

**DEVELOPMENT AGREEMENT**

**ULU KE KUKUI RENTAL HOUSING**

Mali, Waianae, Oahu

DEPARTMENT OF HAWAIIAN HOME LANDS

and

\_\_\_\_\_

\_\_\_\_\_, 2019

## TABLE OF CONTENTS

### RECITALS

### AGREEMENT

1. Description of Project .....	4
2. Term .....	4
3. Rental Program .....	4
4. DHHL Assistance .....	4
5. Processing of Project.....	5
6. Developer’s Agreement to Develop the Project .....	6
7. Required Documents and Information.....	7
8. No Assignment of Agreement or Other Rights.....	11
9. Publicity .....	11
10. Relationship of Parties .....	11
11. Termination.....	11
12. Default.....	12
13. Integrated Agreement.....	14
14. General Terms.....	15

## EXHIBITS

- A. Ulu Ke Kukui Location Map
- B. Chairman's Approval of Developer
- C. Rental Program
- D. Preliminary Project Budget
- E. Preliminary Project Schedule

## DEVELOPMENT AGREEMENT

THIS DEVELOPMENT AGREEMENT ("Agreement") is made and effective this day of \_\_\_\_\_, 2019 ("Effective Date"), by and between the State of Hawaii, by its **DEPARTMENT OF HAWAIIAN HOME LANDS** ("DHHL"), whose principal place of business is 91-5420 Kapolei Parkway, Kapolei, Hawaii 96707, but whose post office address is P.O. Box 1879, Honolulu, Hawaii 96805, and \_\_\_\_\_ ("Developer"), a \_\_\_\_\_, whose principal place of business and post office address is \_\_\_\_\_.

### RECITALS:

- A. DHHL owns in fee simple that certain parcel of land known as the former Voice of America Site located in Maili, Waianae, on the Island of Oahu, City and County of Honolulu, Hawaii (Exhibit A).
- B. Under Section 220.5 of the Hawaiian Homes Commission Act, 1920, as amended ("HHCA"), DHHL is authorized to enter into and carry out contracts with private developers to develop available lands for homestead, commercial, and multi-purpose projects.
- C. On August 19, 2019, DHHL announced and noticed a Request for Proposals ("RFP") which was directed to developers who met the qualifications described therein to submit proposals to renovate, operate and maintain the Ulu Ke Kukui multi-family residential housing facility in Maili, Wai'anae, O'ahu (hereinafter referred to collectively as the "Project"; individual rental apartments are hereinafter referred to as "Project Units"; other facilities not intended for residential rental uses, including but not limited to resident manager unit, offices, classroom, kitchen, parking lot, and open areas are hereinafter referred to as "Project Common Areas").
- D. Pursuant to the RFP process, Developer submitted its Project Proposal dated \_\_\_\_\_.
- E. Pursuant to Chairman's Approval of the Developer Selection, dated \_\_\_\_\_, and attached hereto as Exhibit B, the Chairman of the Hawaiian Homes Commission ("HHC") selected Developer as the entity qualified to develop the Project per the specifications of the RFP.
- F. This Agreement covers the development of the Project, which is further described below, 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;
  - (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 either of them. Developer understands and agrees that all financial and other obligations which Developer has incurred up to the date of this Agreement and hereafter are Developer's sole responsibility.

This Agreement shall incorporate by reference: (1) the RFP, dated August 19, 2019, and all

attachments and addenda thereto; (2) Developer's Project Proposal dated \_\_\_\_ ("Project Proposal"); and (3) any change orders or amendments to this Agreement made by Developer and/or DHHL to complete the Project.

### **AGREEMENT:**

In consideration of the recitals and the mutual covenants, obligations and conditions set forth in this Agreement, DHHL and Developer hereby mutually agree as follows:

1. Description of Project. The name of the Project is "Ulu Ke Kukui Rental Housing". The name of the Project may be changed only with DHHL's prior written approval. The Project is located on the Island of Oahu, City and County of Honolulu, Hawai'i, as more particularly shown on Exhibit A attached hereto.
2. Term. The term of this Agreement shall be for twenty (20) years, commencing on the 25<sup>th</sup> day of November 2019 up to and including the 24<sup>th</sup> day of November 2039, or unless terminated sooner pursuant to the terms of this Agreement.

