewhere in the United States, the consent may extend to foreclosure and sale at the foreclosure to any purchaser, including the mortgagee, provided the purchaser shall be qualified under this chapter to lease, own, or otherwise acquire and hold the land or any interest therein. The interest of the mortgagee or holder shall be freely assignable. The term "holder" includes an insurer or guarantor of the obligation or condition of the mortgage, including the Federal Housing Administration, the Federal National Mortgage Association, Department of Veterans Affairs, the Small Business Administration, the United States Department of Agriculture, or any other federal agency and their respective successors and assigns, or any lending institution authorized to do business in the State or elsewhere in the United States; provided that the consent to mortgage to a nongovernmental holder shall not confer any greater rights or powers in the holder than those which would be required by any of the aforementioned federal agencies.

(b) Notwithstanding any provision in this chapter to the contrary, in leases or sales for agricultural residential purposes, the board may waive or modify any restrictions of the lease or sale or any restrictions contained in any such lease or sale if the waiver or modification is necessary to enable any of the federal agencies specified in subsection (a) or any lending institution authorized to do business in the State or elsewhere in the United States to participate in any loan secured by a mortgage on the land or the leasehold interest; provided any such

waiver or modification shall not confer any greater rights or powers in the holder than those which would be required by the Federal Housing Administration or the United States Department of Agriculture. [Eff

DEC 06 2007] (Auth: HRS §166E-6; §166E-8)
(Imp: HRS §166E-6; §166E-8)

S4-158-33 Notice of breach or default. Except as otherwise specifically provided in this chapter, in the event of a breach or default of any term, covenant, restriction, or condition of any lease or patent heretofore or hereafter issued under this chapter, the administrator shall deliver a written notice of the breach or default by personal service or by registered or certified mail to the party in default and to each holder of record having any security interest in the land covered by or subject to the lease or patent making demand upon the party to cure or remedy the breach or default within sixty days from the date of receipt of the notice; provided that where the breach involves a failure to make timely rental payments pursuant to the lease or patent issued under this chapter, the written notice shall include a demand to pay the rent with less than sixty days, but not less than five business days, after receipt of the notice. Upon failure of the party to cure or remedy the breach or default within the time period provided or within such additional period as the board may allow for good cause, the board subject to section 4-158-34, may exercise such rights as it may have at law or as set forth in the lease or encumbrance. [Eff.

DEC 06 2007] (Auth: HRS §166E-6; §166E-8)
(Imp: HRS §166E-6; §166E-8)

S4-158-34 Rights of holder of security interest.

(a) Whenever any notice of breach or default is given to any party under section 4-158-33 or under the terms of any lease, license, agreement, or other instrument issued or to be issued under this chapter, a copy of the notice shall be delivered by the department to all

holders of record of any security interest in the land or interest covered by the lease, license, agreement, or other instrument whose security interest has been recorded with the department. Should the board seek to forfeit the privilege, interest, or estate created by the lease, license, agreement, or other instrument, each holder may, at its option, cure or remedy the breach or default, if the same can be cured or remedied, by the payment of money or, if such is not the case, by performing or undertaking in writing to perform all the terms, covenants, restrictions, or conditions of any lease, license, agreement, or other instrument capable of performance by the holder, as determined by the board, within the time period provided in section 4-158-33 or within such additional period as the board may allow for good cause and add the cost thereof to the mortgage debt and the lien of the mortgage. Upon failure of the holder to exercise its option, the board may:

- (1) Pay to the holder from any moneys at its disposal, including the special fund, which is made available for that purpose, the amount of the mortgage debt, together with interest and penalties, and secure an assignment of the debt and mortgage from the holder, or if ownership of the interest or estate shall then have vested in the holder by way of foreclosure or action in lieu thereof the board shall be entitled to a conveyance of the interest or estate upon payment to the holder of the amount of the mortgage debt, including interest and penalties, and all reasonable expenses incurred by the holder in connection with the foreclosure and preservation of its security interest, less appropriate credits, including income received from the privilege, interest, or estate subsequent to the foreclosure; or
- (2) If the property cannot be reasonably reassigned without loss to the department then terminate the outstanding privilege,

interest, or estate without prejudice to any other right or remedy for arrears of rent or for any preceding or other breach or default, and use its best efforts to redispense of the affected land to a qualified and responsible applicant free and clear of the mortgage and the debt thereby secured; provided that a reasonable delay by the board in instituting or prosecuting any right or remedy it may have under this section shall not operate as a waiver of the right or to deprive it of the remedy when it may still resolve the violation created by the breach or default involved.

