

State of Hawai'i
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawai'i 96813

November 30, 2012

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawai'i

PSF No: 09OD-111
Oah'u

Retain Prior Board Action of May 25, 2012, Agenda Item D-13, Acquisition of Private Lands and Set Aside to Division of Forestry and Wildlife for addition to the Hamakua Wildlife Sanctuary at Kailua, Ko'olaupoko, O'ahu, Tax Map Key (1) 4 -2-003:017, by Denying a Request by Grantor to Revise the Current Deed Document Form

BACKGROUND:

On May 25, 2012, under Agenda Item D-13, the Board approved the acquisition of private lands, to be set aside to the Division of Forestry and Wildlife ("DOFAW") for addition to the Hamakua Wildlife Sanctuary at Kailua, Ko'olaupoko, O'ahu. The 67.178 acres, more or less, would be acquired from private owner Castle Family, LLC, a Hawaii Limited Liability Company ("Castle"). The Board approved Item D-13 and authorized the acquisition of the property subject to terms and conditions included in the submittal, including "[t]he standard terms and conditions of the most current deed document form, as may be amended from time to time" and "the review and approval of the Department of the Attorney General" (page 5).

Subsequent to the Board's approval, the Department received a letter from the private landowner of the subject property requesting the three following revisions to the deed form proposed by the Department:

1. Revise the general warranty of title to a limited warranty of title;
2. Delete the requirement to conduct further environmental testing; and
3. Delete the environmental indemnification provision contained in the deed and in the purchase and sale agreement.

Castle explains its reasoning for the request of these items in the attached letter, dated August 29, 2012 (Exhibit A).

REMARKS:

The State's standard land acquisition forms and policies are intended to protect the State's fiscal resources in transactions with private parties. Based on the potential risks and liabilities involved in revising the deed and eliminating environmental indemnification clauses, Land Division recommends denial of the Grantor's request.

Land Division recognizes that DOFAW views the conservation benefits of the acquisition to be of high value; comments from DOFAW are included below.

DOFAW remarks:

Project description

The goal of the Hamakua Marsh Watershed Protection/Hillside Acquisition Project is to acquire 65 acres of wetland and mauka watershed lands in fee and add them to the existing Hamakua Marsh Wildlife Sanctuary administered by the DOFAW. Purchase of the wetland and watershed parcel adjacent to Hamakua Marsh Wildlife Sanctuary will add to the inventory of State-owned conservation lands in the Kawainui Marsh wetland complex, and diversify management of the area for watershed protection, endangered species recovery, recreation, education and open space.

The project is an integral part of a 10-year, \$2,000,000 restoration and education project for Hamakua Marsh Watershed and the adjacent Kawainui Stream. Land acquisition and habitat restoration activities to date have protected 22 acres of wetland and stream. Removal of introduced brush and trees has created feeding, loafing and nesting habitat for Hawaiian waterbirds and migratory shorebirds.

The proposed land acquisition involves purchase of the adjacent watershed parcel, restoration of two acres of wetland, control of non-native scrub vegetation on the hillside, and reforestation with native tree and shrub species. Restoration of the upland native forest area that provides water for the marsh will provide habitat for common native plant species such as kou, milo, 'a'ali'i, naio and loulou, as well as various federally listed native plants. An interpretive trail will be developed to educate the public about threatened and endangered species management, and other wetland and watershed features of the area. The trail will also include a Pu'u O Ehu ridge loop, which includes a spectacular 360 degree panorama from mountains to ocean, including views of wetlands, urban areas, forest reserve and offshore island seabird sanctuaries. The Hamakua Hillside area is one of the last green spaces in urban Kailua. It forms the backdrop for Hamakua Marsh Wildlife Sanctuary, a popular spot for wildlife viewing, and the restored view plane into the marsh is providing inspiration for many of the urban design considerations in Kailua town, integrating the wildlife sanctuary with the local community.

A U.S. Natural Resources Conservation Service Cooperative Agreement and Conservation Plan already cover the property, and funding exists for operations, management and start-up restoration projects.

Hamakua Marsh is designated by Governor's Executive Order as a Hawai'i State Wildlife Sanctuary, and is registered as a Wetland of International Importance by the Ramsar Convention on Wetlands. DOFAW is committed to the long-term management the area. Management actions will include restoration and maintenance of wildlife habitat, wildlife monitoring, predator removal, vegetation control, native forest restoration, and maintenance of educational features such as trails and signs. Negotiations are also underway with local Hawaiian groups to place a burial mound on the property for the permanent interment of iwi from the area. DOFAW will provide operations and maintenance funding for the acquisition parcel.

The project will be performed in close cooperation with local schools, Natural Resources Conservation Service, Pacific Coast Joint Venture, Ducks Unlimited, U.S. Fish and Wildlife Service, Kailua Urban Design Task Force, Kalama Land Company Limited and DOFAW.

