

DEPARTMENT OF AGRICULTURE

Amendment and Compilation of Chapter 4-153
Hawaii Administrative Rules

July 23, 1998

SUMMARY

1. §§4-153-1 to 4-153-4 are amended.
2. §4-153-8 is amended.
3. §§4-153-11 to 4-153-13 are amended.
4. §§4-153-16 to 4-153-18 are amended.
5. §4-153-29 is amended.
6. Chapter 153 is compiled.

HAWAII ADMINISTRATIVE RULES

TITLE 4

DEPARTMENT OF AGRICULTURE

SUBTITLE 8

DIVISION OF AGRICULTURAL RESOURCE MANAGEMENT

CHAPTER 153

AGRICULTURAL PARK PROGRAM RULES

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Historical Note: Chapter 4-153, Hawaii Administrative Rules, is based substantially upon Chapter 4-2, Hawaii Administrative Rules, (Department of Agriculture) (Eff 1/28/88; R 3/6/92]

SUBCHAPTER 1

ADMINISTRATION

§4-153-1 Definitions. As used in this chapter:

"Abandoned property" means any and all property 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 or aquacultural activity" has the same meaning as defined in section 166-2, Hawaii Revised Statutes.

"Agricultural park" has the same meaning as defined in section 166-2, Hawaii Revised Statutes.

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

"Applicant" means any person, association, partnership, or corporation, other than a holder of record having a security interest, which acts to acquire or obtain an agricultural park lease or any interest therein, including a sublease, or an interest in an association or a partnership which holds the

lease or stock in a corporation which holds the lease.

"Board" means the board of agriculture.

"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; or
- (2) Has not less than 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.

The term "bona fide farmer" includes agricultural cooperatives organized under chapter 421, Hawaii Revised Statutes, 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 the stock issued by the corporation is owned by persons who qualify individually as bona fide farmers. For the purposes of this chapter, "bona fide farmer" also includes "qualified aquaculturalist" as defined in section 219-2, Hawaii Revised Statutes.

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

"Corporate successor" means a solely-owned corporation which, through assignment of lease, succeeds an agricultural park lessee 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.

"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.

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

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

"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 4-153-35 and who has filed a copy of the interest with the department and the bureau of conveyances of the State.

"New farmer" means a person who is:

- (1) A college or community college graduate in agriculture or aquaculture 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.

"Person" means an individual, or partnership, corporation, association, or agricultural cooperative organized under chapter 421, Hawaii Revised Statutes, except as otherwise defined in this chapter.

"Public purpose", as used in this chapter, unless the context clearly indicates otherwise, means all public uses, including but not limited to the straightening of boundaries of public lands, acquisition of access to landlocked public lands, the consolidation of holdings of public lands and the development of agricultural parks and residential, commercial, industrial, or resort projects on public lands.

"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.

"State" means the State of Hawaii. [Eff 3/6/92; am and comp] (Auth: HRS §166-9) (Imp: HRS §§166-2, 166-9)

§4-153-2 Administration of agricultural park program. Responsibility for the administration of the agricultural park program shall be placed within the agricultural resource management division, under the direction of the administrator. [Eff 3/6/92; am and comp] (Auth: HRS §166-3) (Imp: HRS §166-3)

- §4-153-3 Powers. (a) The administrator shall have the power to:
- (1) Accept and process applications for agricultural park leases;
 - (2) Disapprove agricultural park lease applications when the prospective applicant is unable to meet the requirements of the agricultural park program or the criteria for the particular lease disposition;
 - (3) Recommend for board action the disposition of agricultural park lands to qualified applicants;
 - (4) Collect rents, assessments, and other fees and charges;
 - (5) Recommend for board action cancellation of leases where due notice of breach or default has been provided;
 - (6) Issue non-renewable dispositions granting easements, permits and rights of entry for a period not in excess of fourteen days for use consistent with the purposes of this chapter;
 - (7) Administer and manage the agricultural park special fund; and
 - (8) Recommend for board action lease rentals as provided in section 4-153-18.
- (b) The board shall have the power to:
- (1) Approve of plans to develop agricultural parks;
 - (2) Establish, operate, maintain, and improve agricultural park infrastructure;
 - (3) Award and cancel leases, issue revocable permits, easements, and rights of entry covering agricultural park lands for use consistent with agricultural park purposes;
 - (4) Approve the transfer, assignment, or sublease of an agricultural park lease or any interest therein, including the transfer

