

**MEMORANDUM OF UNDERSTANDING**  
Ala Wai Small Boat Harbor Parking Facility

This Memorandum of Understanding (“MOU”) is made and entered into as of the 31<sup>st</sup> day of JANUARY, 2015, by and between DIAMOND PARKING SERVICES LLC (hereinafter “Diamond”) and the STATE OF HAWAII, DEPARTMENT OF LAND AND NATURAL RESOURCES (hereinafter “the State”), to memorialize their understanding regarding Diamond and the State’s duties and obligations under the Concession Contract for the Ala Wai Small Boat Harbor parking facility (hereinafter the “AWSBH”).

**RECITALS**

1. Whereas, on January 25, 2010, Diamond and the State entered into a contract for the operation of a parking facility concession by Diamond at the AWSBH for a period of five (5) years commencing on February 1, 2010 and ending on January 31, 2015 (hereinafter “Concession Contract”), with one option to extend the contract for another five (5) years;

2. Whereas, both Diamond and the State have agreed to exercise the option to extend the Concession Contract for another five (5) years;

3. Whereas, both Diamond and the State agree that certain provisions in the Concession Contract are ambiguous and can be more plainly stated;

4. Whereas, in light of Diamond and the State’s intent to extend the Concession Contract, Diamond and the State agree that it is important to clarify the parties’ duties and obligations under the Concession Contract;

5. Whereas, paragraph 7.2 of the Concession Contract provides that “[t]he Parking Concession Contract shall not be varied in its terms or conditions *except* by an instrument in writing executed subsequently hereto by both parties; and

6. Whereas, consistent with paragraph 7.2 of the Concession Contract, this Memorandum of Understanding shall clarify certain terms and conditions set forth in the Concession Contract as described more fully below.

**TERMS**

NOW, THEREFORE, in consideration of the parties’ option to extend the term of the Concession Contract, the mutual promises and obligations contained herein, and intending to be fully and legally bound, Diamond and the State each hereby agree as follows:

**I. DIAMOND'S ENFORCEMENT OBLIGATIONS.**

**a. Diamond Shall Monitor AWSBH for Compliance With The Posted Terms And Conditions.**

Paragraph 2.12 of the Concession Contract provides that:

*The Concessionaire shall observe all parking rules within the Harbor.*

*The Concessionaire shall work with DOBOR and DOCARE for the enforcement of vehicle parking rules and other applicable laws by DOBOR and DOCARE, including the towing and removal of vehicles.*

This MOU clarifies Paragraph 2.12 and confirms that the phrase "Concessionaire shall observe all parking rules within the harbor" means that Diamond shall monitor the parking facility for compliance with the posted Terms and Conditions for parking, including the payment of parking rates as approved under Hawaii Administrative Rules, Chapter 13-233. This MOU further confirms that pursuant to Paragraph 2.12, Diamond shall perform the following tasks:

- 1) Monitor the parking facility and report suspicious activities to DOBOR, DOCARE, and the Honolulu Police Department as appropriate;
- 2) Collect parking fees;<sup>1</sup>
- 3) Issue private parking notices to vehicles parked in violation of the posted Terms and Conditions for parking. Diamond shall take reasonable efforts to issue private parking notices that comport with applicable law; and
- 4) Provide DOBOR, DOCARE, and HPD with a list of license plate numbers for habitual violators for informational purposes.

**b. Diamond Is Not A Law Enforcement Officer.**

Paragraph 7.1 of the Concession Contract provides that:

*Concessionaire is deemed to be an Independent Contractor and not the agent, employee, partner or joint venture of DLNR. Services performed under the Parking Concession Contract shall not constitute nor be construed as employment with DLNR. . . .*

This MOU confirms that the State has not deputized or authorized Diamond, its employees, and/or its agents to act as law enforcement officers at the AWSBH. All law enforcement powers

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<sup>1</sup> Diamond shall pay the State its share of the collected revenue as set forth in the Concession Contract.

and duties at the AWSBH remain with the State, its enforcement agencies, and the Honolulu Police Department.

**c. Private Parking Notices.**

Diamond may issue a private parking notice to any vehicle that has violated posted Terms and Conditions for parking at the AWSBH; has parked in excess of the time paid for; or has failed to pay. Diamond shall take reasonable efforts to issue private parking notices that comport with applicable law. Diamond shall pay the State its share of the collected revenue as set forth in the Concession Contract. The private parking notice is not a ticket or citation issued by a law enforcement officer or agency.

**2. TOWING.**

As noted above, Paragraph 2.12 of the Specifications to the Concession Contract provides that:

*The Concessionaire shall observe all parking rules within the Harbor.*

*The Concessionaire shall work with DOBOR and DOCARE for the enforcement of vehicle parking rules and other applicable laws by DOBOR and DOCARE, including the towing and removal of vehicles.*

This MOU clarifies Paragraph 2.12 of the Specifications and confirms that Diamond is not a towing company and is not responsible for initiating, ordering or performing tows at the AWSBH.