When the interests of DHHL so requires, DHHL may terminate this Agreement for convenience by providing six (6) months prior written notice to the Developer.

Unless terminated, DHHL may extend the term of this Agreement for an additional three periods of up to ten years or portions thereof without the necessity of re-bidding, upon mutual agreement in writing at least sixty (60) days prior to the expiration date.

3. Rental Program. Developer will operate and manage the rental of \_\_\_ Project units to qualified and eligible DHHL beneficiaries ("Beneficiaries") in accordance with the rates and procedures set forth on Exhibit C attached hereto ("Rental Program"), which Rental Program has been reviewed and approved by DHHL. Samples of letters and forms in furtherance of the Rental Program which are intended to be sent to any Beneficiary shall first be approved by DHHL. Any meeting agendas and schedules shall first be approved by DHHL. The Rental Program may be amended by Developer, subject to DHHL approval.
4. DHHL Assistance. In addition to any and all other obligations under this Agreement, DHHL, at its sole cost and expense, shall be responsible for providing the following assistance to the Project and Developer in furtherance of its public purpose of creating housing opportunities for native Hawaiians.

A. Development Rights. DHHL grants to Developer the right to develop the Project on the Project Lands in accordance with the terms of this Agreement, provided, however, that notwithstanding any provision to the contrary in this Agreement, such development rights are qualified as follows:

- 1) Developer shall not have any legal or equitable right, title, or interest in or to any portion of the Project Land; and
- 2) Developer's right to enter the Project Lands is limited to entering the Project Land to develop the Project in accordance with the terms of this Agreement.

- B. Beneficiary Meetings. DHHL will coordinate with and assist Developer in scheduling and conducting Beneficiary orientation and other meetings necessary or advisable to carry out their mutual purposes under this Agreement, including the scheduling and the setting of any agenda items for any such meeting as well as providing speakers to represent DHHL.
5. Processing of Project. In addition to the other requirements of this Agreement, the Project shall be renovated, and the Project units marketed and rented in accordance with the following procedures:
- A. Developer Proceeding with Development. As of the Effective Date, Developer has provided DHHL with (a) schematic plans and outline specifications for renovation of the Project Units and Common Areas (“Project Renovation Plans”) which Project Renovation Plans DHHL has approved in concept, (b) a preliminary Project Budget implementing the Rental Program which DHHL has approved in concept, and (c) a preliminary Project Schedule which DHHL has approved in concept. Copies of documents (b) and (c) are attached hereto as Exhibits D and E, respectively. Developer and DHHL undertake to agree to a final Project Budget and Project Schedule at their earliest opportunity as more fully set forth in paragraph 6.A. below.
  - B. Compliance with Normal Procedures, Applicable Laws, Ordinances etc. Project Renovation plans, construction documents and other submissions ordinarily required by the State of Hawaii or C&C shall be submitted to the appropriate agencies to be reviewed for conformance with the relevant standards and requirements.
  - C. Building Permits. Developer shall be responsible for obtaining from the C&C, and for providing DHHL with copies of, all building permits for renovation of the Project in accordance with the Project Renovation Plans. Developer shall use its best efforts to obtain all such building permits at its earliest opportunity.
  - D. Repairs to improvements. That Developer shall at its own expense, keep, repair and maintain all buildings and other improvements now existing or hereafter constructed or installed on the premises in good order, condition and repair, reasonable wear and tear excepted.
  - E. Reports. Developer shall cause the following reports to be prepared and submitted to DHHL for DHHL'S review and acceptance, which shall not be unreasonably withheld:
    - 1) On or before the fifteenth (15th) day of each month, monthly financial statement of receipts and disbursement, schedule of accounts receivable and payable, and reconciled bank statements for project accounts for the previous month;
    - 2) Annual audit prepared and certified by a Certified Public Accountant (CPA) or other person acceptable to DHHL; and
    - 3) Management reports covering occupancy, operations, physical condition of the premises and improvements.

- F. Developer will permit DHHL and its agents, at all reasonable times as to cause as little interference with Developer's use of the premises as is reasonably possible during this Lease term, to enter into and upon the premises to inspect and examine the same and determine the state of repair and condition thereof, including without limitation the right to inspect Developer's records regarding compliance with all applicable rules and regulations.