- of stock of a corporation holding the lease, or the interest in an association or partnership holding the lease. To the extent the board reserves such a right in the lease, upon the transfer, assignment, or sublease of an agricultural park 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;
- (5) Establish additional criteria for the selection of lessees 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 lease, the criteria to be included in the public notice of lease disposition;
 - (6) Establish conditions of award which must be met to the satisfaction of the administrator prior to lease execution, the conditions to be included in the public notice of lease disposition;
 - (7) Establish reasonable fees for services rendered by the division and for preparation of documents to be issued;
 - (8) Waive rental payments due to natural catastrophes and other external factors beyond the lessee's control and determine the period for the waiver;
 - (9) Delegate to the chairperson or the administrator, subject to the board's control and responsibility, such powers and duties as may be lawful or proper for the performance of functions vested in the board; and
 - (10) Establish lease rentals as provided in section 4-153-18. [Eff 3/6/92; am and comp] (Auth: HRS §166-9) (Imp: HRS §§166-3, 166-5, 166-6, 166-7, 166-10, 171-11)

§4-153-4 Right to inspect. The administrator or the administrator's authorized representative has the right to inspect, at reasonable hours, the leased

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property in an agricultural park, and the improvements, crops, livestock, equipment, chattels, books, and records of the lessee in connection with the administration of the lease. [Eff 3/6/92; am and comp] (Auth: HRS §166-9) (Imp: HRS §166-6)

§4-153-5 Application for leases. (a) Unless otherwise provided in a public notice of disposition of agricultural park lands, the applicant shall file an application with the department at the following location:

Agricultural Resource Management Division
State Department of Agriculture
1428 South King Street
Honolulu, Hawaii 96814
Mailing address: P. O. Box 22159
Honolulu, HI 96823-2159

(b) The applicant shall file an application on forms furnished by the department, together with any supporting documentation required to verify qualification. Financial statements in a format acceptable to the department are required as part of the application.

(c) The department shall require a completed application for review and shall notify the applicant of a deficient application. If the applicant fails to provide the necessary documentation or correction within ten (10) days of notification of deficiency, the application shall be deemed incomplete and disapproved.

(d) Each applicant shall authorize the department in writing to verify the applicant's qualifications and any other information submitted. [Eff 3/6/92; comp] (Auth: HRS §166-9) (Imp: HRS §166-7)

§4-153-6 Fees and charges. (a) Fees for the processing of public documents and records shall be charged as follows:

- (1) Lease, Assignment of Lease, Sublease, Consent to Mortgage, Collateral Agreement, and all other documents: \$30.00/document
- (2) Copy of public document: \$.50/page

(b) 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 transaction.

(c) 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 share shall be determined by the administrator. [Eff 3/6/92; comp] (Auth: HRS §166-9) (Imp: HRS §166-6)

§4-153-7 Report on all dispositions. The department shall submit, as part of its annual report required by section 141-1(7), Hawaii Revised Statutes, 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 3/6/92; comp] (Auth: HRS §166-9) (Imp: HRS §141-1(7))

SUBCHAPTER 2

PLANNING AND DEVELOPMENT

§4-153-8 Planning. (a) The division from time to time shall:

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

(b) Prior to the development of an agricultural park project, and subject to section 166-4, Hawaii Revised Statutes, the division 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, Hawaii Administrative Rules (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 agricultural park improvements are to be developed exempt from county zoning and subdivision requirements pursuant to section 166-4, Hawaii Revised Statutes, the project plans and specifications shall include detailed information on the method and costs

of maintaining the exempt improvements. [Eff 3/6/92; am and comp] (Auth: HRS §166-9) (Imp: HRS §§166-3, 166-4, 166-9)

§4-153-9 Development. The division shall cause agricultural park infrastructure improvements approved by the board to be established, improved, operated, and maintained. [Eff 3/6/92; comp] (Auth: HRS §166-9) (Imp: HRS §§166-3, 166-4, 166-9)

SUBCHAPTER 3

JOINT VENTURES

§4-153-10 Development of joint ventures. (a) As provided by section 166-5, Hawaii Revised Statutes, the board may enter into a partnership agreement with a federal agency, a county, or a private party for development and subdivision of an agricultural park, which may include irrigation systems.

