

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

October 22, 2021

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

OAHU

Amend Prior Board Action of June 10, 2021, Item D-3, *Consent to Mortgage and Request to Issue Estoppel Certificate, General Lease No. S-5954, Diamond Head Theatre, Lessee, Kaimuki, Honolulu, Oahu, TMK (1) 3-2-030:001.*

The purpose of the amendment is to amend the subject lease by reserving the Board's right to evaluate whether any purchaser is qualified for nominal rent in accordance with Section 171-43.1, Hawaii Revised Statutes if the subject lease is sold in forfeiture.

BACKGROUND:

On June 10, 2021, Item D-3, the Board of Land and Natural Resources (Board) gave its consent to the mortgage and issuance of an estoppel certificate relating to the proposed construction of the new theater building by the tenant. A copy of the approved submittal is attached as **Exhibit 1**.¹

REMARKS:

During the review process, the Department of the Attorney General (AG) noted that the lease was amended in 2019 by allowing the tenant to obtain a mortgage of the lease, subject to prior approval from the Board.

Recommendation 1.C of the 2021 approval allows the Board to reserve its right to evaluate whether the purchaser is qualified for nominal rent in accordance with Section 171-43.1, Hawaii Revised Statutes, if the subject lease is sold in foreclosure. Staff believed the recommendation was prudent to preserve the integrity of leasing to non-profit entity at nominal rent.

After conferring with the AG, staff is recommending a second amendment to the lease by incorporating the above-mentioned Recommendation 1.C so that AGs can approve the

¹ Exhibits of the June 10, 2021 action can be downloaded from the following link:
<https://dlnr.hawaii.gov/wp-content/uploads/2021/06/D-3.pdf>

consent and estoppel certificate documents. The latest development was relayed to the tenant and it does not have any objection to the proposed amendment. There are no other pertinent issues or concerns. Staff recommends the Board authorize the above-mentioned amendment.

RECOMMENDATION: That the Board:

1. Amend prior Board action of June 10, 2021, Item D-3 by authorizing the second amendment of General Lease No. S-5954 to include language providing substantially as follows: "The Board reserves right to evaluate whether the purchaser is qualified for nominal rent in accordance with Section 171.43.1, Hawaii Revised Statutes, if the subject lease is sold in foreclosure," subject to the following:
 - A. The standard terms and conditions of the most current lease amendment form, as may be amended from time to time;
 - B. Review and approval by the Department of the Attorney General; and
 - C. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interest of the State.
2. All other terms and conditions in its June 10, 2021 approved submittal to remain the same.

Respectfully Submitted,

Barry Cheung

Barry Cheung
District Land Agent

APPROVED FOR SUBMITTAL:

Suzanne D. Case

Suzanne D. Case, Chairperson *RT*

D-3

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Consent to Mortgage and Request to Issue Estoppel Certificate, General Lease
No. S-5954, Diamond Head Theatre, Lessee, Kaimuki, Honolulu, Oahu, TMK
(1) 3-2-030:001.

APPLICANT AND REQUEST:

Diamond Head Theatre, a Hawaii nonprofit corporation. ("DHT") requesting consent to mortgage from First Hawaiian Bank, Mortgagee, in an amount not to exceed \$2,000,000.

LEGAL REFERENCE:

Sections 171-6 and 22, Hawaii Revised Statutes, as amended. ("HRS")

LOCATION:

Portion of Government lands situated at Kaimuki, Honolulu, Oahu, identified by Tax Map Key: (1) 3-2-030:001, as shown on the map attached as **Exhibit A**.

AREA:

2.735 acres, more or less.

ZONING:

State Land Use District: Urban
City and County of Honolulu LUO: Residential(R-5)/theater (Non-conforming)

TRUST LAND STATUS:

Section 5(e) lands of the Hawaii Admission Act
DHHL 30% entitlement lands pursuant to the Hawaii State Constitution: No

APPROVED BY THE BOARD OF
LAND AND NATURAL RESOURCES
AT ITS MEETING HELD ON
June 10, 2021 GP

D-3

EXHIBIT 1

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CHARACTER OF USE:

For production of live theater and allied purposes, including education in the theater arts, cultural community and educational purposes.

