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**DEPARTMENT OF HAWAIIAN HOME LANDS**

**and**

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**KEOKEA-WAIOHULI DEVELOPMENT PHASE I**

**KEOKEA, KULA, MAUI**

**DEVELOPMENT AGREEMENT**

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**(date)**

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## DEVELOPMENT AGREEMENT

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## DEVELOPMENT AGREEMENT

### **LIST OF EXHIBITS**

Exhibit A	Description of Project Land and Encumbrances
Exhibit B	Project Description
Exhibit C	Chairman's Approval of the Developer Selection
Exhibit D	Preliminary Project Budget
Exhibit E	Preliminary Project Cash Flow Schedule
Exhibit F	Preliminary Schedule
Exhibit G	Developer's Sales Program
Exhibit H	Sales Price Schedule
Exhibit I	Developer's Assistance from DHHL
Exhibit J	Interim Lender's Means of Cure for Developer's Default

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## **DEVELOPMENT AGREEMENT**

This Development Agreement covers the development of affordable housing at Keokea-Waiohuli Development, Phase 1 for the Department of Hawaiian Home Lands by the Developer named below.

**1. EFFECTIVE DATE OF THIS AGREEMENT:** \_\_\_\_\_

**2. PARTIES; NOTICES**

DHHL: Department of Hawaiian Home Lands

Mailing Address:

P.O. Box 1879  
Honolulu, Hawaii 96805

DEVELOPER: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

All notices between the parties shall be in writing and shall be mailed or delivered at the foregoing addresses. A party may change its address for the receipt of notices by giving written notice of such change to the other party.

**3. DEVELOPMENT AGREEMENT**

This Development Agreement shall include the Request for Proposals, all addenda, wage schedule, and any change orders and amendments required to complete the project. In the event of any conflict or inconsistency between said documents and this agreement, this agreement shall control.

**4. DEFINITIONS**

Definitions are found in the Request for Proposals.

**5. RECITALS**

A. Under HHCA, Section 220.5, DHHL is authorized to enter into and carry out contracts to develop available lands for homestead, commercial, and multi-purpose projects.

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- B. On \_\_\_\_\_, DHHL announced and advertised a "Request for Proposals" which was directed to private developers who met the qualifications described therein to submit a proposal for the development of the housing project, described therein.
- C. DHHL reviewed the applications and proposals submitted by developers who responded to the "Request for Proposals", including Developer's application and Developer's Project Proposal dated \_\_\_\_\_.
- D. Pursuant to memorandum dated \_\_\_\_\_ and attached hereto as Exhibit C, the Chairman of the Hawaiian Homes Commission approved \_\_\_\_\_ as an "eligible developer" qualified to develop the project per the specifications of the Request for Proposals.
- E. This Agreement covers the development of the Project, which is further described hereinbelow, and is intended:
  - (1) To establish the terms and conditions under which Developer will proceed to develop the Project in accordance with Developer's Project Proposal, as amended;
  - (2) To set forth the responsibilities and roles of DHHL and Developer; and
  - (3) To establish the agreement between DHHL and Developer as to the financial risks and other obligations to be assumed by them, respectively, including all costs which may be incurred by any of them hereafter. Developer understands and agrees that all financial and other obligations which Developer has incurred up to the date of this Development Agreement and hereafter are Developer's sole responsibility.
- F. In consideration of the foregoing "Recitals", which are contractual, and other valuable consideration, the parties agree as follows.

### **6. GENERAL DESCRIPTION OF THE PROJECT**

- A. Name. The name of the Project is: Keokea-Waiohuli Development, phase I  
  
The name of the Project may be changed only with DHHL's prior written approval.
- B. Location. The Project Land is located in Keokea, Kula, Maui, Hawaii as more particularly described in Exhibit A attached hereto. The Tax Map Key are 2-2-002:014 (portion) and 055 (portion).

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- C. Project Description. The Project is described in Exhibit B, which is attached hereto and incorporated by reference. The project will contain the following housing units:

<u>Approximate Number of Units</u>	<u>Type of Unit</u>
_____	Developer-built
_____	Self-help
_____	Owner/builder (vacant lots)
_____	TOTAL NUMBER OF UNITS

Developer will be responsible for the design, development, construction, marketing and sales of the Developer-built and Self-help units subject to this Agreement.

### **7. DESCRIPTION OF SALES PROGRAM**

- A. General. A written description of Developer's sales program including sample letters and forms to be used and attached hereto, as Exhibit G has been reviewed and approved by DHHL. The sales program may be amended by developer, subject to DHHL approval.
- B. Eligibility and qualification Requirements. Persons and families who apply to purchase a housing unit must also satisfy the following requirements or conditions:
- (1) Each applicant will complete, sign and deliver to DHHL an "Application for homestead Lease".
  - (2) Each purchaser must be a "native Hawaiian" as that term is defined under HHCA, section 201 (a) (5).
  - (3) The selection of purchasers and the units which purchasers may purchase will be accomplished through DHHL's homestead award program procedures.
  - (4) Purchasers will be required to attend and successfully pass a homeownership counseling course provided that such a program is required by the permanent lender.
  - (5) Purchasers must use their housing unit as their principal dwelling and must sign a certificate of owner-occupancy.

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- (6) The housing units will be sold subject to the provisions of HHCA and DHHL Administrative Rules and this Agreement.
- (7) Each purchaser must meet such other qualifications as established by HHCA or rules adopted by DHHL.

### **8. DHHL ASSISTANCE**

DHHL agrees to provide the following financial and other assistance for the Project in furtherance of the public purpose of creating housing opportunities for native Hawaiians.