6. Developer's Agreement to Renovate and Operate the Project.

- A. Finalizing Project Documents. The final Project documents, including the final Project Budget and Project Schedule, shall include:
  - 1) A narrative describing the overall Project concept.
  - 2) Architectural and engineering planning and design documents for renovating the Project Units and Common Areas.
  - 3) Developer's estimated costs for renovating the Project Units and Common Areas, and on-going management and operating costs, including Developer's estimates of costs incurred to date and over the remaining term of development/operations. 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) 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.
  - 5) Description of Developer's rental program and rental rates of the Project Units together with the figures and analysis used to arrive at such rental rates.
  - 6) Amendments to the Proposal agreed to by DHHL.
  - 7) Any other document, agreement, or plans requested by DHHL deemed necessary for development of the Project.
- B. Risks of Development. Developer understands and agrees that Developer is not guaranteed any profit in connection with the development of the Project.
- C. Developer's Expenses. Developer agrees to contract and pay for all expenses relating to renovation and operation of the Project including related architectural, engineering, surveying, legal, and administration costs.
- 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 or by additional equity from Developer. Developer shall be responsible all costs and expenses allocable hereunder to Developer.

- 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 the environment, ecology, health and safety, which apply to the development, construction, marketing and sale of the houses, subject, however, to any exemption or pre-emption from the same which DHHL shall adopt with the powers granted to DHHL under the HHCA.
- F. Taxes, assessments, etc. (a) That Developer shall pay or cause to be paid, when due, the amount of all taxes, rates, assessments and other outgoings of every description as to which the premises or any part, or any improvements, or DHHL or Developer, are now or may be assessed or become liable by authority of law during the term of this Agreement provided, however, that with respect to any assessment made under any betterment or improvement law which may be payable in installments, Developer shall be required to pay only those installments, together with interest, which become due and payable during the term. (b) That Developer shall reimburse to DHHL, upon demand, any and all conveyance and transfer taxes payable with respect to this transaction, or with respect to any document to which Developer is a party, creating or transferring an interest or an estate in the premises.
- G. Utility services. That Developer shall pay or caused to be paid all charges, duties, rates and, other outgoings of every description, including water, sewer, gas, refuse collection, relocation of utility poles and lines or any other charges, as to which the premises or any part, or any improvements, or DHHL or Developer may become liable for during the term, whether assessed to or payable by DHHL or Developer.
- H. Hold Harmless Agreement. Developer agrees to pay, defend, indemnify and hold harmless DHHL from any and all claims of any person or entity, including mechanic's and materialmen's claims which arise out of, or in connection with the development, construction, marketing and rental of any unit.

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

## 7. Required Documents and Information.

- A. Information about Developer. DHHL acknowledges that Developer has submitted the following information about Developer as required by the Request for Proposals and that such information is satisfactory to DHHL:
  - 1) Corporate, Partnership and Other Organizational Documents. Copies of organizational documents including Articles, By-Laws, and Corporate Resolutions, as applicable.
- B. Development Documents. Developer shall additionally submit copies of the following contracts to DHHL as applicable:

- 1) Architectural Contract. The architectural contract for the renovation of the Project for review and approval by DHHL, which contract shall be with an architect or architectural firm which is licensed to engage in the architectural business in Hawaii and is approved by DHHL.
- 2) Engineering Contracts. Any 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 and is approved by DHHL.
- 3) Project Management, Rental Management and Financial Management Contracts. Any contracts for project management, rental management, and financial management for review and approval by DHHL.
- 4) Architect's and Engineer's Insurance. For 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, such errors and omissions insurance and other liability insurance as shall reasonably insure them against 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 \$1,000,000 per claim and \$2,000,000 annual aggregate. If the Self-Insured Retention (SIR) or Deductible (Errors and Omissions) exceeds \$25,000, the State of Hawaii reserves the right, but not the obligation, to review and request a copy of CONTRACTOR's most recent annual report or audited financial statement.
- 5) Permits and Approvals. Developer shall additionally submit copies of the following government permits and approvals to DHHL as applicable:
  - a) approvals of the renovation plans by State and C&C governmental departments, agencies or bodies having jurisdiction over the same;
  - b) building permits or similar permits;
  - c) Developer shall be responsible for the payment of all fees and other costs which are imposed by any such governmental department, agency or body having the authority for issuing such permits or approvals and related to such permit or approval issuance.
- 6) Other Contracts. Developer shall submit to DHHL copies of all contracts, subcontracts and any other agreements for renovation of the project and all related fixtures and personal property.
- 7) Performance and Labor and Material Payment Bonds. Developer shall submit to DHHL 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 Homes. 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.