TERM OF LEASE:

Sixty-five (65) years commencing on August 18, 2008 and expiring on August 17, 2073.
No rental reopening during the term of the lease.

ANNUAL RENTAL:

\$480.00 to be paid semi-annually and 10% of the gross rental receipts received by the Lessee when it rents out the facility to third parties.

USE OF LOAN PROCEEDS:

Construction of the new theater building.

REMARKS:

The subject property, including the improvements, was acquired by the federal government in 1923 and used as an army theater. It was leased in 1961 to DHT, who was then called the Honolulu Community Theatre. In 1964, the property was conveyed to the State as federal surplus. A 50-year lease was issued to DHT pursuant to an auction in 1966.

At its meeting of July 28, 2006, under agenda item D-3, the Board authorized the mutual cancellation of the 50-year lease and issued a 65-year lease to DHT. The new lease ("GL 5954") was intended to facilitate DHT's ongoing fund-raising campaign for the refurbishment of the improvements.

On December 7, 2017, the Department of Planning and Permitting ("DPP") issued a Finding of No Significant Impact for the redevelopment of the theater. On December 23, 2017, the Final Environmental Assessment was published in The Environmental Notice. Zoning Variance was granted by DPP for the redevelopment of the theatre on June 29, 2018.

At its prior meeting of October 25, 2019, under agenda item D-6, the Board authorized the amendment of the subject lease by allowing the Lessee to mortgage the subject leasehold interest subject to prior written approval.

The lease was issued to DHT pursuant to Section 171-43.1, HRS, at nominal rent. Staff recommends the Board include a condition in the consent that if the lease is sold in foreclosure, the Board reserves the right to evaluate whether the purchaser is qualified for nominal rent in accordance with Section 171-43.1, HRS. If the purchaser is not determined

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to be so qualified, rent under the lease shall immediately be re-opened to determine fair market rent with the purchaser responsible for the cost of the appraisal procured by the State.

DHT is requesting the Board consent to the mortgage in an amount not to exceed \$2,000,000 from First Hawaiian Bank (**Exhibit B**) for the construction of the new theater building. In addition, the lender also asked for issuance of an estoppel certificate (**Exhibit C**). Staff notes that the estoppel certificate may contain some provisions that are objectionable to the State, and therefore recommends that the Chairperson be delegated authority to negotiate the terms of the estoppel certificate based on the advice of the Department of the Attorney General.

Applicant is compliant with the terms and conditions of the subject lease and there are no other pertinent issues or concerns.

RECOMMENDATION: That the Board:

- I. Consent to the mortgage between Diamond Head Theatre, Mortgagor, and First Hawaiian Bank, Mortgagee, subject to the following:
 - A. The loan proceeds shall be used for the purposes as stated in "Use of Loan Proceeds" above. The Lessee shall maintain records of loan expenditures which may be inspected by the Department;
 - B. The standard terms and conditions of the most current consent to mortgage form, as may be amended from time to time;
 - C. If the lease is sold in foreclosure, the Board reserves the right to evaluate whether the purchaser is qualified for nominal rent in accordance with Section 171-43.1, HRS. If the purchaser is not determined to be so qualified, rent under the lease shall immediately be re-opened to determine fair market rent with the purchaser responsible for the cost of the appraisal procured by the State;
 - D. Review and approval by the Department of the Attorney General; and
 - E. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.
2. Issue Estoppel Certificate relating to the mortgage under General Lease No. S-5954, Diamond Head Theatre, Mortgagor, and First Hawaiian Bank, Mortgagee, in the form of Exhibit B, subject to the following:
 - A. The Chairperson is hereby delegated authority to negotiate the terms of the Estoppel certificate based on the advice of the Department of the Attorney

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General;

- B. Review and approval by the Department of the Attorney General; and
- C. Such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State.

Respectfully Submitted,

Barry Cheung

Barry Cheung
District Land Agent

APPROVED FOR SUBMITTAL:

Suzanne D. Case

RT

Suzanne D. Case, Chairperson