A. Development Rights. Pursuant to this Agreement, DHHL is granting to Developer Development Rights to develop the Project on the Project Land. Provided, however that notwithstanding any provision contained in this Agreement or any other document to the contrary, such Development Rights are qualified as follows:

- (1) Developer shall not have any legal or equitable right, title or interest in any part of the Project Land.
- (2) Developer's Development rights are limited to entering the Project Land to conduct such inspections, tests and other studies necessary to enable Developer to prepare the Project Plans, and to entering the Project Land to develop the Project in accordance with the terms of this Agreement.

B. Assistance Necessary to Start Construction.

- (1) On-Site Preparation. DHHL will be responsible for all on-site grading, fill and compaction work necessary for the Project. DHHL will provide Developer with final construction plans and specifications.
- (2) Subdivision. DHHL will provide Developer with a final plat map and County-approved construction plans and specifications for the Project.
- (3) Main Utility Lines. DHHL will be responsible for the construction of all on-site utility lines and for constructing any lateral connections to the such main utility lines necessary to connect such on-site utility lines to such main utility lines. DHHL shall be responsible for paying all advances for construction of such main utility lines; any refunds to said advances shall be payable to DHHL.
- (4) Main Waterline and Sewer Line. DHHL will be responsible for constructing all on-site waterlines and sewer lines necessary to serve the Project and for connecting such lines to the main waterline and sewer lines. DHHL shall be responsible for paying all water and sewer systems

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facilities charges. DHHL will be responsible for securing adequate potable water and sewer commitments for the Project.

- (5) Public Access. DHHL will be responsible for the construction of all roads and access within the Project.
  - (6) Interim Loan. DHHL shall, upon written request by Developer, make best efforts to obtain a commitment to make the interim loan or a guarantee of any interim loan; or that in the event of a default of the Interim Loan by the Developer, DHHL shall make an agreement with the interim Loan Lender allowing the Interim Loan Lender means to cure the default. (See Exhibit J)
- D. Tax Exemption Certification. DHHL shall request HHFDC assistance to certify the persons or entities, who are contractually participating in the Project and are involved in the design, development/ planning, construction, financing and sale of the Project and whom DHHL has approved in writing, for exemption from applicable Hawaii general excise taxes on gross income received from the Project pursuant to HRS Sec. 201E-205.
- E. FHA Insurable Loan.
- (1) DHHL shall issue at closing of sale of each residential unit a lease covering the lot upon which that residential unit is situated, such lease shall be in a form sufficient to qualify for a FHA insured loan.
  - (2) DHHL shall comply with HUD's Direct Endorsement Program Expanded to Cover Loans on Hawaiian Home Lands as stated in the HUD Circular Letter 93-06.
- F. NAHASDA Funds. DHHL shall provide \$\_\_\_\_\_ in NAHASDA funds to assist in marketing and sales of the houses.

## **9. PROCESSING THE PROJECT**

The development of the Project shall be processed in the following manner:

- A. Developer Proceeding With Development. Upon the signing and delivery of this Development Agreement, Developer shall provide DHHL with a revised schedule for the preparation and completion of the Project Plans for DHHL's review and approval. Developer shall prepare and finalize the Project Plans in accordance with the schedule that has been approved by DHHL. DHHL shall have the right to monitor the progress of the preparation of the Project Plans and Project planning on a weekly basis.

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The preliminary Project Budget, preliminary Cash Flow Schedule and preliminary Project Schedule are attached as Exhibits D, E and F, respectively.

- B. Compliance With Normal Procedures, Applicable Laws, Ordinances etc. Subject to the waiver and exemption provisions of this paragraph, the Project Plans shall be prepared in substantial compliance with and processed in a manner ordinarily required by the State and the County. Subdivision and construction documents, plans and specifications and other submissions ordinarily required by the State or County shall be submitted to the appropriate agency to be reviewed for conformance with the standards and requirements of the State or County.
- C. Project Budget, Project Cash Flow Schedule and Project Schedule. Developer shall submit to monthly to DHHL for DHHL's review and approval:
- (1) An updated Project Budget showing Developer's estimated costs for developing and constructing the Project, including Developer's estimates of costs incurred to date and over the remaining term of development;
  - (2) An updated Project Cash Flow Schedule; and
  - (3) An updated Project Schedule showing Developer's progress to date and estimated time for completing the Project.

The updated Project Budget, Project Cash Flow Schedule and Project Schedule shall be in the same form as Exhibits D, E and F, respectively which may be modified by Developer subject to DHHL's prior review and approval.

- D. During the course of construction, DHHL, including their employees, consultants and other representatives, shall have the right to enter the Project Land and to inspect the quality and quantity of the improvements thereon.

### **10. DEVELOPER'S AGREEMENT TO DEVELOP THE PROJECT**

Developer agrees to timely complete the development and construction of the Project lien free subject to the following terms and conditions:

- A. Finalizing and Completing Project Documents. Developer shall provide DHHL with a schedule for finalizing and completing the Project Plans, Project Budget, Project Cash Flow Schedule, Project Schedule and other Project documents within six (6) months after receiving all governmental permits and approvals.

Developer's schedule for finalizing and completing Project Plans shall be subject to DHHL review and approval; Developer shall finalize and complete the Project Plans according to the approved schedule. The final Project Plans shall include:

- (1) A narrative describing the overall Project concept.

