

ITEM NO: E-1

SUBJECT: Memorandum of Agreement with City and County of Honolulu Regarding  
Sale or Exchange of Lands

COMMENT

Land Management Administrator Linda Chinn gave a brief history of the Hawaiian Home Lands Recovery Act (HHLRA) of 1995 which is the settlement between the State of Hawai'i and the Federal government for the illegal taking of the Hawaiian home lands. Part of the settlement maintains that those lands be identified and a value placed on these properties and to identify federal property equal to that value. The Waiawa property has been identified as one of those parcels which had a potential income loss of \$20,000,000. Under the HHLRA, the department can sell property up to that value which were deemed lands given to Hawaiian Home Lands to satisfy the potential income loss.

Recommendation is to have the Commission approve the proposed MOA (Memorandum of Agreement) between DHHL and the City to convey certain lands. It has been amended subject to Attorney General's review and approval of the Department of Interior.

MOTION

Moved by Commissioner T. Morikawa, seconded by Commissioner H. Tancayo.

DISCUSSION

In May, 2006, Chairman of Hawaiian Home Lands was given the authority to exchange lands but now in this sense, it allows for the mutual sale of lands, said Chairman Park. It was confirmed by Ms. Chinn that the sale or exchange is based on fair market value. Deputy Attorney General Iha reiterated that the matter be subject to Attorney General's approval.

ACTION

Motion carried unanimously.

RECESS 9:40 a.m.

Moved by Commissioner F. Lum, seconded by Commissioner P. Artates to adjourn to Executive Session.

Exhibit 1-A

STATE OF HAWAII

DEPARTMENT OF HAWAIIAN HOME LANDS

October 20, 2009

TO: Chairman and Members, Hawaiian Homes Commission

THROUGH: Anita S. Wong, Deputy to the Chairman *Anita Wong*

FROM: Darrell Yagodich, Planning Program Manager  
Planning Office *Darrell Yagodich*

SUBJECT: Memorandum of Agreement between the Department of  
Hawaiian Home Lands and the City and County of  
Honolulu Regarding the Mutual Sale or Exchange of  
Certain Lands

RECOMMENDED MOTION/ACTION

That the Hawaiian Homes Commission (Commission) approves the proposed Memorandum of Agreement (MOA) between the Department of Hawaiian Home Lands (Department) and the City and County of Honolulu (City) to convey certain lands in Waiawa and Kapolei through either the mutual sale or exchange to achieve their respective land use and management objectives (See attached Exhibit A) and authorizes the Chairman to execute the MOA.

DISCUSSION

Proposed Sale or Exchange

At its regular meeting on May 23, 2006, the Commission approved and authorized the Chairman to carry out necessary actions to complete a land exchange with the City, exchanging the Department's Ewa Drum site totaling approximately 55.876 acres for the City's Varona Village site totaling approximately 52.717 acres (See Exhibit B). The City's planned use for the Ewa Drum site is for a transit corporation yard that is an essential element for their planned Honolulu rail transit system (Honolulu High-Capacity Transit Corridor Project). The City plans to break ground for the rail transit system in late 2009. The Varona Village site is located adjacent to the Department's master planned community of East Kapolei and would expand the Department's land holdings in that community for future development.

In May 2009, during the exchange negotiations with the City, the City requested the Department to consider the sale of the Ewa Drum site to the City and in return the City would sell the Varona Village site to the Department. The City informed the Department that they have federal funds available that can only be used to purchase land for transit purposes and would prefer to use these funds to purchase the Ewa Drum site.

#### Hawaiian Home Lands Recovery Act

The Ewa Drum site was one of several federal properties that the Department acquired pursuant to the Hawaiian Home Lands Recovery Act of 1995 (HHLRA), P.L. 104-42. HHLRA represents the settlement for compensation to the Department for past use by the federal government of the Department's lands. The State Attorney General opined that the Department is authorized pursuant to HHLRA to sell the Ewa Drum site provided the Chairman of the Commission grants his approval to designate Ewa Drum site to be sold.

Section 203(3) of the HHLRA authorizes the Chairman to sell lands designated as compensation for "lost use" of Hawaiian home lands. The term "lost use" is defined in the HHLRA, Section 202(7) as the value of the use of the land during the period when the Hawaiian Homes Commission was unable to use lands because of the use of such lands by the federal government after August 21, 1959. Our independent appraisers have valued the "lost use" compensation as \$20 million as of 1993.