- 8) Agreements. Developer shall obtain agreements from the general contractor, architect, and engineer who have contracted to work on the houses 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 upon the default hereunder of Developer, provided DHHL assumes and complies with the obligations of Developer under their respective contracts.
- 9) Insurance. Developer shall maintain in force at all times the following policies of insurance in connection with the design, finance, construction, marketing and sale of the houses:

<u>Insurance Coverage</u>	<u>Minimum Policy Limits</u>
General Liability (occurrence form)	Bodily Injury and Property Damage (combined single limit): <u>\$1,000,000</u> per occurrence and <u>\$2,000,000</u> aggregate  Personal Injury: <u>\$1,000,000</u> per occurrence and <u>\$2,000,000</u> aggregate
Automobile Insurance (covering all owned, non-owned and hired automobiles)	Bodily Injury: <u>\$1,000,000</u> per person and <u>\$1,000,000</u> per occurrence  Property Damage: \$1,000,000 per accident or combined single limit of \$2,000,000.
Workers' Compensation (statutory limit is required by laws of the State of Hawai'i)	Insurance to include Employer's Liability. Both such coverages shall apply to all employees of the Developer and, in case any sub-contractor fails to provide similar protection for all his employees, to all employees of subcontractors.
Builder's risk covering the general contractor and all subcontractors	100% replacement value
Fire and extended coverage	100% replacement value
Malicious mischief	100% replacement value

Flood insurance (if required)

Maximum coverage available

- a) The State of Hawai'i, Department of Hawaiian Home Lands, its elected and appointed officials, officers, employees, and agents shall be named as additional insured with respect to operations, services, or products provided to the State of Hawai'i. Developer agrees to provide to the DHHL, before the effective date of this Agreement, certificate(s) of insurance necessary to evidence compliance with insurance provisions of this Agreement. Developer shall keep such insurance in effect and the certificate(s) on deposit with DHHL during the entire term of this Agreement. Upon request by DHHL, Developer shall furnish a copy of the policy or policies.
  - b) Failure of Developer to provide and keep in force such insurance shall be regarded as a material default under this Agreement. DHHL shall be entitled to exercise any or all of the remedies provided in this Agreement for default of Developer.
  - c) The procuring of such required policy or policies of insurance shall not be construed to limit Developer's liability under this Agreement or to fulfill indemnification provisions and requirements of this Agreement. Notwithstanding said policy or policies of insurance, Developer shall be obliged for the full and total amount of any damage, injury or loss caused by negligence or neglect connected with this Agreement.
  - d) Developer shall immediately provide written notice to DHHL should any of the insurance policies evidenced on its Certificate of Insurance form be cancelled, limited in scope, or not renewed upon expiration.
  - e) DHHL is a self-insured State agency. Developer's insurance shall be primary. Any insurance maintained by the State of Hawai'i shall apply in excess of, and shall not contribute with, insurance provided by Developer.
  - f) The Developer shall require all subcontractors to have in full force and effect the same insurance coverage as required of the Developer. Such insurance shall name the State of Hawai'i, Department of Hawaiian Home Lands, its elected and appointed officials, officers, employees, and agents as additional insured with respect to operations, services or products provided to the State of Hawai'i. The Developer shall be responsible to enforce its subcontractors' compliance with these insurance requirements and Developer shall, upon request, provide DHHL a copy of the policy or policies of insurance of any subcontractor.
- C. Rental 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) Rental Agreement.