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- (2) Architectural and engineering planning and design documents such as maps, plans, specifications and development and construction documents.
  - (3) Project Budget showing Developer's estimated costs for developing and constructing the Project, including Developer's estimates of costs incurred to date and over the remaining term of development. The final Project budget can only be revised with DHHL's prior written approval. Any revision to the final Project Budget, which DHHL approves, shall be incorporated herein by reference.
  - (4) Project Cash Flow Schedule which Developer shall update as requested but not more than monthly for DHHL's review and approval.
  - (5) Project Schedule (which Developer shall update for DHHL's review and approval). The final Project Schedule can only be revised with DHHL's prior written approval. Any revision to the final Project Schedule, which DHHL's approves, shall be incorporated herein by reference.
  - (6) Rate of unit production and projected sales.
  - (7) Description of Developer's sales program and sales price of the units together with the figures and analysis used to arrive at such sales prices.
- B. Risks of Development. Developer understands and agrees that Developer is not guaranteed any profit in connection with the development of the Project, except as provided in Section 19 entitled "TERMINATION OF THE PROJECT" herein below.
- C. Developer's Equity. Developer agrees to contract for and pay for all project expenses such as architectural, engineering, surveying, legal, development administration, etc. up to closing of interim loan.
- D. Project Cost Overruns. If the actual cost and expense of any item shown in the Project Budget exceeds the amount budgeted for such item shown therein, funds to pay for the difference shall be paid from cost savings on any other item and then from contingency.

Developer shall be responsible to pay and promises to pay for all costs and expenses of developing and constructing the Project over and above the sum of the Developer's sales proceeds, except for the infrastructure costs which shall in any event be paid for out of DHHL Trust funds.

The Project Budget is subject to future revision subject to DHHL's written approval. Any revision to the Project Budget approved by DHHL shall be incorporated herein by reference.

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- E. Compliance with Laws, Ordinances, Codes, Regulations, etc. Without limitation, Developer shall be responsible for complying with all laws, ordinances, codes, and regulations and governmental requirements, including those pertaining to zoning and the environment, ecology, health and safety, which apply to the development and construction of the Project subject, however, to any exemption or pre-emption from the same which DHHL shall adopt with the powers granted to DHHL under HHC Laws.
- F. Project Public Improvements. Developer shall construct and complete the interior roadways, utilities and other public improvements within the Project, in compliance with the standards and requirements of the County, subject, however, to any exemption or pre-emption from the same which DHHL shall adopt with the power granted to DHHL under HHC Laws.
- G. Taxes and Assessments Paid. Unless exempt, all taxes and assessments affecting the Project due and payable shall have been paid. All assessments affecting the Project shall also have been paid and discharged, whether or not payable in installments or constituting a lien against the project.
- H. No Condemnation or Damage. No part of the Project (or the improvements thereon, if any) shall have been damaged and not repaired to DHHL's satisfaction nor taken in condemnation or other title proceeding, nor shall any such proceeding be pending.
- I. Bankruptcy or Insolvency. Neither Developer nor any Guarantor shall be involved in any bankruptcy, reorganization, arrangement, or insolvency proceeding nor shall any such proceeding be pending without prior notice or approval of DHHL.

### **11. LIST AND DESCRIPTION OF REQUIRED DOCUMENTS AND INFORMATION**

- A. Information About the Developer. Developer shall submit the following information about the developer before execution of this Agreement.
  - (1) Corporate, partnership Documents and Other Organizational Documents. Copies of organizational documents including Articles, By-Laws, Corporate Resolutions, or of Developer's Partnership Agreement and Certificate, as applicable.
  - (2) Evidence of Authority to Do Business; Certificates of Good Standing and Tax Clearances. As issued by the Department of Commerce and Consumer Affairs and Department of Taxation.
- B. Hold Harmless Agreement. Developer, agrees to pay, defend, indemnify and hold harmless DHHL from any and all claims of any person or entity, including brokers' claims for commissions or fees, mechanic's and materialmen's claims

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which arise out of or in connection with the construction of any unit of the Project, the sale of the units in the project which arise or are made within one (1) year after occupancy of the unit.

This agreement shall not cover the negligence or willful acts, omissions, failure to act, or misconduct of HHC, DHHL or their employees and agents.

- C. Project Documents. Unless otherwise specified by DHHL, the following documents shall be in a form approved by DHHL which shall be timely submitted to DHHL and timely approved by HHC and/or DHHL. All review and approvals shall be completed in a ten (10) calendar day period after receipt of such Project documents.
- (1) Project Budget. Developer shall provide a Project Budget, which Developer shall update periodically or upon DHHL's reasonable request.
  - (2) Project Cash Flow Schedule. Developer shall provide a Project Cash Flow Schedule which Developer shall update periodically or upon DHHL's reasonable request.
  - (3) Project Schedule. Developer shall submit a detailed Project Schedule showing the proposed progress of development and construction of the Project which Developer shall update periodically or upon DHHL's reasonable request.
  - (4) Compensation Statement. Developer shall submit a compensation statement showing all compensation, fees, including management, administrative and consultant fees and other compensation which Developer (including Developer's principals or affiliates) shall be paid directly or indirectly from proceeds of interim Loan and other funds of the Project.
  - (5) Survey. DHHL shall provide a survey and a licensed surveyor's certificate showing the Project site, the dimensions and area thereof, dimensions and locations of any existing improvements, utilities, or parking areas, easements, the location of any adjoining streets, and the distance to and name of the nearest intersecting street. The certificate shall be in such form as may be required for the loan or any permanent financing.
- D. Development Documents. Developer shall submit the following documents to DHHL:
- (1) Architectural Contract. Developer shall submit the architectural contract for review and approval by DHHL which contract shall be with an architect or architectural firm, which is licensed to engage in the

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architectural business in Hawaii, approved by DHHL for the entire Project.