**b. Contract with Towing Company.**

This MOU further clarifies Paragraph 2.12 and confirms that the State may contract directly with a towing company to conduct tows at the AWSBH, as an independent contractor. The State's contract or revocable permit with any towing vendor shall provide that the towing vendor shall:

- 1) "In case the State or DP [aka Diamond] shall, without any fault on their part, be made a party to any litigation commenced by or against Permittee in connection with this Permit, pay all costs and expenses incurred by or imposed on the State or DP including attorneys' fees"; and
- 2) "Procure and maintain, at its own cost and expense, in full force and effect throughout the term of this Permit, comprehensive general liability insurance, or its equivalent with an insurance company or companies licensed or authorized to do business in the State of Hawaii with an AM Best rating of not less than "A-" or other comparable and equivalent industry rating, in an amount of at least \$1,000,000.00 for each occurrence and \$2,000,000.00 aggregate, and with coverage terms acceptable to the Chairperson of the Board. The policy or policies of insurance shall name the State of Hawaii and DP as

additional insured and a copy shall be filed with the DLNR. The insurance shall cover the entire Premises, including all buildings, improvements, and grounds and all roadways or sidewalks on or adjacent to the Premises in the use or control of the Permittee.”

It is Diamond’s understanding, and the State does hereby confirm, that the State’s current revocable permit with Ace Towing Service, Inc. contains these provisions.

**c. Post-Tow Hearings Shall Be Maintained By The State.**

The State shall continue to maintain a post-tow hearing process that comports with constitutional, federal, and state law.

**d. Closure of the Free Parking Area.**

Paragraph 2.11 of the Specifications to the Concession Contract provides that:

*No overnight parking will be allowed in the free public parking areas. Closure times will be from 10:30 p.m. to 4:30 a.m. The Concessionaire shall enforce this closure, although the State may allow extensions of time for the open area, or portions of, for special events.*

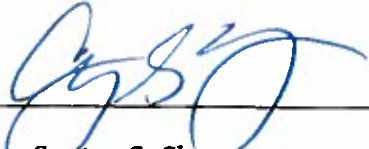
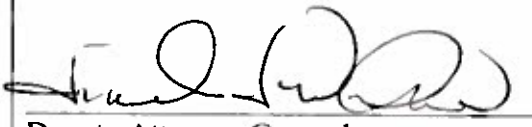
This MOU confirms that the State, with the assistance of its towing vendor, is responsible for enforcing closure of the free public parking areas. Diamond will continue to monitor the parking facility during closure times and will report suspicious activities to DOBOR, DOCARE, and HPD as appropriate. In addition, Diamond shall provide DOBOR, DOCARE, and HPD with a list of license plate numbers for habitual violators for informational purposes.

**Counterpart Execution.** The parties hereto agree that this instrument may be executed in counterparts, each of which shall be deemed an original, and said counterparts shall together constitute one and the same agreement, binding all of the parties hereto, notwithstanding all of the parties are not signatory to the original or same counterparts. For all purposes, including without limitation, recordation, filing and delivery of this instrument, duplicate unexecuted and unacknowledged pages of the counterparts may be discarded and the remaining pages assembled as one document.

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[This section intentionally blank]

IN WITNESS WHEREOF, this Memorandum of Understanding has been entered into effective as of the date and year first above written.

<p><b>DIAMOND PARKING SERVICES LLC</b></p> <p>_____</p> <p>By: _____</p> <p>Its: _____</p> <p>Dated: _____</p>	<p><b>THE STATE OF HAWAII</b></p> <p></p> <p>_____</p> <p>By: <u>Carty S. Chang</u> Chairperson of the Board of Land and Natural Resources</p> <p>Dated: _____</p> <p>APPROVED AS TO FORM:</p> <p></p> <p>_____</p> <p>Deputy Attorney General</p> <p>Dated: <u>April 22, 2015</u></p>
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IN WITNESS WHEREOF, this Memorandum of Understanding has been entered into effective as of the date and year first above written.

<p><b>DIAMOND PARKING SERVICES LLC</b></p> <p><u>Jonathan Diamond</u></p> <p>By: <u>[Signature]</u></p> <p>Its: <u>President</u></p> <p>Dated: <u>5/1/2015</u></p>	<p><b>THE STATE OF HAWAII</b></p> <p>_____</p> <p>By: _____</p> <p>Chairperson of the Board of Land and Natural Resources</p> <p>Dated: _____</p> <p>APPROVED AS TO FORM:</p> <p>_____</p> <p>Deputy Attorney General</p> <p>Dated: _____</p>
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