#### Beneficiary Consultation

The subject sale or exchange of these land parcels were part of a Beneficiary Consultation on July 20, 2009. See Exhibit "C" for the consultation notice to lessees and applicants in the region and relevant portions of the power-point presentation. 45 people signed in.

Questions were raised as to how the HHLRA authorizes the sale of Hawaiian home lands when the Hawaiian Homes Commission Act of 1920, as amended, prohibits land sales. Comments were received about the Department's major investments in the East Kapolei area and the need for more land there. There was no opposition to the acquisition of Varona Village for the Ewa Drum Site.

On July 9, 2009, the Chairman granted his approval to designate the Ewa Drum site to be sold to the City as authorized under the HHLRA (See Exhibit D). In addition, in a letter dated August

19, 2009 the Chairman notified the Secretary of the U.S. Department of the Interior that he designed the Ewa Drum site for sale as authorized under the HHLRA (See Exhibit E).

#### Summary

The approved sale of the Ewa Drum site gives the Department a negotiating alternate to an exchange. To formalize the intentions of the Department and the City the proposed MOA was drafted to guide and govern all actions necessary to accomplish the transfer of title to each respective land from each Party to the other by either sale or exchange.

The major provisions of the MOA include:

- The parties agreed to either sell or exchange their respective properties after the City receives the Record of Decision from the Federal Transit Administration for the Honolulu High-Capacity Transit Corridor Project. (The City expects to receive the ROD in December 2009.)
- The value of the properties in either a sale or exchange shall be based on appraisals of fair market values.
- In the event that the parties agree to the sale of the properties, the parties shall enter into a purchase and sale agreement, which shall be mutually agreed upon by the parties.
- In the event that the parties agree to the exchange of the properties. The parties shall enter into an exchange agreement, which shall be mutually agreed upon by the parties and subject to approval by the U.S. Secretary of the Interior.
- Upon execution of the MOA, the parties shall execute a License Agreement for their respective properties giving the other party access to their respective properties and giving the party full rights of possession pending the transfer of title.

#### RECOMMENDATION

The Commission's approval of the recommended motion is respectfully requested.

## MEMORANDUM OF AGREEMENT

This Memorandum of Agreement (MOA) is entered into on this \_\_\_\_\_ of \_\_\_\_\_, 2009, by and between the Department of Hawaiian Home Lands, State of Hawaii ("DHHL") and the City and County of Honolulu, a municipal corporation of the State of Hawaii ("City").

### PURPOSE

WHEREAS, DHHL and the City have identified an opportunity to achieve their respective land use and management objectives through the conveyance of certain lands in Waiawa and Kapolei, Oahu, Hawaii, through either mutual fee simple sale or an equal-value exchange; and

WHEREAS, DHHL and the City have agreed to sell or exchange these parcels of land when the City receives the Record of Decision from the Federal Transit Administration ("FTA") for the Honolulu High-Capacity Transit Corridor Project, a FTA New Starts project; and

WHEREAS, DHHL and the City have agreed that pending the sale or exchange of properties between DHHL and the City, the Parties shall grant each other the necessary property interests in each other's property so that each may take possession of the other's property at the earliest possible moment; and

WHEREAS, the purpose of this MOA is to guide and govern all actions necessary to accomplish the transfer of title to each respective property from each Party to the other by sale or exchange,

NOW THEREFORE, the Parties mutually acknowledge that the consideration for the execution hereof are their respective mutual covenants and their respective benefits inuring herefrom, and hereby agree to sell or exchange their respective properties according to the following terms, covenants, conditions, and provisions:

### EXCHANGE or SALE PROPERTIES

**EXHIBIT A**  
**ITEM NO. E-1**

DHHL is the fee owner of the Ewa Facility Drum site suitable for conveyance to the City by sale or exchange. The property is identified as Tax Map Key numbers (1) 9-4-08: 010 and (1) 9-6-03: 044; consisting of approximately 55.842 acres; described in detail in Exhibit A and made a part hereof ("DHHL Property").