- (2) Engineering Contracts. Developer shall submit the engineering contracts for review and approval by DHHL which contracts shall be with an engineer or engineering firm, which is licensed to engage in the engineering business in Hawaii, approved by DHHL for the entire Project.
- (3) Project Management, Marketing Management and Financial Management Contracts. Developer shall submit, if any, contracts for project management/ marketing management and financial management contracts for review and approval by DHHL.
- (4) Architect's and Engineer's Insurance. All architects, engineers and other design professionals providing any architectural, engineering or other design services in connection with the development and/or construction of the Project must be required to have in full force and effect such errors and omissions insurance and other liability insurance that shall protect them from claims of negligence, breach of warranty or other claims arising out of the design and construction of the Project. Developer shall deliver to DHHL evidence that all such architectural, engineering and design professionals have purchased and have in full force and effect insurance providing a minimum of \$500,000 per claim and \$500,000 per aggregate.
- (5) Permits and Approvals. Developer shall submit to DHHL copies of all, as applicable:
  - (i) approvals of the construction plans and specifications by State and County governmental departments, agencies or bodies having jurisdiction over the same;
  - (ii) building permits or similar permits;
  - (iii) property reports and related documents or subdivision approval;
  - (iv) subdivision and/or grading bonds, if required;
  - (v) grading permit;
  - (vi) performance and labor and material payment bonds; and
  - (vii) utility company letters which Developer has obtained in connection with the development and construction of the Project.

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Developer shall be responsible for the payment of all fees and other costs which are imposed by the State or County governmental department, agency or body having the authority for issuing such permits or approvals.

- (6) Other Contracts. Developer shall submit to DHHL copies of all contracts, subcontracts and any other agreements for construction of all improvements in the Project and all fixtures and personal property to be secured hereunder.

All contracts between the Developer and any contractor shall contain a contract provision for retainage consistent with Hawaii Revised Statute Section 103-32.1

General contractor shall submit to DHHL a current tax clearance certificate issued by the Department of Taxation of the State of Hawaii.

- (7) Performance and Labor and Material Payment Bonds. Developer shall submit performance and payment bonds which shall insure the full performance of all construction contracts and the payment of all obligations arising out of the construction of the Project. Such bonds shall be issued by a surety licensed to do business in the State of Hawaii with an appropriate rider naming DHHL as obligee. A materialhouse bond may be substituted for a surety bond upon DHHL's and Interim Lender's review and approval, provided that infrastructure construction to be paid out of Trust funds shall be insured by a surety bond.
- (8) Agreements. Developer shall obtain agreements from the general contractor, architect, and engineer who have contracted to work on the improvements to be constructed in the Project to the effect that each of them shall continue to perform for DHHL the services which they have contracted to perform for Developer at any time at the request of DHHL, notwithstanding any foreclosure of the mortgage, provided DHHL pays such general contractor, architects, and engineer for the service rendered for DHHL.
- (9) Insurance. Developer shall be responsible for having in force at all times the following policies of insurance in connection with the project:

### Insurance Coverage

General Liability

### Minimum Policy Limits

\$2,000,000.00 in the aggregate for property damage; \$2,000,000.00 per occurrence for injuries to or death of any one person in any accident in the aggregate

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Workers' Compensation	As required by Hawaii laws
Fire and extended coverage	100% replacement value
Builder's risk covering the general contractor and all subcontractors	100% replacement value
Malicious mischief	100% replacement value
Flood insurance (if required)	Maximum coverage available

The insurance policies shall be in a form and substance including amounts of coverage, acceptable to DHHL.

Developer shall furnish DHHL with insurance polices and/or certificates, which shall name DHHL as an additional insured. Such insurance policies shall provide that the insurance company shall give DHHL no less than thirty (30) days prior written notice of any termination or cancellation of such insurance policies.

**Developer acknowledges notice that it is free to procure all required insurance policies, from any insurance company authorized to do business in the state of Hawaii, pursuant to chapter 479, Hawaii revised statutes.**

### E. Reports and Notices.

- (1) Progress Reports. As requested but not more than monthly, Developer shall deliver to DHHL written progress reports informing DHHL of the status of the development and construction of the Project, including without limitation, the status of construction of the improvements, marketing and sale of units in the Project, an updated Cash Flow and such other information as DHHL may require.
- (2) Completion and Survey Certification. The Project shall be completed on or before the date specified in the Loan Agreement substantially in accordance with the plans and specifications.

A certification by an architect or engineer duly licensed under the laws of the State of Hawaii that the improvements have been completed in accordance with the approved plans and specifications and a certification by a surveyor registered under the laws of the State of Hawaii that all improvements "as built" are located within the boundary and setback lines

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of the Project or, in the case of a subdivision, of each lot, shall be furnished to DHHL as soon as possible following completion.

- (3) Notices of Completion. A certified copy of the Affidavits of Notice(s) of Completion duly filed in the appropriate Circuit Court of the State of Hawaii shall be furnished to DHHL. Such notice will be filed as soon as possible after the architect or engineer has certified the housing units and improvements for each building permit issued have been completed.

F. Sales Documents. The following documents shall be submitted to DHHL for approval as soon as practicable and within a time frame that is consistent with the Project Schedule.

- (1) Schedule of Prices for All Units.
- (2) Escrow Agreement. All payments made by purchasers for the purchase of units in the Project must be deposited with an escrow. Developer shall enter into a written escrow agreement with the escrow. The escrow and the form and content of the escrow agreement shall be subject to DHHL's and Interim Lender's prior approval. The escrow agreement must provide that the escrow will not disburse funds that are delivered to or deposited with escrow in connection with the sales of the units in the Project without DHHL's and Interim Lender's approval. Escrow shall retain only such funds that are necessary to pay escrow fees and closing costs and sales commissions, if any, and shall immediately disburse the balance of such funds to repay interim loan to lender and to pay profit to Developer.
- (3) Escrow Letter. Escrow shall acknowledge receipt of and agree to comply with the terms of the escrow agreement.
- (4) Form of Sales Contract.
- (5) Specimen Bill of Sale.
- (6) Broker's Agreement.
- (7) Appraisal of each unit model.
- (8) FHA and architect inspection reports.
- (9) Warranty Book.

