

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

December 13, 2013

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

Ref: GL 5661

OAHU

Consent to the Covenant of Purpose, Use and Ownership Affecting the Kapiolani Community College Culinary Institute of the Pacific as Part of General Lease No. 5661, University of Hawaii, Lessee; Waikiki, Honolulu, Oahu; TMK (1) 3-1-042:011

BACKGROUND:

Pursuant to General Lease No. 5661, University of Hawaii (“UH”) leases the subject 7.878-acre State parcel for educational purposes. It is a 65-year lease commencing on September 1, 2004 and expiring on August 31, 2069, as part of the Kapiolani Community College (“KCC”) campus. KCC plans to build the Culinary Institute of the Pacific (“Project”) on the subject property. UH submitted an application for financial assistance from the Economic Development Administration (“EDA”) in the amount of \$2,146,000 to assist in the construction of the Project.

Pursuant to the terms and conditions of the EDA’s award, UH needs to execute the Covenant of Purpose, Use and Ownership (“Agreement”), which prohibits UH from alienating its leasehold interest or use the property other than the purposes stated in the EDA’s award, during the estimated useful life of the Project. Under the Agreement, EDA will be compensated if UH fails to comply with either of the prohibitions mentioned above. The estimated useful life of the Project is twenty (20) years, which was agreed to by EDA. In addition, the Agreement will be recorded at the Bureau of Conveyances. A copy of the draft Agreement is attached as **Exhibit A**.

REMARKS:

The EDA’s requirement described above is similar to a mortgage encumbering the subject leasehold interest. The Board has given similar authorization for non-profit entities receiving federal grants to improve their respective facilities.

As noted from the Agreement¹, the covenants of not to ‘sell, transfer, convey, mortgage’, and “use for non-Project purposes” are only applicable during the estimated useful life of

¹ Condition 2 on page 2 of the Agreement

the Project. Since the subject lease has more than 50 years before expiration in 2069, staff does not have any objection to the proposed 20-year restrictive covenant.

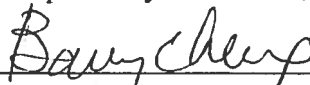
Therefore, staff recommends the Board consent to the Agreement as described above.

There are no other pertinent issues or concerns relating to the request.

RECOMMENDATION: That the Board consent to the Covenant of Purpose, Use and Ownership Agreement attached as Exhibit A hereto, subject to the following:

- A. Review and approval by the Department of the Attorney General; and
- B. Other terms and conditions as prescribed by the Chairperson which best serve the interest of the State.

Respectfully Submitted,


Barry Cheung
District Land Agent

APPROVED FOR SUBMITTAL:


William J. Aila, Jr., Chairperson



Revised (12/06)

COVENANT OF PURPOSE, USE AND OWNERSHIP

THIS COVENANT OF PURPOSE, USE AND OWNERSHIP dated this ____ day of _____, 2013, by and between the UNIVERSITY OF HAWAI'I, the state university and body corporate of the State of Hawai'i, whose address is 2444 Dole Street, Bachman Hall, Room 202, Honolulu, Hawai'i, 96822 (hereafter with its successors and assigns collectively called "Recipient") and the ECONOMIC DEVELOPMENT ADMINISTRATION, UNITED STATES OF AMERICA, whose address is Main Commerce Building, Washington, D.C. 20230 (hereafter with its successors and assigns collectively called "EDA"):

RECITALS:

WHEREAS, Recipient submitted an application, designated as EDA Award (Project) No. 07-01-06814, for financial assistance pursuant to the Public Works and Economic Development Act of 1965 (Pub. L. 108-373, 42 U.S.C. 3121, et seq.), (hereafter the "Act"); and

WHEREAS, by offer of Award, dated June 15, 2012, EDA offered to Recipient a financial assistance award in the amount \$2,146,000.00 (hereinafter called "Award Amount") to assist in financing the Public Works and Economic Development Facilities Program – Kapi'olani Community College Culinary Institute of the Pacific (hereafter called the "Project"); and

WHEREAS, the Project included acquisition of and/or specifically improving the real property described in Exhibit "A" attached hereto and incorporated herein (hereafter with all improvements thereon collectively called the "Property"); and

WHEREAS, on July 17, 2012, Recipient accepted the Offer of Award (hereafter called "Award Agreement") subject to certain terms and conditions, pursuant to which Recipient covenanted and agreed to comply with the applicable requirements of 13 Code of Federal Regulations (hereafter "CFR"), Part 314; and

WHEREAS, the Award Agreement provides the purposes for which the Award Amount may be used and provides, inter alia, that Recipient will not sell, lease, mortgage, or otherwise alienate any right to or interest in the Property, or use the Property for purposes other than, and different from, those purposes set forth in the Award Agreement and the application made by Recipient therefore (hereafter collectively called "Project Purposes"), such alienation and use being prohibited by 13 CFR Part 314, 15 CFR Part 24, and 15 CFR Part 14; and

WHEREAS, under the authority of the Act, EDA is not authorized to permit Recipient to use the Property for purposes other than the Project Purposes or to lease, transfer, convey,

mortgage, or hypothecate the Project to any party without prior approval from EDA, unless EDA is repaid its share of the market value of the Project, as set forth below; and

WHEREAS, Recipient, as lessee of the Property described in Exhibit "A" attached hereto, agreed to record this Covenant against Recipient's leasehold interest in the Property in the appropriate office for the recording of public records affecting real property so as to constitute notice to all persons of any and all restrictions on title to and use of the Project and all or part of the Property described in Exhibit "A" attached hereto; and