(b) "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. [Eff 3/6/92; comp] (Auth: HRS §§166-5, 166-9) (Imp: HRS §§141-1, 166-3, 166-4, 166-5)

§4-153-11 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 4-153-18;
- (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 the partner; 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 3/6/92; am and comp] (Auth: HRS §§166-5, 166-9) (Imp: HRS §§166-3, 166-4, 166-5)

§4-153-12 Terms of joint venture. Any partnership agreement for a joint venture shall be approved by the board and shall be in conformity with section 166-5, Hawaii Revised Statutes. 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 166-4, Hawaii Revised Statutes, 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 on-site 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 off-site 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 he 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.
- (9) Other terms and conditions set by the board.
 [Eff 3/6/92; am and comp]
 (Auth: HRS §§166-5, 166-9) (Imp: HRS §§166-3, 166-4, 166-5)

SUBCHAPTER 4

ELIGIBILITY REQUIREMENTS

§4-153-13 General eligibility requirements for agricultural park lands. (a) Any person shall be eligible to apply for an agricultural park lease if the person:

- (1) 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
- (2) Is a bona fide farmer or new farmer as defined in this chapter;

(b) In the case of agricultural cooperatives, associations, partnerships and corporations, the residence requirement must be met by seventy-five per cent of the members, partners or stockholders who are bona fide farmers, new farmers or qualified aquaculturalists.

(c) No person shall be eligible to lease agricultural park 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.

(d) No person shall be eligible to lease agricultural park land who is in arrears in the payment of taxes or other obligations to the State or any of its counties. [Eff 3/6/92; am and comp]
(Auth: HRS §§166-7, 166-9) (Imp: HRS §§166-7, 166-9)

§4-153-14 Permanent register for agricultural park lands. The administrator shall establish and maintain a register in which all persons desiring to acquire agricultural park lands may register. The administrator shall determine the information required from each registrant and may establish a criteria for registration. [Eff 3/6/92; comp]
(Auth: HRS §166-9) (Imp: HRS §§166-3, 166-9)

SUBCHAPTER 5

QUALIFICATIONS OF APPLICANTS

§4-153-15 All applicants. (a) In addition to satisfying the general eligibility requirements of section 4-153-13, all agricultural park applicants shall qualify as bona fide farmers or new farmers, as defined, and shall demonstrate ability to perform the lease terms and shall provide the following information, at a minimum, to the department:

- (1) A resume with periods of farming experience identified by month and year;
- (2) A preliminary plan of utilization and development of agricultural park 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.
- (b) Additionally, applicants which are partnerships, corporations, associations 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, directors and officers, and members, with periods of farming experience identified by months and years.
- (c) Whenever the board establishes additional criteria for the selection of lessees, pursuant to section 4-153-3(b)(5), in support of qualification, each applicant shall provide documentation to the satisfaction of the department. [Eff 3/6/92; comp] (Auth: HRS §§166-7, 166-9) (Imp: HRS §§166-7, 166-9)

SUBCHAPTER 6

PREFERENCE RIGHTS

§4-153-16 Preference right. Any person otherwise qualified to take an agricultural park lot shall have preference in any disposition of agricultural park 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 ten years following the application date for an agricultural park lot;
 - (4) Operates a farm located in a zoning district where agricultural use is a nonconforming use; or
 - (5) Is a new farmer as defined in section 4-153-1. [Eff 3/6/92; am and comp] (Auth: HRS §§166-8, 166-9) (Imp: HRS §166-8)

§4-153-17 Proof of preference status. (a) 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.