## **12. WARRANTY; WARRANTY PROGRAM**

Developer and the Developer's general contractor shall give purchasers of units in the Project a warranty covering construction or material/supply defects, and shall establish a

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warranty program pursuant to which Developer and the general contractor agree to promptly respond to claims of construction or other defects and to correct and repair construction or material/supply defects.

Under the warranty program, Developer shall provide each purchaser with a "warranty package" which describes all warranties which the Developer, general contractor, any materialman or other contractor are giving to the purchaser and how to make a warranty claim to the Developer. Such warranties shall be for a term of no less than one year from the date the purchaser's purchase of the unit is closed.

Notwithstanding any provision in any agreement, including surety bond, sale or purchase agreement, this Development Agreement or other agreement, and whether or not DHHL is a party thereto or has approved such agreement, pursuant to which Developer or a contractor, materialman or other person has disclaimed or limited any warranty, liability or responsibility to respond to claims of construction or material/supply defects and to correct and repair construction or material/supply defects in or with respect to the Project and any of the units therein, Developer, including Guarantor, agrees to pay, perform, indemnify and hold DHHL harmless from all responsibility or liability to anyone, including the owners and occupants of the units and any association or organization representing such owners' or occupants' rights or interests, with respect to all such matters. DHHL shall not have any responsibility or duty and DHHL shall not assume any responsibility or liability for responding to claims of construction or material/supply defects or to correct and repair construction or other defects. Developer shall not be responsible for claims relating to the performance of DHHL's work under this Agreement or any provisions of DHHL's lease agreement to the purchaser.

If Developer is not timely responding to warranty claims, DHHL may require Developer to post bonds, warranty insurance or other security, including cash, letter(s) of credit, or equivalent, and may withhold disbursement of any funds, including profit, which is allocated for payment to Developer, to secure Developer's responsibility or liability to respond to claims of construction or material/supply defects and to correct and repair and construction defects.

### **13. NO ASSIGNMENT OF DEVELOPMENT AGREEMENT OR OTHER RIGHTS**

The identity of the Developer is of material importance to DHHL. This Agreement cannot be assigned by Developer to another developer or to any third party, nor can there be any sale or transfer of any interest in the Developer without the written consent of DHHL. DHHL shall have no obligations whatsoever hereunder to any third parties, except as provided in Exhibit J and Section 8C(6).

### **14. DATE OF CLOSING - COMMENCEMENT OF CONSTRUCTION**

Finance and Development Schedule

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- (1) General. Developer shall complete the development and construction of the Project within \_\_ months from date of this Agreement.
- (2) Issuance of a Notice to Proceed. Within ten (10) calendar days after the Interim Loan has closed, DHHL shall issue a "Notice to Proceed". Developer shall commence construction within fourteen (14) calendar days after receiving the Notice to Proceed.

### **15. PUBLICITY**

Developer shall have sole responsibility for funding the advertising and promotional program for the Project. The advertising and promotional program shall publicize the fact that the Project is being developed by Developer with financial and other assistance from DHHL. The Project budget shall include the cost of such publicity as an item of expense in the Project budget. DHHL may, in DHHL's sole discretion, participate, at its cost, with Developer in the advertising and promotional program.

### **16. RELATIONSHIP**

In the performance of services required under the development agreement, the Developer shall be an "independent contractor," with the authority and responsibility to control and direct the performance and details of the work and services required under the agreement. There shall be no partnership, joint venture, employer and employee, master and servant, or other agency relationship between the DHHL and the Developer. Nor shall the DHHL be deemed to be the developer of the project or a seller of the housing units in the Project. The Developer, inclusive of any person acting by, through, under, or for the benefit of the Developer (such as, for example, any real estate broker or sales person) shall not represent itself as being a partner, joint venturer, employee, servant, or agent of DHHL, nor shall the Developer, inclusive of any person acting by, through, under, or for the benefit of the Developer, have any authority to bind, act for, or represent DHHL in any respect. The Developer shall be developing and constructing the Project in Developer's own behalf and shall pay, indemnify, defend and hold DHHL harmless from all claims, demands, lawsuits, judgments, deficiencies, damages (whether paid by DHHL as part of a settlement or as a result of a judgment) and expenses, including attorney's fees and all costs of suit, made against DHHL or incurred or paid by DHHL arising out of or in connection with the Developer's development and construction of the Project.

Developer shall not be responsible for indemnifying DHHL for the negligence, willful acts or omissions of DHHL, its employees or agents.

### **17. REVIEWS, INSPECTIONS AND APPROVALS**

All reviews and approvals inspections and other services rendered and relied on or performed by DHHL or their agents, whether or not paid for by Developer, shall be rendered or relied upon by DHHL solely for DHHL's benefit and protection. DHHL

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shall have the right to make inspections during construction. If DHHL requires the services of a private outside consultant, including engineers and/or architects, to assist DHHL in monitoring or inspecting the Project, DHHL shall be responsible for the payment of the fees and costs of such private outside consultant.

Developer shall be responsible for the quality and quantity of work that is represented to be completed in any Interim Loan draw request or other document.

Developer, surety, contractor, purchasers of the units or anyone else, including any class or association of purchasers or owners of the units, shall not nor shall any of them have any right to rely upon any reviews, approvals, inspections and services by or on behalf of DHHL.

