

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Land Division  
Honolulu, Hawaii 96813

September 28, 2018

Board of Land and Natural Resources  
State of Hawaii  
Honolulu, Hawaii

OAHU

Rejection of Offer of Quitclaim Deed to the State for Submerged Lands and  
Improvements Thereon by the Doris Duke Foundation of Islamic Art, Tax Map Key (1)  
3-1-041:005, Waikiki, Honolulu, Oahu.

BACKGROUND

At its meeting in April 27, 2018 under agenda item K-4, the Board considered Conservation District Use Application (CDUA) OA-3809 from the Doris Duke Foundation for Islamic Art (DDFIA). DDFIA proposed to modify a private boat basin located on privately owned submerged lands, being part of its property known as Shangri La. DDFIA sought to dismantle an artificial breakwater that served as the seaward boundary of the boat basin and use the boulders from the dismantled breakwater to reinforce a preexisting seawall running along the interior of the boat basin. DDFIA stated that the breakwater was a public safety hazard, as members of the public have suffered serious injuries from high risk behavior occurring there.

After testimony in opposition from members of the public, the Board denied DDFIA's application. DDFIA then requested a contested case. As a result of confusion regarding the Board's vote on the prior item, at the meeting on May 25, 2018, under agenda item K-1, the Board was asked to rescind its prior denial of the CDUA. The Board affirmed its denial of the application. At its meeting on June 22, 2018, under agenda item K-3, the Board approved the appointment and selection of a hearing officer for the contested case hearing.

On June 14, 2018, DDFIA submitted to the Department an offer to convey to the state, by quitclaim deed, the submerged lands and improvements thereon that were the subject of the CDUA. Exhibit A. In its offer, DDFIA noted that opposition to its proposal was largely focused on an alleged negative effect on public recreation. Therefore, DDFIA's offer to convey the property to the state would allow the submerged lands and breakwater to continue to be used for public recreation purposes.

DISCUSSION

Staff has grave concerns about the acquisition of the submerged lands and improvements by the

State, and strongly urges the Board to deny DDFIA's offer. The offer is a result of the Board's denial of DDFIA's application to remove a hazardous condition that has resulted in members of the public trespassing onto DDFIA's land and being seriously injured, involving DDFIA in costly litigation. Under these circumstances, for the Board to accept this offer in order to preserve a hazardous condition posing a risk to the public and impose on the State taxpayers a significant liability, would be contrary to the public interest as well as the Board's fiduciary obligations.

It is questionable as to whether there is a sufficient public purpose to support this acquisition. Staff's position is that manmade structures such as the breakwater and boat basin do not offer significant recreational value worthy of public ownership, especially when balanced against the cost, hazard and liability. From the public testimony, it appears that many of those who opposed the removal are those who reside in the immediate or nearby area. Although there was compelling testimony from people from the surrounding areas who supported the area as a recreational resource, the limited availability of parking and access also confines the use of the area as a recreational resource which could serve a wider audience. Acquisition by the Board would result in the taxpayers of the state underwriting a costly recreational opportunity which would serve only a limited amount of the general public.

Staff also has concerns about policy precedents that could be set by this acquisition. It should be noted that DDFIA sought to remove an artificial structure in the shoreline area. It is the long standing policy of the Board to preserve coastlines in as much of the natural state as possible. While some testifiers expressed concerns that the removal of the structure would increase potential hazards during periods of high surf, staff notes that would simply subject the area to natural shoreline conditions like any other coastal area in the state. During such periods, the public is urged and expected to exercise caution and avoid the area if necessary. The Department does not seek to artificially engineer or modify shoreline areas to alleviate potential natural hazards solely to provide public recreational opportunities.

As indicated by DDFIA as part of their CDUA, the current state of the property imposes significant maintenance and liability obligations upon the owner, which would be transferred to the State and taxpayers with this acquisition. Finally, staff notes that a contested case is pending. Staff presumes that the Board will consult the Department of the Attorney General regarding the request and whether the Board can act on this submittal in light of the contested case.

RECOMMENDATION:      That the Board

- 1) Reject the offer of quitclaim deed to the State for submerged lands and improvements thereon by the Doris Duke Foundation of Islamic Art.