(b) The proceeds of any disposition under subsection (a) (2) shall be applied: first, to reimburse the department for costs and expenses in connection with the disposition; second, to discharge in full any unpaid purchase price or other indebtedness owing the department in connection with the privilege, interest, or estate terminated; third, to the mortgagee to the extent of the value received by the department upon disposition which exceeds the fair market lease value of the land as previously determined by the department's appraiser; and fourth, to the owner of the privilege, interest, or estate. Nothing contained in this section shall be construed in a manner as to infringe upon or prejudice in any way the rights of a holder of record having a security interest which shall have vested prior to the effective date of a foreclosure sale, judicial or nonjudicial, or by way of assignment in lieu of foreclosure, or when the institutional lender sells or causes the sale of the lessee's interest in a lease by way of a foreclosure sale, judicial or nonjudicial. The institutional lender shall convey a copy of the sale or assignment as recorded in the bureau of conveyances. [Eff DEC 06 2007] (Auth: HRS \$166E-6; \$166E-13) (Imp: HRS \$166E-6; \$166E-13)

S4-158-35 Re-purchase right, first offer to

board; limitation on re-purchase price. (a) A lease or any interest therein, including stock of a corporation holding the lease or an interest in a partnership or association holding the lease, shall not be transferred or assigned unless the lease and improvements, or any interest therein, are first surrendered to the board, as follows:

- (1) The board may have the option to re-purchase the lease for the price paid by the current lessee, including closing costs, or the fair market value, less appreciated value, at the time of re-purchase, as determined in paragraph (3), whichever is the lower but not less than zero. For the purposes of this subsection, "price paid by the current lessee" means the consideration paid for the lease exclusive of improvements and "appreciated value" means the replacement cost for developing the leased premises. If the board does not exercise its option, the provisions of section 4-158-19(a)(4) shall apply;
- (2) Any improvements affixed to the realty, including trade fixtures and growing crops, shall be re-purchased at their fair market value;
- (3) At the time of the re-purchase, the fair market value of the lease less appreciated value and the fair market value of any improvements shall be determined by a qualified appraiser whose services shall be contracted for by the administrator; provided that should the lessee disagree with the values, the lessee may appoint the lessee's own appraiser who together with the department's appraiser shall appoint a third appraiser, and the fair market value shall be determined by arbitration as provided in chapter 658A, HRS. In this event, the lessee shall pay for the lessee's own appraiser, the department shall pay for its appraiser, and the cost of the third

appraiser shall be borne equally by the lessee and the department;

- (4) The board may re-purchase the lease and improvements with funds from the special fund or may accept a surrender of lease subject to the offer by a qualified applicant to purchase the lease and improvements, including any encumbrances, for not less than the amount to be paid therefor by the board;
- (5) Notwithstanding the conditions herein, the consideration for the applicant's purchase of the lease as provided in paragraph (4) shall not be less than the total of all encumbrances that have been approved by the board at the time of the re-purchase.

(b) This section shall not apply to a holder of record having a security interest upon foreclosure pursuant to section 4-158-34. [Eff DEC 06 2007]
(Auth: HRS §166E-6; §166E-8) (Imp: HRS §166E-6; §166E-8)

§4-158-36 Condemnation of leases. The lease shall provide that whenever a portion of the public land under lease is condemned for public purposes by the State, county, or any other governmental agency, the lease rental shall be reduced in proportion to the value of the portion of the premises condemned, and the lessee shall be entitled to receive from the condemning authority:

- (1) The value of growing crops, if any, which the lessee is not permitted to harvest; and
- (2) The proportionate value of the lessee's permanent improvements so taken in the proportion that it bears to the unexpired term of the lease; provided that the lessee may remove and relocate the lessee's improvements to the remainder of the lands occupied by the lessee.

The foregoing rights of the lessee shall not be exclusive of any other to which the lessee may be

entitled by law. Where the portion so taken renders the remainder unsuitable for the uses for which the land was leased, the lessee shall have the option to surrender the lease and be discharged for any further liability therefor; provided that the lessee may remove the lessee's permanent improvements within such reasonable period allowed by the department. [Eff

DEC 06 2007] (Auth: HRS §166E-6; §166E-8)
(Imp: HRS §§166E-6, 171-38; §166E-8)

§4-158-37 Taxes. Any provision to the contrary notwithstanding, leases and licenses issued by the board and permits issued to permittees, who are holdover lessees or licensees, shall be subject to real property taxes which shall be assessed on a pro rata basis against the lessee, licensee, or the permittee and the lessee's, licensee's, or permittee's successor in interest.