### **18. FORCE MAJEURE**

In the event that either DHHL or Developer shall be delayed or hindered in or prevented from the performance of any act required under this Agreement by reason of strikes, lockouts, labor troubles, inability to procure materials, failure of power, restrictive governmental laws or regulations, riots, insurrection war, civil or criminal proceedings, injunctions, writs, appeals, stays or any other reason of a like nature, which is not within the control of, or which is not the fault of, or capable of being prevented by the party delayed in performing work or doing acts required under the terms of this Agreement, and including in the case of Developer, delays in approvals, consents, or issuance of permits by DHHL, then performance of such act shall be excused for the period of the delay and the period for the performance of any such act shall be extended for a period equivalent to the period of such delay. DHHL or Developer shall notify the other in writing of the date of commencement of any force majeure event upon which DHHL or Developer intends to rely for an extension of the period for the performance of any such act (which notice shall be given within thirty (30) days of the commencement date of any such force majeure event), and shall also notify the others in writing of the date on which any such event ended.

### **19. DEFAULT**

A. Developer shall be in default if:

- (1) Developer shall fail to timely pay, perform and/or complete Developer's obligations under this Agreement or under the loan documents contemplated by the Loan Agreement.
- (2) Developer shall become insolvent, or shall become voluntarily or involuntarily dissolved or shall make any assignment for the benefit of creditors or shall generally fail to pay Developer's debts as they become due.

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- (3) Developer shall become the subject of an order for relief in an involuntary case under the bankruptcy laws as now or hereafter constituted and such order shall remain in effect and unstayed for a period of sixty (60) consecutive days.
- (4) Developer shall commence a voluntary case under the bankruptcy laws as now or hereafter constituted, or shall file any petition or answer seeking for itself any arrangement, composition, adjustment, liquidation, dissolution or similar relief to which it may be entitled under any present or future statute, law, or regulation.
- (5) Developer shall file any answer admitting the material allegations of any petition filed against Developer in any such proceedings.
- (6) Developer shall seek or consent to or acquiesce in the appointment of or taking possession by, any custodian, trustee, receiver or liquidator of developer or of all or a substantial part of Developer's property(ies) or assets.
- (7) Developer shall take action looking to Developer's dissolution or liquidation; or within sixty (60) days after commencement of any proceedings against Developer seeking any arrangement, composition, adjustment, liquidation, dissolution or similar relief to which Developer may be entitled under any present or future statute, law or regulation and such proceedings shall not have been dismissed.
- (8) Within sixty (60) days after the appointment of, or taking possession by, any custodian, trustee, receiver or liquidator of any or of all or a substantial part of the properties or assets of Developer, without DHHL's consent or acquiescence, any such appointment or possession shall not have been vacated or terminated.
- (9) There shall be any attachment, execution or other judicial seizure of, or otherwise materially affecting all or any part of this Development Agreement, the Development Rights or the Project Land or any improvements thereon or any other material property or asset of Developer, or any similar action on account of developer's acts or failure to act, unless, in any such case, such attachment, execution or seizure is set aside, dissolved, bonded off or otherwise eliminated within thirty (30) days of its occurrence.
- (10) Any third person shall obtain an order or decree in any court of competent jurisdiction enjoining or prohibiting Developer from performing this Agreement and such proceedings shall not be discontinued and such order

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or decree shall not be vacated within thirty (30) days after the granting thereof.

- (11) There shall be a sale, transfer, hypothecation, assignment or conveyance of all or any part of this Agreement, the Development Rights, the Project, including the units and other improvements comprising the Project, or the Project Land by Borrower without the prior written consent of DHHL, except as expressly allowed and contemplated by this Agreement.
- (12) Any representation or warranty made by or on behalf of Developer herein, in any of the other writing in connection with the Project or the Loan shall prove to have been false or incorrect in any material respect on the date as of which such representation or warranty was made.
- (13) A final judgment is entered which alone or with other outstanding final judgments against Developer or any of its partners would have a material adverse effect on their financial ability to perform their obligations in connection with this Agreement or the Interim Loan and (i) such judgment shall not be discharged, or (ii) within thirty (30) days after entry of such judgment the execution thereof shall not be stayed pending appeal, or (iii) such judgment shall not be discharged within thirty (30) days after the expiration of any such stay.

- B. Notice of Default. If Developer shall be in default, DHHL shall notify Developer of such default in writing to Developer's address shown above by any means, including without limitation personal delivery or certified or registered mail.

No failure forbearance or delay on the part of DHHL in exercising any power or right under this Agreement or under any of the loan documents contemplated by the Loan Agreement shall operate as a waiver of the same or any other power or right, and no single or partial exercise of any such power or right shall preclude any other or further exercise thereof or the exercise of any other such power or right. No action taken by DHHL pursuant to this Agreement to proceed with the development of the Project despite Developer's default shall constitute a waiver of any of the conditions precedent which Developer is required to perform to proceed with the development of the Project. If Developer fails, refuses, neglects or is unable to perform or satisfy any such condition, DHHL shall not be precluded from thereafter declaring such failure, refusal, neglect or inability to be an event of default as provided in this Agreement.

- C. Cure Period. Developer shall have thirty (30) calendar days to cure a default which can be remedied and cured by the payment of money.

If a default cannot be remedied by the payment of money, Developer shall have sixty (60) calendar days in which to cure such default. Developer shall

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immediately proceed with taking all action necessary to cure the default. During such period of default, Developer shall protect the Project from loss, damage, vandalism, waste or other destruction and shall maintain the Project Schedule to the extent that it is practicable to do so. Developer shall provide DHHL staff and/or DHHL Designated Project Manager with progress reports upon reasonable request.