The City is the fee owner of certain properties situated in Ewa, Oahu, suitable for conveyance to DHHL by sale or exchange. These properties consist of first, a portion of Tax Map Key: (1) 9-1-17-69, which consists of approximately 33.253 acres, and the second, a portion of Tax Map Key: (1) 9-1-17:075, which consists of approximately 18.808 acres, both of which are shown more fully on the map attached hereto as Exhibit B and made part hereof ("City Property").

### AGREEMENT

1. Value of Sale/Exchange Properties. DHHL and the City agree that the value of the sale/exchange properties shall be based on appraisals of fair market values for the sale/exchange properties. The appraisals will be based on the "Uniform Standard of Professional Appraisal Practice" and/or the "Uniform Appraisal Standards for Federal Land Acquisitions."
2. Sale or Exchange of Properties.
  - a. Sale of Properties. In the event that the parties agree to the sale of the properties, DHHL and the City are obligated to the following:
    - (1) DHHL agrees to sell and convey to the City and the City agrees to purchase, the DHHL Property, subject to and in accordance with the terms and conditions set forth in a purchase and sale agreement, the form and content of which shall be mutually agreed upon by the parties for a sale by quitclaim deed on an "as is", "where is" basis.
    - (2) City agrees to sell and convey to DHHL and DHHL agrees to purchase, the City Property, subject to and in accordance with the terms and conditions set forth in a purchase and sale

agreement, the form and content of which shall be mutually agreed upon by the parties for a sale by quitclaim deed on an "as is", "where is" basis, and subject further that the City Property is properly subdivided for conveyance.

b. Exchange of Properties. In the event that the parties agree to the exchange of the properties, the parties shall execute a Land Exchange Agreement, the form and content of which shall be mutually agreed upon by the parties for an exchange on an "as is", "where is" basis. Furthermore, in the event of an exchange of properties, DHHL and the City are obligated to the following:

- (1) DHHL shall convey and the City shall accept title to the DHHL property by duly executed and acknowledged quitclaim deeds.
- (2) The City shall convey and DHHL shall accept title to the City property by duly executed and acknowledged quitclaim deeds, subject to the City Property being properly subdivided for conveyance.

3. Approval or Review of Governmental Authorities.

- a. In the event of a sale of the properties described herein, such sale shall be subject to DHHL obtaining the approval of the Hawaiian Homes Commission. In the event of an exchange of the properties described herein, such exchange shall be subject to DHHL obtaining the approval of the Hawaiian Homes Commission and the United States of America, acting by and through its Secretary of the Interior.
- b. This MOA, the sale or exchange and any license for the use of the properties described herein shall be subject to the approval of the City Council.

4. Right of Entry and License Agreement: The Parties recognize that each Party will need control and use of the other Party's property prior to the closing of the sale or exchange of the subject properties ("Closing"). Upon the execution of this MOA,



subject to any applicable governmental approvals, and prior to the effective date of the Closing:

- a. DHHL shall execute a License Agreement for the DHHL Property allowing the City and its agents to have access to the property and giving the City full rights of possession of the DHHL Property pending the transfer of title in accordance with the terms and conditions set forth in the License Agreement. The City shall be responsible for all claims, demands, liabilities, costs and expenses arising out of or in connection with DHHL's provision of the License Agreement to the City.
- b. The City shall execute a License Agreement for the City property allowing the DHHL and its agents to have access to the property and giving the DHHL full rights of possession pending the transfer of title in accordance with the terms and conditions set forth in the License Agreement. DHHL shall be responsible for all claims, demands, liabilities, costs and expenses arising out of or in connection with the City's provision of the License Agreement to DHHL.
- c. During the period from the execution of this MOA to the Closing, neither Party shall allow liens or other encumbrances to attach to any part of the other Party's Property.
- d. In the event the City Council, the Hawaiian Homes Commission or the United States Secretary of the Interior, as applicable, disapproves this MOA, any License Agreements shall terminate immediately; provided, however, that the City shall be allowed on the DHHL property to remove any improvements made thereon by the City and DHHL shall be allowed access to the City property to remove any improvements made thereon by DHHL. Each Party shall be solely responsible for the cost and expense for the removal of improvements.

5. Environmental Analyses and Assessments.

- a. The Parties will comply with an environmental analysis and related studies as required by the National



Environmental Policy Act (NEPA) for their respective properties. In the event of an exchange of properties, the environmental analyses shall be reviewed by the United States Department of the Interior.