## 2) House Rules

8. No Assignment of Agreement or Other Rights. The identity of Developer is of material importance to DHHL. Except as otherwise set forth in this section or otherwise agreed by Developer and 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 majority interest in Developer without the written consent of DHHL. Notwithstanding the foregoing, DHHL acknowledges and agrees that Developer may assign this Agreement and its rights and liabilities hereunder to its Interim Lender as security for the Interim Loan. With the exception of such potential assignee and in accordance with this Agreement, DHHL shall have no obligations whatsoever hereunder to any third parties.
9. Publicity. Developer shall have sole responsibility for conducting and funding the advertising and promotional program for the Project Houses. The advertising and promotional program shall publicize the fact that the Project is being developed by Developer with assistance from DHHL. The Project Budget shall include the cost of such publicity as an item of expense. In addition to its obligations hereunder, DHHL may, in DHHL's sole discretion, participate, at its cost, with Developer in the advertising and promotional program.
10. Relationship of Parties. In the performance of its work under this Agreement, Developer shall be an "independent contractor" with the authority and responsibility to control and direct the performance and details of all such work. There shall be no partnership, joint venture, employer and employee, master and servant, or other agency relationship between DHHL and Developer, nor shall DHHL be deemed to be the developer of the Project or a seller of the Project Houses. Developer, inclusive of any person acting by, through, under, or for the benefit of 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 Developer, inclusive of any person acting by, through, under, or for the benefit of Developer, have any authority to bind, act for, or represent DHHL in any respect. Developer shall be developing and constructing the Project Houses on 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 Developer's development and construction of the houses.  
  
Developer shall not be responsible for indemnifying DHHL for the negligence, willful acts or omissions of DHHL, its employees or agents.
11. Termination. That at the end of or earlier termination of this Agreement, Developer shall peaceably deliver unto DHHL possession of the premises, together with all buildings and other improvements of whatever nature or name, now or hereafter erected or placed upon same, in good order and condition, reasonable wear and tear excepted. Furthermore, upon the expiration, termination, and/or revocation of this Lease, should Developer fail to remove any and all of Developer's personal property from the premises, after notice thereof, DHHL may remove any and all personal property from the premises and either deem the property

abandoned and dispose of the property or place the property in storage at the cost and expense of Developer, and Developer does agree to pay all costs and expenses for disposal, removal, or storage of the personal property.

12. Default.

A. Developer shall be in default under this Agreement if:

- 1) Developer shall fail to timely pay, perform and/or complete Developer's obligations under this Agreement, which shall include the failure to renovate, operate, and maintain the Project.
- 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.
- 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 Developer's rights under this Agreement, 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 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 other than as allowed hereunder.
  - 12) Any representation or warranty made by or on behalf of Developer herein, 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 would have a material adverse effect on its financial ability to perform its obligations in connection with this Agreement 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 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 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 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 any undisbursed 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.

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

1) Terminate all of Developer's right, title and interest under this Agreement and take over the Project.

Notwithstanding such termination, Developer shall not be released from the obligation to pay and perform all outstanding obligations under this Agreement, including payment of any damages arising out of delays and cost overruns incurred.

2) Retain all deposits, funds or security that have been paid.

3) 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.

4) Sue for damages including architectural and engineering fees and costs and attorney's fees and costs.

5) Seek specific performance.

All rights, powers and remedies herein given to DHHL are cumulative and not alternative and 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.

E. Limitation of Developer's Remedies in the Event of DHHL's Default. DHHL shall be in default under this Agreement if DHHL does not timely perform DHHL's respective obligations under this Agreement or any related agreements. 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.

13. 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 Agreement.

#### 14. 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. Dispute Resolution/Attorneys' Fees and Costs. In the event of any dispute under this Agreement, Developer and DHHL agree that, prior to initiating any litigation to resolve any such dispute, they will engage in good faith in voluntary mediation toward resolving such dispute conducted by Dispute Prevention and Resolution, Inc. of Honolulu. Any such litigation shall be filed in the Circuit Court of the First Circuit, State of Hawaii. Should any such 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.
- 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 for 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.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the date and year first above written.

DEPARTMENT OF HAWAIIAN HOME LANDS

---

WILLIAM J. AILA, JR.  
 Chairman, Hawaiian Homes Commission

---

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

APPROVED AS TO FORM:

---

Deputy Attorney General