Respectfully Submitted,



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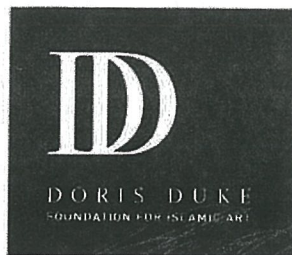
Ian Hirokawa  
Special Projects Coordinator

APPROVED FOR SUBMITTAL:

A handwritten signature in black ink, appearing to read "Robert K. Masuda", is written over a horizontal line.

Robert K. Masuda, First Deputy Director

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June 14, 2018

Suzanne Case, Chair  
And Members of the Board of Land & Natural Resources  
1151 Punchbowl Street  
Honolulu, Hawai'i 96813  
Attn: Land Division

Request for Acceptance of Offer of Quitclaim Deed to Submerged Lands and Improvements Thereon: TMK (1) 3-1-041:005 (por.)

Dear Chair Case and Members of the Board of Land and Natural Resources:

The Doris Duke Foundation for Islamic Art (DDFIA) offers to the State of Hawaii, and requests that the Board of Land and Natural Resources (Board) accept, by quitclaim deed, any and all right, title and interest that DDFIA may have in the submerged lands seaward of the certified shoreline that are a portion of TMK (1) 3-1-041:005, including the improvements thereon.

Through public testimony and discussion by Board members at the April 27, 2018 and May 25, 2018 Board meetings, and subsequent to the Board's majority decision to deny Conservation District Use Application (CDUA) OA-3809, which had been recommended for approval by the Department of Land and Natural Resources (DLNR), it is clear to DDFIA that there is an overriding desire to keep these submerged lands and the improvements thereon open and available for recreational use by the general public. This type of public recreation, and consequently, ownership of the submerged lands and maintenance of the improvements thereon, do not comport—and have never comported—with DDFIA's mission. On the other hand, there is a clear public purpose associated with control over and use of the submerged lands and improvements thereon. Therefore, the submerged lands and improvements thereon are better suited for State ownership and control rather than private ownership by DDFIA.

**Statutory Authority**

Hawai'i Revised Statutes (HRS) § 171-30(a)(1) provides for the acquisition of real property by the Board. It states:



**§ 171-30 Acquisition of real property; general.** (a) The board of land and natural resources shall have the exclusive responsibility, except as provided herein, of acquiring, including by way of dedications:

- (1) All real property or any interest therein and the improvements thereon, if any, required by the State for public purposes, including real property together with improvements, if any, in excess of that needed for such public use in cases where small remnants would otherwise be left or where other justifiable cause necessitates the acquisition to protect and preserve the contemplated improvements, or public policy demands the acquisition in connection with such improvements.

DDFIA is not seeking compensation or consideration for this quitclaim conveyance; therefore, legislative action is not required for acceptance.

That the State has a heightened interest in public recreational use of shoreline areas is evidenced in HRS Chapter 115, Public Access to Coastal and Inland Recreational Areas. Moreover, the public trust doctrine compels the State to exercise management and control over submerged lands for the promotion of the interests of the public.

#### **Background**

DDFIA's 4.921-acre Shangri La property is identified as TMK (1)3-1-041:005 ("Parcel 5"). Parcel 5 includes two submerged parcels totaling 0.608 acres as part of Land Court Application (LCA) 1226.

According to State property records, these submerged lands were conveyed by way of an Exchange Deed, dated December 8, 1938 between the Territorial Land Board of Hawai'i and Mrs. Doris Duke Cromwell. Under this Exchange Deed, Mrs. Duke Cromwell transferred a shoreline parcel of 7,817 square feet in Kailua to the Territory of Hawai'i to allow for the expansion of a municipal park. It is now part of the City and County of Honolulu's Kailua Beach Park. In addition, Mrs. Duke Cromwell established a perpetual easement for the Territory of Hawai'i within Parcel 5 consisting of a 4-foot right-of-way to serve as a pedestrian walkway along the coastline. This is currently the stone shoreline walkway along the boat basin. The submerged lands were acquired by Doris Duke for the purpose of creating a private vessel berthing basin.

Doris Duke died in 1993 and the Shangri La property, including the submerged lands, was eventually conveyed to DDFIA.

DDFIA was established in 1998. DDFIA's mission is to promote the study and understanding of Islamic arts and cultures in accordance with Doris Duke's will. DDFIA's activities include the operation of Doris Duke's former home in Honolulu—known as "Shangri La"—as a museum of Islamic art, culture and design. Shangri La has been open to the public since 2002, and currently offers guided tours, lectures, performances, and other educational and artistic programs in support of its mission. None of DDFIA's programs and activities utilize the submerged lands.