(b) Willful sale or surrender of a farm shall disqualify an applicant as a displaced farmer. [Eff 3/6/92; am and comp] (Auth: HRS §§166-8, 166-9) (Imp: HRS §166-8)

SUBCHAPTER 7

APPRAISALS AND SETTING OF LEASE RENTS

§4-153-18 Appraisals and setting of lease rents.
(a) Public auction. The appraisal of agricultural park 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 of agricultural park 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 an agricultural park lease, the base rental and additional rental for any ensuing period shall be the rental value at the time of reopening determined in accordance with generally accepted appraisal methods. 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 658, Hawaii Revised Statutes. 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.

Automatic escalation of the appraised rental at reopening may be permitted. The increase shall be

based on the "Consumer Price Index for all Urban Consumers, U.S. City Average", published monthly by the Bureau of Labor Statistics of the U.S. Department of Labor, labeled as "CPI". The calculation of the escalated value shall be based on a base index and a reopening period index, both of which are arithmetic averages over a set period of time. The quotient of these two indexes will set the rate of increase, which is then multiplied by the existing rental, giving the rental for the ensuing period.

In the event publication of the CPI is discontinued or not available, any comparable statistics, equivalent to the CPI, published by an agency of the United States or by a responsible financial periodical of recognized authority, shall be used to calculate the indexes as described in the preceding paragraph.

The CPI computation shall be conclusive and binding, but shall not preclude any adjustment in the event of a published amendment to the CPI or an error in the computation; provided the lessee, within thirty days after receipt of notice, shall notify the lessor of the claimed error or dispute therein.

(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 4-153, 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 agricultural park system for parks 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 an agricultural park lot's unproductive acreage, e.g., drainageways, wastelands, restricted easements, common usage, and uncontributory land areas, for those agricultural park 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 plant must reach a certain maturity before bearing fruit, e.g., macadamia nut trees and 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.

- (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 3/6/92; am and comp] (Auth: HRS §§166-6, 166-9) (Imp: HRS §166-6)

SUBCHAPTER 8

DISPOSITION OF LEASES

§4-153-19 Negotiation. (a) A lease of agricultural park land may be disposed of through negotiation upon a finding by the board that the public interest demands it.

(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 4-153-22(b), of the department's intention to lease agricultural park land 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 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 4-153-22; 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 4-153-22, the board may renegotiate leases as provided in section 4-153-3. [Eff 3/6/92; comp] (Auth: HRS §§166-6, 166-9) (Imp: HRS §166-6)

§4-153-20 Drawing of lot. When the board determines that agricultural park lands are to be leased by drawing, the administrator shall give public

notice inviting applications for the drawing as provided in section 4-153-22, 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 4-153-22. 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 3/6/92; comp]
(Auth: HRS §§166-6, 166-9) (Imp: HRS §166-6)

§4-153-21 Public auction. (a) Disposition of agricultural park lands may be made at public auction after public notice as provided in section 4-153-22. 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 an agricultural park lease, a bidder shall qualify as a bona fide farmer or new farmer as defined in this chapter. [Eff 3/6/92; comp] (Auth: HRS §§166-6, 166-9) (Imp: HRS §166-6)

§4-153-22 Notices. (a) 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; and

- (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 4-153-6.

(b) Negotiation. Notice of a proposed disposition by negotiation shall be published at least once in each of three successive weeks in a newspaper of general circulation in the State and in addition in a newspaper of general circulation in the appropriate county. The notice shall invite proposals and state in general terms the size, location, and minimum rental of lots to be leased, the terms of lease, and the last date on which application shall be received by the department, which date shall be not less than thirty days after the last date of publication of the notice.

(c) Drawings. Whenever a disposition by drawing by lots is proposed, notice inviting applications to participate in the drawing shall be published once a week for three successive weeks in a newspaper of general circulation published in the State and, in addition, in a newspaper of general circulation in the appropriate county. The notice shall contain:

- (1) The qualifications required of applicants;
- (2) A general description of the land, including the 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. In addition to the notice to each applicant, the administrator shall publish the notice of drawing at least three times within a period of ten days in a newspaper of general circulation in the State and, in addition, in a newspaper of general circulation in the appropriate county, each publication to be not more often than once in two successive days. 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.