Upon notice from the appropriate tax agency, the administrator shall notify the lessee, licensee, or permittee and each holder of record having a security interest as provided in section 4-158-34 of any default in the payment of the taxes and upon failure to remedy the default within sixty days after receipt of notice of default, the board may cancel and terminate the lease, license, or permit without prejudice to any other remedies the department may have against the lessee, licensee, or permittee. [Eff

DEC 06 2007] (Auth: HRS §166E-6; §166E-8)
(Imp: HRS §§166E-6; §166E-8)

§4-158-38 Lease forfeiture. (a) Upon the violation of any condition or term of any lease to be observed or performed by the lessee, the board shall, after the notice of default as provided in section 4-158-33, and subject to the rights of each holder of record having a security interest as provided in section 4-158-34, terminate the lease or tenancy and take possession of the leased land, without demand or previous entry and without legal process, together

with all improvements placed thereon and shall retain all rent paid in advance as damages for the violations.

(b) The board shall have the right to withdraw the demised premises, or any portion thereof, at any time during the term of this lease with reasonable notice and without compensation, except as provided herein, for public uses or purposes, for constructing new roads or extensions, or changes in line or grade of existing roads, for rights-of-way and easements of all kinds, and shall be subject to the right of the board to remove soil, rock, or gravel as may be necessary for the construction of roads and rights-of-way within or without the demised premises; provided that upon the withdrawal or taking which causes any portion of the land originally demised to become unusable for the specific use or uses for which it was demised, the base annual rental shall be reduced in proportion to the value of the land withdrawn or made unusable. If any permanent improvement constructed upon the demised premises by the lessee is destroyed or made unusable in the process of the withdrawal or taking, the proportionate value thereof shall be paid based upon the unexpired term of this lease; provided that no withdrawal or taking shall be had as to those portions of the land which are then under cultivation with crops until the crops are harvested, unless the board pays to the lessee the value of the crops; and provided further that upon withdrawal the lessee shall be compensated for the present value of all permanent improvements in place at the time of withdrawal that were legally constructed upon the demised premises by the lessee of the leased land being withdrawn. For tree or orchard crops taken, payment shall be based on the residual value of trees taken and, if there are unharvested crops, the value of such unharvested crops. [Eff DEC 06 2007] (Auth: HRS §§166E-6, 171-39) (Imp: HRS §166E-6)

SUBCHAPTER 6

OTHER PROVISIONS

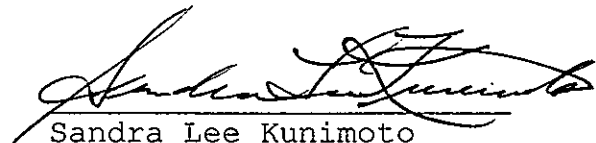
§4-158-39 Report on all dispositions. The department shall submit, as part of its annual report required by section 141-1(7), HRS, a report on all dispositions made in the preceding year, the persons to whom made, the size of each disposition, the use, the tax map key number, the base rental and any additional rental, and method of disposition. [Eff
DEC 06 2007] (Auth: HRS §166E-6) (Imp: HRS §166E-6)

§4-158-40 Severability. This chapter shall be deemed to be severable, and in the event a section of this chapter is determined to be invalid, such invalidity shall affect that section only and not invalidate this chapter in its entirety. [Eff
DEC 06 2007] (Auth: HRS §91-2) (Imp: HRS §91-2)

DEPARTMENT OF AGRICULTURE

Chapter 4-158, Hawaii Administrative Rules, on the Summary Page dated October 23, 2007, was adopted on October 23, 2007, following public hearings held on October 1, 2, 3, and 4, 2007, after public notices were given in the **Honolulu Star-Bulletin, Hawaii Tribune-Herald, West Hawaii Today, The Maui News, and The Garden Island** on August 30, 2007.

The adoption of chapter 4-158 shall take effect ten days after filing with the Office of the Lieutenant Governor.



Sandra Lee Kunimoto
Chairperson
Board of Agriculture

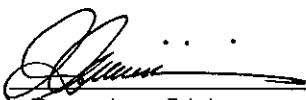
APPROVED:



Linda Lingle
Governor
State of Hawaii

Dated: **NOV 23 2007**

APPROVED AS TO FORM:



Deputy Attorney General
Deputy Attorney General

Filed

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LIEUTENANT GOVERNOR'S
OFFICE

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