Because ownership and control of the submerged lands does not fit within DDFIA's mission and because of the public's recreational use of the shoreline area fronting Shangri La, DDFIA in 2013 approached DLNR about conveying the submerged lands to the State. DLNR held the opinion that the Exchange Deed was valid and was resistant to accepting ownership of the submerged lands because of concerns arising from the serious injuries (paraplegia and quadriplegia) that had occurred in the basin area. While DDFIA does not believe ownership of submerged lands is legal under current law, DDFIA did believe that it was in the public interest to work with DLNR to increase safety at the basin rather than challenge DLNR's interpretation that the submerged lands were privately owned. For permitting purposes only, DDFIA acknowledged DLNR's interpretation of the Exchange Deed in order to study and implement measures to improve safety at the shoreline. DDFIA's objective was to allay DLNR's concerns and overcome its resistance to accepting the submerged lands so that the agency may resume authority as it currently exercises across State land and natural resources.

DDFIA posted additional signs warning of dangers, hired security guards, and erected a 6-foot high fence along the pedestrian walkway. Unfortunately, these efforts proved ineffective in curtailing dangerous activities by the public, prompting DDFIA to seek more effective alternatives to improve safety. DDFIA spent several years and considerable resources to determine the best improvements that could be made to the area. After extensive engineering, environmental and planning studies and public consultation, the conclusion was that the design best suited for safety, access and the environment was to dismantle the Diamond Head breakwater and restore the shoreline to a more natural condition.

Some residents in the neighborhood surrounding the basin opposed the dismantling of the breakwater because of the perceived effect it would have on public recreation. Comments made by a majority of the Board members indicated that the public's emotional attachment to the basin and the continued use of the basin as a public recreational facility were of utmost interest to the Board and underlay the Board's decision to deny DDFIA's CDUA to dismantle the breakwater, despite an Environmental Assessment's "Finding of No Significant Impact" and DLNR's firm recommendation to approve the CDUA. DDFIA had acted in good faith with sincere concern about public safety. DDFIA abided by DLNR's interpretation that it would be treated as a landowner seeking permission to make safety improvements on private property. The Board decided that that these facts were to be overridden in the public interest.

### **Quitclaim Deed**

Black's Law Dictionary defines "quitclaim deed" as follows:

A deed of conveyance operating by way of release; that is, intended to pass title, interest, or claim which the grantor may have in the premises, but not professing that such title is valid, nor containing any warranty or covenants for title.

In the United States, submerged lands are deemed to be held in trust for the people of the state, i.e., public trust lands, and it is highly unusual to have a private person or entity hold title to submerged lands. In fact, a US Supreme Court case and a Hawai'i supreme court case, both dating back to the late 1800s, have held that a State's relinquishment of management and control of public trust lands to a private party are generally

invalid. *Illinois Central Railroad Co. v. State of Illinois*, 146 U.S. 387, 13 S. Ct. 110 (1892); *King v. Oahu Railway & Land Co.*, 11 Haw. 717 (1899).

Arguably, therefore, Doris Duke Cromwell did not have valid legal title to the submerged lands. Because of this cloud on Mrs. Duke Cromwell's title, DDFIA is offering a quitclaim deed to the State. By offering a quitclaim deed, a determination of actual, legitimate title to the submerged lands is avoided. For if the conveyance to Mrs. Duke Cromwell was valid, then all such right, title, and interest that has been passed down to DDFIA will be relinquished to the State. On the other hand, if the conveyance of the submerged lands was not a valid conveyance, then all right, title and interest has always been with the State and the quitclaim deed does not alter that.

#### **Request**

Based on the foregoing, DDFIA respectfully requests that the Board accept DDFIA's offer to quitclaim its right, title and interest in the submerged lands that are a portion of TMK (1)3-1-041:005, including the improvements thereon. These submerged lands are currently used solely for public recreation purposes and, as evidenced in recent Board meetings, the Board is intent on keeping this area open and available for public recreation. Accepting this offer of a quitclaim deed from DDFIA is authorized under HRS § 171-30(a)(1), comports with the State's interest in shoreline recreation areas as expressed in HRS Chapter 115, and is consistent with the State's obligations and responsibilities under the public trust doctrine.

Very truly yours,



Edward P. Henry,  
President  
DDFIA

cc: Yvonne Izu, MLF