(d) Auctions. Notice of any proposed disposition by public auction shall be published at least once in each of three successive weeks in a newspaper of general circulation in the State and, in addition, in a newspaper of general circulation in the appropriate county. The last publication shall be not less than ten days before the date of the auction. Notice of the auction shall contain the following:

- (1) Time and place of the auction;
- (2) General description of the land, including the location and tax map key;
- (3) Specific use for which the disposition is intended;
- (4) Upset rental to be charged and basis for additional rent, if any; and
- (5) The date by which applications for qualification shall be filed.

The maps showing the metes and bounds description and the classification of the land shall be kept in the office of the department and shall be open for inspection at all reasonable hours. [Eff 3/6/92; comp] (Auth: HRS §§166-6, 166-9, 171-16) (Imp: HRS §166-6)

§4-153-23 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 4-153-16; 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 4-153-16(1) through 4-153-16(5).
- (2) Within the Group I preference categories and within Group II, by establishing subgroups of priority based on qualification for agricultural park 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 non-restrictive 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 3/6/92; comp] (Auth: HRS §§166-6, 166-9) (Imp: HRS §166-6)

SUBCHAPTER 9

LEASE PROVISIONS

§4-153-24 Lease provisions; generally. Every agricultural park 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;
- (3) Restrictions against alienation as set forth in section 4-153-33;
- (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 agricultural park lands and to effectuate the purposes of the State Constitution and of chapter 166, Hawaii Revised Statutes. [Eff 3/6/92; comp] (Auth: HRS §§166-6, 166-9) (Imp: HRS §§166-6, 166-9)

§4-153-25 Consent to mortgage. (a) Whenever under this chapter or under any agricultural park lease issued by the board, consent of the State is required as a condition precedent to the mortgage of, or the creation of a security interest in public land, the chairperson may, upon due application, grant the consent, and if the mortgage or security interest is to a recognized lending institution authorized to do business in the State of Hawaii, the consent shall extend to foreclosure and sale at the foreclosure to any purchaser, provided that the purchaser is qualified under this chapter to lease and hold the land or any interest therein.

(b) The holder of record having a security interest includes any insurer or guarantor of the obligation or condition of the mortgage, including any federal mortgage lending agency and its respective successors and assigns or any lending institution authorized to do business in the State of Hawaii; 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 federal mortgage lending agency. [Eff 3/6/92; comp] (Auth: HRS §§166-6, 166-9) (Imp: HRS §§166-6, 166-9)

§4-153-26 Irrigation projects. In any agricultural park lease 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 the project, the assessments constituting 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 4-153-34. [Eff 3/6/92; comp] (Auth: HRS §§166-6, 166-9) (Imp: HRS §§166-6, 166-9, 167-19)

§4-153-27 Taxes. Agricultural park leases shall be subject to real property taxes. Upon notice by the appropriate agency, the administrator shall notify the lessee and each holder of record having a security interest as provided in section 4-153-35 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 without prejudice to any other remedies the State may have against the lessee. [Eff 3/6/92; comp] (Auth: HRS §§166-6, 166-9) (Imp: HRS §§166-6, 166-9)

§4-153-28 Condemnation of leases. The agricultural park lease shall provide that whenever a portion of the public land under lease is condemned for public purposes by the State, a county, or any other governmental agency, the base rental shall be reduced in proportion to the value of the portion of the premises condemned. The lessee shall be entitled to receive from the condemning authority:

- (1) The value of growing crops, 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, in the alternative, 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 from any further liability therefor; provided that the lessee may remove the lessee's permanent improvements within such reasonable period allowed by the State. [Eff 3/6/92;

comp] (Auth: HRS §§166-6, 166-9)
 (Imp: HRS §§166-6, 166-9, 171-38)

§4-153-29 Re-purchase right, first offer to board; limitation on re-purchase price. An agricultural park lease or any interest therein, including stock of a corporation holding the lease or an interest in a partnership or association holding the lease, shall not be transferred or assigned unless the lease and improvements, or any interest therein, are first surrendered to the board, as follows:

- (1) The board shall have the option to re-purchase the lease for the price paid by the current lessee, including closing costs, or the fair market value, less appreciated value, at the time of re-purchase, as determined in paragraph (3), whichever is the lower but not less than zero. For the purposes of this 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 4-153-33(a)(6) 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 department; 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 658, Hawaii Revised Statutes. 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 agricultural park 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; provided that the purchase by a qualified applicant shall be subject to sections 4-153-19 and 4-153-22.
- (5) Notwithstanding the conditions herein, the consideration for the applicant's purchase of the lease as provided in paragraph (4) above shall not be less than the total of all encumbrances that have been approved by the State at the time of the re-purchase.
- (6) This section shall not apply to a holder of record having a security interest upon foreclosure pursuant to section 4-153-35.
[Eff 3/6/92; am and comp _____]
(Auth: HRS §§166-6, 166-9) (Imp: HRS §§166-6, 166-9)

§4-153-30 Disposition of abandoned or seized property. The department may sell, donate, or otherwise dispose of property abandoned or seized on land managed by the department upon compliance with the requirements of section 171-31.5, Hawaii Revised Statutes. [Eff 3/6/92; comp _____] (Auth: HRS §166-9)
(Imp: HRS §171-31.5)

§4-153-31 Covenants against discrimination. The board shall provide in every agricultural park lease 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 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 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 3/6/92; comp] (Auth: HRS §§166-6, 166-9) (Imp: HRS §§166-6, 171-64)

§4-153-32 Additional terms and conditions. (a) The agricultural park 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 department 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 an agricultural park 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 agricultural park land only for the purposes specified in the lease, in accordance with a plan of development and utilization which, in the case of original lessees of agricultural park lots, 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 agricultural park 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) Mineral and metallic rights and surface and ground water shall be reserved to the State.

(g) The State shall retain the rights to all prehistoric and historic remains found on agricultural park lands. [Eff 3/6/92; comp] (Auth: HRS §§166-6, 166-9) (Imp: HRS §§166-6, 166-9)

SUBCHAPTER 10

LEASE RESTRICTIONS

§4-153-33 Lease restrictions; generally. (a) Except as otherwise provided, the following restrictions shall apply to all agricultural park leases:

- (1) Options for renewal of terms shall be prohibited;
- (2) No lease shall be for a term of less than fifteen years nor more than fifty-five

years, including any extension granted for mortgage lending or guarantee purposes;

- (3) No lease shall be made for any land under a lease which has more than two years to run;
- (4) 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 any of its political subdivisions; 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;
- (5) Any transferee, assignee, or sublessee of an agricultural park 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 4-153-29;
- (6) With the approval of the board, and subject to the provisions of section 4-153-29, 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 lease contains the principal residence of the lessee;
 - (B) The lessee becomes mentally or physically disabled;
 - (C) Extreme economic hardship is demonstrated to the satisfaction of the board; or
 - (D) The assignment is to the corporate successor of the lessee; provided that

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 4-153-18(d);

- (7) The lessee shall not sublet the whole or any part of the demised premises without the approval of the board; provided that prior to the approval, the board shall have the right to review and approve the rent to be charged to the sublessee; provided further that where the lessee is required to pay rent based on a percentage of its gross receipts, the rents paid to the lessee by the sublessee shall be included as part of the lessee's gross receipts; provided further that the board shall have the right to review and, if necessary, revise the rent and percentage rental, if applicable, of the demised premises based upon the rental rate charged to the sublessee; and provided further that the rent and percentage rental may not be revised downward;
- (8) 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 extend the term of the lease to qualify the lease for mortgage lending or guaranty

purposes with any federal mortgage lending agency and its respective successors and assigns or to any lending institution authorized to do business in the State; provided further 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 fifty-five years;
- (4) The board may increase the rent and adjust the rental period; and
- (5) 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.

(c) The board at any time during the term of any agricultural park lease and when justified by sound agricultural practices and economic or other circumstances, may permit an alternative agricultural or aquacultural use or uses for any portion or portions of the land demised under the lease. As a condition to permitting alternative uses, the board may require such other modifications, including rental adjustments or changes in the lease, as may be necessary to effect or accommodate the alternative use or uses. An alternative use or uses may be allowed by the board upon:

- (1) The application of the lessee;
- (2) Consent of each holder of record having a security interest in the leasehold; and
- (3) A finding by the board that the alternative use or uses are in the public interest.