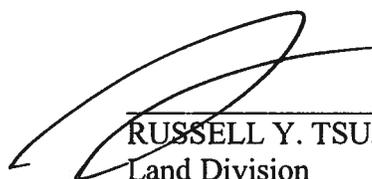
Remarks and Recommendations

DOFAW recommends that the Board give additional and favorable consideration to the requests of the seller to amend its previous approval of Item D-13, from May 25, 2012, approving the acquisition of the Hamakua parcel with the foregoing conditions proposed by the seller. DOFAW understands that the position that Land Division is recommending to use the standard State warranty deed for purchase of the property, however, DOFAW believes this is a unique situation that should be evaluated in the perspective of the potential large conservation, education, and recreation value that can be acquired versus the limited risk of accepting a revised limited warranty deed and eliminating environmental indemnification clauses. DOFAW has been working in the area for many years and feels that the property is an important asset for watershed protection and education, and is in condition for conveyance to the State. The limited warranty deed requested by the seller is similar to the deed language used for acquisition of the adjacent, and much larger, Kawainui Marsh from the City and County of Honolulu. Failure to modify the conditions to those acceptable to the seller may halt the acquisition and result in the loss of federal grant funds appropriated to the project, and in the development of a valuable community asset.

RECOMMENDATIONS: That the Board:

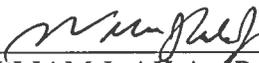
1. Retain its prior action to approve the May 25, 2012, Agenda Item D-13, "Acquisition of Private Lands and Set Aside to Division of Forestry and Wildlife for addition to the Hamakua Wildlife Sanctuary at Kailua, Ko'olaupoko, O'ahu, Tax Map Key (1) 4 -2-003:017;" and
2. Deny Castle's request to:
 - a) Revise the general warranty of title to a limited warranty of title;
 - b) Delete the requirement to conduct further environmental testing; and
 - c) Delete the environmental indemnification provision contained in the deed and in the purchase and sale agreement.

Respectfully submitted,



RUSSELL Y. TSUJI, Administrator
Land Division

APPROVED FOR SUBMITTAL:



WILLIAM J. AILA, JR., Chairperson
Board of Land and Natural Resources

EXHIBITS:

Exhibit A: August 29, 2012, letter from Kaneohe Ranch to Chairperson William J. Aila, Jr.



KANEOHE
RANCH

August 29, 2012

William J. Aila, Jr., Chairperson
Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

RECEIVED
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DEPT. OF LAND
& NATURAL RESOURCES
STATE OF HAWAII

Re: PSF No.: 090D-111 (Oahu) – Acquisition of Private Lands and Set Aside to Division of Forestry and Wildlife (“DOFAW”) for addition to the Hamakua Wildlife Sanctuary at Kailua, Koolaupoko, Oahu, Tax Map Key (1) 4-2-003:017

Dear Chairperson Aila:

We have been advised that the requests herein need to be considered by the Board of Land & Natural Resources. We will appreciate your and their consideration of these requests.

Specifically, this letter is written regarding the above-referenced acquisition by DOFAW of land currently owned by Castle Family LLC (“Castle”). Castle respectfully requests the following three revisions to the deed form proposed by DOFAW for this transaction, as noted on the attached Exhibit A:

1. Revise the general warranty of title to a limited warranty of title – this is a compromise position, as generally Castle would insist on giving only a quitclaim deed for this type of sale, particularly since Castle has agreed to pay for DOFAW’s title insurance policy.
2. Delete the requirement to conduct further environmental testing – Castle has already conducted and paid for a Phase II study of the at-risk areas of the land which revealed no significant environmental problems, therefore Castle should not be required to do any further testing after the sale closes.
3. Delete the environmental indemnification provision (both in the deed and in the purchase and sale agreement) – Castle is selling the land to DOFAW at a purchase price which is significantly less than the true value of the land to a private developer or owner. As Castle is agreeing to give up that higher value in order to allow DOFAW to have the land (and is agreeing to pay all closing costs, which are normally split between buyers and sellers), Castle should not also be obligated to provide the environmental indemnity at issue.

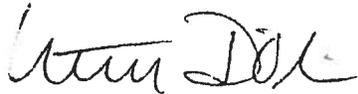
EXHIBIT A

William J. Aila, Jr., Chairperson
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Given the compromises which we are agreeing to in order to allow DOFAW the opportunity to acquire this land (we pay all closing costs, give title warranty and already paid for Phase 2 Report showing property clean), we think the proposed revisions are fair and reasonable.

Thank you for your kind consideration of these matters.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "H. Mitchell D'Olier".

H. Mitchell D'Olier
President and
Chief Executive Officer

Attachment – Exhibit A
cc: Mr. Ian Hirokawa
Mr. David G. Smith