Upon the occurrence of such default, DHHL may, but shall not be required to, advance funds or agree to undertake to advance funds over and above the undisbursed Interim Loan proceeds, to any third party or for any reason to eliminate or reduce the risk of loss resulting from such default. Such agreement or agreements by DHHL shall be in such form and have such content the funds advanced shall be in such amount, and such advances shall be made at such time or times and upon such terms and conditions as DHHL, in its judgment deems appropriate, necessary or useful to eliminate, reduce or indemnify DHHL or the Project against any such danger. All sums paid or agreed to be paid by DHHL pursuant to such agreements or undertakings shall be for the account of Developer. Developer shall reimburse DHHL upon demand, for any such sums paid by DHHL together with interest computed at seven and one-half percent (7.5%) until the date of reimbursement. All such advances shall be secured by the DHHL Loan Documents.

D. DHHL's Rights. After Developer has been declared to be in default and Developer fails to cure such default within the time period allowed, Developer agrees that DHHL shall have all legal and equitable rights to which DHHL may be entitled to under laws including without limitation the rights and remedies set forth below. DHHL may:

- (1) Enforce DHHL's rights and remedies under the document contemplated by the Loan Agreement.
- (2) Terminate all of Developer's right, title and interest in the Development Rights, the Project and the Project Land and take over the completion of the Project.

Notwithstanding such termination, Developer shall not be released from the obligation to pay and perform all outstanding obligations under this Agreement, including the payment of the unpaid balance of the Developer's Equity which Developer is obligated to pay and invest and damages arising out of delays and cost overruns incurred to complete the Project lien free.

- (3) Retain all deposits, funds or security that have been paid or delivered to DHHL or escrow.

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- (4) Keep and use all plans, drawings, specifications and Project documents and work product over which the developer can exercise legal control and transfer, whether prepared by Developer or Developer's consultants and, in DHHL's sole discretion, to negotiate with Developer's consultants and contractors to complete the Project.
- (5) Enter into negotiations with other developers and enter into a development agreement with another developer to complete the development of the Project pursuant to development rights afforded to such person under a development agreement.
- (6) Complete the development of the Project and use the Developer's Equity and any other funds or security which Developer has paid or deposited with DHHL to complete the Project.
- (7) Require Developer to put up additional security in an amount necessary to pay for the completion of the project lien free and to repay the Interim Loan and Developer's other obligations hereunder or under the loan documents contemplated by the Loan Agreement. DHHL may require such additional capital to be in the form of cash or a letter of credit (or equivalent) or bond.
- (8) Sue for damages/ including architectural and engineering fees and costs and attorney's fees and costs.
- (9) Seek specific performance.
- (10) Stop all disbursement of the Interim Loan.

All rights, powers and remedies herein given to DHHL are cumulative and not alternative are in addition to all rights, powers and remedies afforded by statutes or rules of law and may be exercised concurrently, independently or successively in any order whatsoever. Without limiting the generality of the foregoing, DHHL may enforce any one or more of the Interim Loan Documents without enforcing all of them concurrently or in any particular order.

- E. Limitation of Developer's Remedies in the Event of DHHL's Default. DHHL shall be in default if DHHL does not timely perform DHHL's respective obligations under this Agreement or any loan documents. In the event of DHHL's default, Developer, including any of Developer's successors or assigns, agrees that Developer's rights and remedies shall be expressly limited to termination of this Agreement and/or the payments provided under paragraph 20.

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### **20. TERMINATION OF THE PROJECT**

DHHL may require that this Agreement, the Project Plans, Project budget, project Cash Flow Schedule and Project Schedule and other project documents be amended or modified as a result of the governmental review and processing of the Project. If substantial amendments or modifications that adversely affect the feasibility of the Project are required, DHHL and Developer shall each have the right to terminate this Agreement by giving written notice thereof on or before thirty (30) days after the written notice from DHHL is received. Provided, however, that if DHHL shall determine that the Project is not financially feasible as a result of such substantial amendments or modifications and shall desire to terminate this Agreement, Developer shall have the option of proceeding with the Project, as amended or modified, and assuming all such additional risks. If Developer elects to proceed with the Project, as amended or modified, Developer shall be entitled to an increase in the units sales price and to a reasonable extension of time to incorporate such amendments and modifications into the Project and Project Plans.

If the development of the Project is terminated by DHHL or by Developer because the Project is not financially feasible as a result of such substantial amendments or modifications, DHHL shall reimburse Developer for the lesser of (i) Developer's actual costs incurred to the date of termination or (ii) \$\_\_\_\_\_.

If the development of the Project is terminated for any other reason, or if termination takes place after receipt of all governmental approvals and finalization of the Project Plans, Project Budget, Project Cash Flow Schedule and Project Schedule, DHHL shall assume all obligation under the interim loan agreement and shall reimburse Developer as follows:

<u>Termination Stage</u>	<u>Termination By Developer</u>	<u>Termination By DHHL</u>
(1) Prior to construction start.	Certified Cost	Certified Cost plus ____%
(2) Prior to construction of 50% of the houses.	Certified Cost	Certified Cost plus ____%
(3) Prior to construction of 100% of the houses.	Certified Cost	Certified Cost plus ____%

In the event of termination for any reason and after DHHL reimburses Developer, Developer agrees to convey and deliver to DHHL all of Developer's right, title and interest in the Project and improvements, including Developer's Project Proposal, the Project Plans and contracts and work product of Developer's consultants and contractors and to execute all documents evidencing the termination of this Agreement.

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### **21. INTEGRATED AGREEMENT**

All prior representations and agreements, including memorandum of understanding, between the parties are merged into this Agreement. The terms of this Agreement may not be waived, modified, or in any way changed by implication, through conduct, correspondence, or otherwise, unless such waiver, modification, or change shall be specifically agreed to in writing by DHHL and Developer.