(d) The land leased under this chapter, or any portion thereof, shall be subject to withdrawal by the State at any time during the term of the lease with reasonable notice and without compensation, except as provided in this section, 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 State 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 upon the 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 rent shall be reduced in proportion to the value of the land withdrawn or made unusable. If any permanent improvement constructed upon the land 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 the 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 State pays to the lessee the value of the crops; and provided further that upon withdrawal any 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 land by the lessee of the leased land being withdrawn. In the case of tree crops, the State shall pay to the lessee the residual value of the trees taken and, if there are unharvested crops, the value of the crops also. [Eff 3/6/92; comp _____] (Auth: HRS §§166-6, 166-9) (Imp: HRS §§166-6, 166-9)

SUBCHAPTER 11

BREACH OR DEFAULT

§4-153-34 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 agricultural park lease issued under this chapter, the board 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, 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, including the payment of additional rents due, pursuant to the lease

issued under this chapter, the written notice shall include a demand upon the party to cure the breach within 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 in this section or within such additional period as the board may allow for good cause, the board may, subject to section 4-153-35, exercise the rights it may have at law or as set forth in the lease. [Eff 3/6/92; comp]
 (Auth: HRS §§166-6, 166-9) (Imp: HRS §§166-6, 166-9, 171-20)

§4-153-35 Rights of holder of security interest.

(a) Whenever any notice of breach or default is given to any party under section 4-153-34, or under the terms of any lease or other instrument issued under this chapter, a copy of the notice shall be delivered by the administrator to all holders of record having a security interest in any land or interest covered by an agricultural park lease or other instrument whose security interest has been recorded with the department and the bureau of conveyances of the State. Should the board seek to forfeit the privilege, interest, or estate created by the lease, 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 the lease capable of performance by the holder, as determined by the board, within the time period provided in section 4-153-34 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 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 State, 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 person 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 the delay serves to assist the board in resolving the problems created by the breach or default involved.

(b) The proceeds of any redispense effected under this section shall be applied: first, to reimburse the department for costs and expenses in connection with the redispense; second, to discharge in full any unpaid lease rental or other indebtedness owing the State in connection with the privilege, interest, or estate terminated; and the balance, if any, to the owner of the privilege, interest, or estate. Nothing 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 this section.

[Eff 3/6/92; comp] (Auth: HRS §§166-6, 166-9) (Imp: HRS §166-6)

§4-153-36 Leases; forfeiture. Upon the violation of any condition or term of any agricultural park lease to be observed or performed by the lessee,

including but not limited to failure of a prospective lessee to execute the lease within thirty days after presentation thereof, the board, after due notice of default as provided in section 4-153-34, and subject to the rights of each holder of record having a security interest as provided in section 4-153-35, shall terminate the lease or tenancy and take possession of the leased land together with all improvements placed thereon, without demand or previous entry and without legal process, and shall retain all rent paid in advance as damages for the violations. The retention of advance rent as liquidated damages shall be in addition to any other rights and remedies available to the department under section 4-153-34. [Eff 3/6/92; comp] (Auth: HRS §§166-6, 166-9) (Imp: HRS §§166-6, 166-9)

SUBCHAPTER 12

SEVERABILITY

§4-153-37 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 3/6/92; comp] (Auth: HRS §91-2) (Imp: HRS §91-2)

Amendments to and compilation of chapter 153, title 4, Hawaii Administrative Rules, on the Summary Page dated July 23, 1998 were adopted on July 23, 1998, following public hearings held on June 15, 1998, June 16, 1998, June 17, 1998, and June 18, 1998, after public notices were given in the Honolulu Star-Bulletin, Hawaii Tribune-Herald, West Hawaii Today, The Garden Island, and The Molokai Dispatch on May 14, 1998.

These amendments to and compilation of chapter 4-153, Hawaii Administrative Rules shall take effect ten days after filing with the Office of the Lieutenant Governor.

JAMES J. NAKATANI
Chairperson,
Board of Agriculture

APPROVED:

BENJAMIN J. CAYETANO
Governor
State of Hawaii

Dated: _____

Filed

APPROVED AS TO FORM:

Deputy Attorney General