- b. Both Parties will comply with a Phase 1 Environmental Site Assessment report for their respective property and in the event of an exchange of properties such assessments shall be subject to review by the United States Department of the Interior.
  - c. Both Parties will comply with environmental assessments for their respective properties as required under Chapter 343, Hawaii Revised Statutes.
6. Inspection. The Parties' representatives are authorized to enter upon the Sale/Exchange Properties for the purpose of completing due diligence inspections, including environmental audits, and for any other purpose required or permitted by this MOA.
7. Warranties. Except as otherwise provided in this MOA, the Parties agree to accept the Sale/Exchange Properties "as is" and "where is". Neither party has made any warranties, express nor implied, concerning the condition of the Sale/Exchange Properties (other than title, as provided herein) or their fitness for any intended use.
8. Encumbrances. The Parties agree not to sell, convey, or further encumber the Sale/Exchange Properties prior to Closing. Each Party shall convey its Sale/Exchange Property by means of a quitclaim deed free of any mortgages, liens, or other encumbrances.
9. Closing and Related Costs. All closing costs incurred at the time of the Closing shall be shared equally between the parties. Closing shall occur upon the recordation in the Bureau of Conveyances and filing in the Land Court of the State of Hawaii, as applicable, of both DHHL's deed for the DHHL Property and the City's deed to DHHL for the City Property. The Parties shall coordinate their efforts to ensure that the deeds are simultaneously submitted for recordation and filing.

10. Construction. The Parties have contributed equally to the drafting of this document, which shall not be construed in favor of either. This MOA shall be construed in accordance with the laws of the State of Hawaii.
11. Term. This MOA shall be in force and effect until the land exchange or sale has been completed to the mutual satisfaction of the Parties.
12. Modification. This MOA may be modified by written consent of both Parties to cover any questions that may arise subsequent to the date of this MOA. The MOA may be renewed for an additional term upon written consent of both Parties.
13. Authority. The Parties hereto represent and warrant that this MOA and all instruments, documents and agreements to be executed in connection herewith are or when delivered will be duly authorized, executed and delivered by the Parties hereto and will be valid, binding and enforceable obligations of the parties charged. Each individual executing this MOA on behalf of DHHL or the City represents and warrants to each other that he or she is duly authorized to do so.
14. Legal Descriptions. The Parties acknowledge that legal descriptions suitable for conveyance of title may not be available for all properties identified in Exhibits A and B. Prior to conveyance of any properties identified in Exhibits A and B, in consultation with the other party, each Party shall prepare a legal description, suitable for recordation, for each property.
15. Termination. This MOA will terminate when all conveyances have been completed and approved in writing by both Parties.
16. Assignment. No transfer or assignment of this MOA, or any part thereof or interest therein, directly or indirectly, voluntarily or involuntarily, shall be made unless such transfer or assignment is first approved in writing by both Parties.

17. Dispute Resolution. The Parties agree to employ a process of negotiation, mediation, or other means of Alternative Dispute Resolution other than binding arbitration to resolve any disagreements that may arise under this MOA, provided however, that each party reserves the right to litigate any dispute that remains unresolved after good faith attempts at Alternative Dispute Resolution.

IN WITNESS WHEREOF, the parties have executed this MOA as of the day and year first written above.

DEPARTMENT OF HAWAIIAN HOME LANDS

By \_\_\_\_\_  
Kaulana H.R. Park  
Chairperson of the Hawaiian Homes Commission

CITY AND COUNTY OF HONOLULU

By \_\_\_\_\_  
Mufi Hannemann  
Mayor

APPROVED AS TO FORM AND LEGALITY

By \_\_\_\_\_  
Deputy Attorney General  
State of Hawaii

APPROVED AS TO FORM AND LEGALITY

By \_\_\_\_\_  
Deputy Corporation Counsel  
City and County of Honolulu

EXHIBIT A

<u>Properties</u>	<u>Acres</u>	<u>Location</u>	<u>TMK</u>
Ewa Drum Facility	56	Waiawa, Oahu	

Acreage amounts are approximate. Precise figures will be obtained and inserted in actual transfer documents.

EXHIBIT B

Varona Village 53

Kapolei, Oahu

(1) 9-1-017:069

(1) 9-1-017:075

Acreage amounts are approximate. Precise figures will be obtained and inserted in actual transfer documents.