WHEREAS, the State of Hawai'i Bureau of Conveyances (hereafter the "Bureau"), which is located at 1151 Punchbowl Street, Room 121, Honolulu, Hawai'i 96813, is the proper office to record this Covenant against Recipient's leasehold interest in the Property; and

NOW THEREFORE, in consideration of financial assistance rendered and/or to be rendered by EDA and of other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, and to assure that the benefits of the Project will accrue to the public and be used as intended by both EDA and Recipient, Recipient hereby covenants and agrees as follows:

1. Estimated useful life of Project. The estimated useful life of the Project is twenty (20) years as determined by the EDA pursuant to paragraph 11(d) of the Special Award Conditions of the Award Agreement.
2. Recipient shall not sell, transfer, convey, or mortgage the Property. Recipient agrees that for the estimated useful life set forth above, Recipient will not sell, transfer, convey, or mortgage any interest in the real property acquired or improved in whole or in part with the funds made available through this Award Agreement, nor shall Recipient use the Property for purposes other than the Project Purposes without the prior written approval of the Assistant Secretary, Economic Development Administration or his/her designee or successor (hereafter the "EDA Assistant Secretary"). Such approval may be withheld until such time as Recipient first pays to EDA the amount of the award funds disbursed or, at the option of the EDA, the federal government's fair share of the Property as provided in the Code of Federal Regulations, Title 13, Part 314. The federal government's fair share of the Property shall be the amount computed by multiplying the percentage of the federal participation in the total cost of the grant program or the Project to the fair market value of the Property at the time of the proposed: (a) conveyance of the Property or (b) use that is not consistent with the Project Purposes.
3. Recipient to compensate EDA for non-Project purposes use or unauthorized conveyance. Recipient further covenants that in the event the Property is used for purposes other than the Project Purposes, or is sold, leased, transferred, conveyed or mortgaged without the prior written approval of the EDA Assistant Secretary, Recipient will compensate the federal government in the amount of the grant funds disbursed or at the option of the federal government, the federal government's fair share of the Property as described above.

4. Recipient to record Covenant. Pursuant to 13 CFR 314, Recipient further agrees that, as a prerequisite to accepting the disbursement of any portion of the Award Amount or any award funds by EDA under the Award Agreement, Recipient shall execute and place on record against Recipient's leasehold interest in the Property acquired or improved in whole or in part with the funds made available through this Award Agreement, this Covenant of Purpose, Use and Ownership (hereafter the "Covenant"). Recipient further agrees that whenever the Property is sold, leased, or otherwise conveyed pursuant to the CFR, Title 13, Part 314, Recipient or the transferor shall add to the document conveying such interest a Covenant of Purpose, Use and Ownership substantially similar to this Covenant. EDA will, in its sole discretion, determine whether the Covenant is satisfactory. EDA may require an opinion of counsel from Recipient confirming that the Covenant is valid and enforceable according to its terms and has been or will be properly recorded.

5. Covenant constitutes a reasonable restraint on alienation. It is stipulated and agreed that the terms hereof constitute a reasonable restraint on alienation of use, control, and possession of or title to the Property given the federal interest expressed herein.

6. Covenant runs with the land. This Covenant, upon recordation with the Bureau against Recipient's leasehold interest in the Property, shall run with the land.

IN WITNESS WHEREOF, Recipient has hereunto set its hand as of the day and year first above written by their duly authorized officer(s). A completed duly recorded copy of this Covenant shall be forwarded to EDA.

UNIVERSITY OF HAWAI'I, the state university
and a body corporate of the State of Hawai'i

By _____
Howard S. Todo
Its Vice President for Budget and
Finance/Chief Financial Officer

Approved as to form:

Office of University General Counsel:

By _____
Its

By _____
Duff Zwald
Its Director of the Office of Procurement and
Real Property Management

Approved:

State of Hawai'i, by its Board of Land
and Natural Resources

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

Approved as to Form:

Deputy Attorney General

STATE OF HAWAII)
) ss.
CITY AND COUNTY OF HONOLULU)

On this ___day of _____, 2013, before me appeared Howard S. Todo, to me personally known, who being by me duly sworn, did say that he is the Vice President of Budget and Finance/Chief Financial Officer of the University of Hawai'i, the state university and a body corporate of the State of Hawai'i, and that said instrument was signed on behalf of said University of Hawai'i by authority of its Board of Regents, and said Howard S. Todo, as said Vice President for Budget and Finance/Chief Financial Officer, acknowledged said instrument to be the free act and deed of said University of Hawai'i.

Notary Public, First Circuit
State of Hawaii

My Commission Expires: _____

Date of Document: _____ # Pages: _____ or <input type="checkbox"/> Undated at time of notarization	
Name: _____ First Circuit	
Doc. Description: _____ _____ _____	
_____ Notary Signature	_____ Date
NOTARY CERTIFICATION (Seal)	

STATE OF HAWAII)
)ss.
CITY AND COUNTY OF HONOLULU)

On this ___ day of _____, 2013, before me appeared Duff Zwald, to me personally known, who being by me duly sworn, did say that he is Director, Office of Procurement and Real Property Management of the University of Hawai'i, the state university and a body corporate of the State of Hawai'i, and that said instrument was signed and sealed on behalf of said University of Hawai'i by authority of its Board of Regents, and said Duff Zwald, as said Director of the Office of Procurement and Real Property Management, acknowledged said instrument to be the free act and deed of said University of Hawai'i.

Notary Public, First Circuit
State of Hawaii
Lynn N. Nakamasu
My Commission Expires: October 31, 2016

Date of Document: _____ # Pages: _____	
or <input type="checkbox"/> Undated at time of notarization	
Name: _____	First Circuit
Doc. Description: _____	

Notary Signature	Date
NOTARY CERTIFICATION	(Seal)