Any waiver by DHHL in whole or in part any of the terms and conditions hereunder, including any extension of time, shall be specific and not general. Each waiver shall only apply to the specific conditions and circumstances surrounding it.

The terms and conditions as set forth in this Agreement, including the Exhibits which are attached and incorporated by reference, supersede all prior correspondence and negotiations and are subject to all laws, regulations, and interpretations which now or may in the future affect DHHL and/or the financial and other assistance from DHHL which is contemplated by this Development Agreement.

### **22. GENERAL TERMS**

- A. Approval and Consent. Except as otherwise provided in this Agreement, where the consent or approval of DHHL or Developer is required by any provision of this Agreement, such approvals or consents shall not be unreasonably withheld or delayed and shall not be conditioned upon the payment of any compensation. If no written objection is received by Developer or DHHL within fifteen (15) calendar days after the request for approval and consent is delivered, then such approval and consent shall be deemed to have been given.
- B. Attorneys' Fees and Costs. Should any litigation be commenced between the parties hereto concerning this Agreement, the subject matter of this transaction or the rights and duties of either in relation thereto, the prevailing party in such litigation shall be entitled to (in addition to such other relief as may be granted) a reasonable sum for its attorneys' fees and costs of litigation as shall be determined by the court.
- C. Amendments. This agreement may not be amended or modified in any respect except by an instrument in writing executed by the parties.
- D. Cooperation. The parties shall cooperate with one another in effecting this Agreement and agree to execute such further and additional mutually approved documentation required to facilitate and complete the transactions contemplated in this Agreement.
- E. Governing Law. The validity of this Agreement and any of its terms or provisions, as well as the rights and duties of the parties to this Agreement, shall be governed by the laws of the State of Hawaii. Any action at law or in equity to

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enforce or interpret the provisions of this Agreement shall be brought in a state court of competent jurisdiction in Honolulu, Hawaii.

- F. Binding Effect of Agreement. This Agreement shall be binding upon and inure to the benefit of DHHL, its successors and assigns; and upon and to Developer, its successors and permitted assigns.
- G. Gender and Number. The use of any pronoun in reference to DHHL or Developer shall be construed to mean the singular or plural, the masculine, feminine, or neuter, as the instrument and context may require.
- H. Captions. All captions used in this Agreement are convenience only and are not to be construed as limiting in any manner the context of any paragraph, section or particular provision.
- I. No Party Deemed Drafter. The parties agree that neither party shall be deemed to be the drafter of this Agreement and that in the event this Agreement is ever construed by a court of law, such court shall not construe this Agreement or any provision hereof against either party as the drafter of this Agreement.
- J. Counterparts. This Agreement may be executed in any number of counterparts. Each such counterpart hereof shall be deemed to be an original instrument but all such counterparts together shall constitute but one Agreement.
- K. Invalidity of Provision. If any provision of this Agreement as applied to any party or to any circumstances shall be adjudged by a court of competent jurisdiction to be void or unenforceable for any reason, the same shall in no way affect (to the maximum extent permissible by law) any other provision under circumstances different from those adjudicated by the court, or the validity or enforceability of this Agreement as a whole.
- L. Computation of Periods. All periods of time referred to in this Agreement shall include all Saturdays, Sundays and state or national holidays, unless the period of time specifies business days, provided that if the date or last date to perform any act or give any notice with respect to this Agreement shall fall on a Saturday, Sunday or state or national holiday, such act or notice shall be timely performed or given on the next succeeding day which is not a Saturday, Sunday or state or national holiday.
- M. Acceptance of the Development Agreement. This Development Agreement shall not be binding unless signed by Developer and received at DHHL's office by 4:00 p.m., \_\_\_\_\_ unless such date is extended by mutual agreement.
- N. Continuing Obligations. All of Developer's unfulfilled or continuing undertakings and obligations contained herein or in any exhibit attached hereto or in any of the loan documents shall survive the closing of the loan until all such

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obligations are fulfilled, and any breach of any such undertaking or obligation shall constitute a default under the loan or this Development Agreement. These obligations, in any event, shall terminate within five (5) years from completion of the project.

- O. Interpretation. This Development Agreement shall be interpreted in a manner which is consistent with the HHC Laws, together with the rules promulgated thereunder.

IN VIEW OF THE ABOVE, the parties execute this Development Agreement by their signatures, on this \_\_\_\_\_ day of \_\_\_\_\_, 2008.

DEPARTMENT OF HAWAIIAN HOME LANDS

By \_\_\_\_\_  
Chairman  
Hawaiian Homes Commission

DEVELOPER: \_\_\_\_\_  
a \_\_\_\_\_ Corporation

By \_\_\_\_\_  
Its \_\_\_\_\_

By \_\_\_\_\_  
Its \_\_\_\_\_

APPROVED AS TO FORM:

\_\_\_\_\_  
Deputy Attorney General

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## ACKNOWLEDGMENT

STATE OF HAWAII )  
 ) SS:  
CITY AND COUNTY OF HONOLULU )

On this \_\_\_\_\_ day of \_\_\_\_\_, 2008, before me appeared \_\_\_\_\_ and \_\_\_\_\_, to me personally known, who being by me duly sworn, did say that they are the \_\_\_\_\_ and \_\_\_\_\_, respectively of \_\_\_\_\_, a \_\_\_\_\_ corporation, that the seal affixed to the foregoing instrument is the corporate seal of said corporation; that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors; and said \_\_\_\_\_ and \_\_\_\_\_ acknowledged said instrument to be the free act and deed of said corporation.

Notary Public, State of Hawaii

My commission expires: \_\_\_\_\_

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