



MUNEKIYO HIRAGA

ATTORNEY AT LAW

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VICE PRESIDENT

TO: Robert Carroll, Chair
Maui County Council
Land Use Committee
200 South High Street, 7th Floor
Wailuku, Hawai'i 96793

DATE: February 15, 2018

SUBJECT: Council Committee 18-53, A Bill for
an Ordinance Amending Ordinance
No. 3554 (2008) to Amend
Condition No. 5 to Provide All or a
Portion of the Workforce Housing
Units Within the 670 Acre
Honua'ula Project District Site,
Paeahu, Palauea, Keahou, Maui,
Hawai'i; TMK (2)2-1-008:056 and
(2)2-1-008:071 (CIZ 2000/0009)

Enclosed is/are:

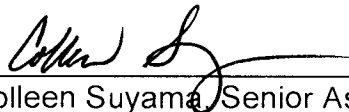
Copies	Date	Description
1	10/14/16	Settlement Agreement Between the Plaintiffs Sierra Club and Maui Unite, and the County of Maui and Honua'ula Partners, LLC

X	For your comment For necessary action For your review For your files	For your use As requested For your signature Returning
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REMARKS:

We are transmitting a copy of the Settlement Agreement for the October 25, 2012 Complaint filed by the Sierra Club and Maui Unite against the County of Maui and Honua'ula Partners, LLC, for your information.

If there are any questions, I can be reached at 244-2015. Thank you.

Signed: 
Colleen Suyama, Senior Associate

Copy to: Charles Jencks, Honua'ula Partners (w/out enclosure)

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SETTLEMENT AGREEMENT

This Settlement Agreement (“**Agreement**”) is entered into and effective as of the 14th day of October, 2016 (“**Effective Date**”), by and between SIERRA CLUB, a California non-profit corporation registered to do business in the State of Hawaii and MAUI UNITE, an unincorporated association (collectively “**Plaintiffs**”), the COUNTY OF MAUI (“**County**”), and HONUA‘ULA PARTNERS, LLC, a Delaware limited liability company (“**HP**”), each being herein sometimes referred to as a “**Party**” and collectively as the “**Parties**”.

RECITALS

WHEREAS, on or about July 25, 2012, the Maui Planning Commission accepted as final the Honua‘ula Final Environmental Impact Statement, dated June 2012 (“**the FEIS**”), prepared by HP for a 1,400 unit development in Wailea, Kihei-Makena, Hawaii;

WHEREAS, on October 5, 2012, Plaintiffs filed their Complaint for Declaratory, Injunctive and Other Relief, and on October 16, 2012, Plaintiffs filed their First Amended Complaint for Declaratory, Injunctive and Other Relief, and on February 5, 2013, Plaintiffs filed their Second Amended Complaint for Declaratory, Injunctive and Other Relief (hereinafter “**the Complaint**”), in an action entitled Sierra Club et al. v. County of Maui, et al., Civil No. 12-1-0800(2) (the “**Lawsuit**”).

WHEREAS, the Complaint challenged the adequacy of HP’s FEIS;

WHEREAS, on June 3, 2013, HP filed Proposed Intervenor Honua‘ula Partners, LLC’s Motion to Intervene Under Hawaii Rules of Civil Procedure Rule 24, which Motion has been continued at the request of the Parties;

WHEREAS, the Parties wish to resolve all of their disputes concerning the adequacy of the FEIS, including, *inter alia*, the above referenced claims asserted in the Complaint;

NOW THEREFORE, in consideration of the mutual promises, covenants, and other good and valuable consideration set forth below, the receipt and sufficiency of which is hereby acknowledged, the Parties hereby stipulate and agree as follows:

AGREEMENT

A. DEFINITIONS, INTERIM ACCESS PROTOCOL AND EXHIBIT LIST

Except as specifically indicated otherwise herein, the following terms within this Settlement Agreement shall be interpreted to mean the following:

1. The following *Lawsuit* and *Parties* referred to in this Agreement shall have the following meanings:
 - a. “**Lawsuit**” means the action entitled *Sierra Club et al. v. County of Maui, et al.*, Civil No. 12-1-0800(2).

- b. **"Plaintiffs"** means the Plaintiffs in the Lawsuit, SIERRA CLUB and MAUI UNITE, including themselves and any and all of their respective officers, directors, agents, employees, subsidiaries, parent companies, sister companies, related entities or affiliates thereof, and any and all successors or assigns of any of the foregoing.
 - c. **"County"** means the COUNTY OF MAUI, which is a defendant in the Lawsuit, including all of the agencies, officers, administrators, employees or other agents of the COUNTY OF MAUI.
 - d. **"HP"** means the proposed intervening defendant in the Lawsuit, HONUA'ULA PARTNERS, LLC, including itself and any and all of its respective officers, directors, members, agents, employees, attorneys, subsidiaries, parent companies, sister companies, related entities or affiliates thereof, including any and all entities in which it has or has had a direct or indirect membership or other ownership interest at any time, and any and all successors or assigns of any of the foregoing.
 - e. **"Master Association"** means the association of owners that will be created by HP to administer the Project and the Project Area.
2. The following *areas* or *sites* or *events* referred to in this Agreement shall have the following meanings:
- a. **"Exclusion Parcel"** means a narrow, undeveloped roadway parcel owned by Ulupalakua Ranch that continues in a roughly southerly direction from the southern terminus of the Pi'ilani Highway right of way, and bisects the Project Area, and as shown in Exhibit "1-G", and as more particularly described (by metes and bounds description) as the "Highway Exclusion" in the *Short Form Memorandum of Reciprocal Agreement for the Granting of Access Rights*, recorded in the Bureau on 1/24/2003, as Doc. No. 2003-013156 (**"Exclusion Short Form"**). Pursuant to the Exclusion Short Form, and amendments thereto, HP, as a successor in interest, has a right of access for roadway and utilities, over and under the Exclusion Parcel, subject to certain conditions identified in an unrecorded *Reciprocal Agreement for the Granting of Access Rights*, dated 1/27/2000, entered into between Ulupalakua Ranch, Inc. and WCPT/GW Land Associates, LLC.
 - b. **"Kanaio-Kalama Road"** is a trail that runs through portions of the Project, as shown in **Exhibit "1-B"**, which trail, as described below, is proposed by HP to be located or relocated, as shown in **Exhibit "1-C"**. Kanaio-Kalama Road is further defined and discussed in Section B(1) of this Agreement.
 - c. **"Maui Meadows Buffer"** and **"MM Buffer"** each mean an approximately 12 acre area along the northern boundary of the Project, immediately south of and adjacent to the existing Maui Meadows Subdivision, which area will not be developed, as described further in this Agreement or in its exhibits. The Maui Meadows Buffer is shown on the map and through the GPS coordinates, attached

hereto as Exhibit "1-D", and is further defined and discussed in Section B(2) of this Agreement.

- d. **"North Preserve Area"** means an approximately 27 acre area located north of the South Preserve Area and south of the Site 200 Wall, as shown on the map, and through the GPS coordinates, attached hereto as Exhibit "1-F", which area will not be developed, as described in this Agreement or in its Exhibits. The North Preserve Area is further defined and discussed in Section B(4) of this Agreement.
- e. **"Project"** means the construction, development and uses of the Project Area by HP or its successors in interest contemplated by the Project Zoning (defined below).
- f. **"Project Area"** means the approximately 670 acres in Wailea, Kihei-Makena, on the Island of Maui, Hawaii, which Project is the subject matter of the FEIS and of the Lawsuit. The Project Area is shown on the map attached hereto as Exhibit "1-A", and is described by metes and bounds description in Exhibit "A" of Ordinance 3554 (identified further below, and attached hereto as Exhibit "3").
- g. **"Site 200 Wall"** means a historic wall that runs from the Project's eastern boundary to the Project's western boundary in generally a *mauka-makai* (mountain to sea), and east to west direction (which may, for purposes of this Agreement and the exhibit thereto, possibly include portions of a generally north-to-south wall previously identified by archaeologist Aki Sinoto as "Site 200-A"). The Site 200 Wall is shown in Exhibit "1-F" and "1-N".
- h. **"South Preserve Area"** means an approximately 134 acre area commencing along the southern boundary of the Project and extending northward, shown on the map and through the GPS coordinates, attached hereto as Exhibit "1-E", which area contains significant archaeological and cultural sites, as well as native plants, which area will not be developed, as described in this Agreement or in its Exhibits. This area is referred to in Condition 27 of Ordinance 3554 and in other documents as the *Native Plant Preserve Area* or *NPPA*. The South Preserve Area is further discussed in Section B(3) of this Agreement.
- i. **"Triangle Area"** means a triangular area located east of the Exclusion Parcel and south of Site 200 Wall, a portion of which is within the easternmost portion of the North Preserve Area. The Triangle Area is more specifically identified in Exhibit "1-F".
- j. **"Workforce Housing"** means the workforce housing units currently required to be constructed at the Kaonoulu Light Industrial Subdivision pursuant to Condition 5 of Ordinance 3554.
- k. **"Workforce Housing Approval"** means that HP obtains approval from all applicable governmental agencies and authorities to construct the Workforce Housing through one of the following means:

- i. HP obtains a final, unappealable amendment to Condition 5 from the County Council to build the Workforce Housing within the Project Area, as provided for in Section D of this Agreement, and, additionally, obtains a final unappealable decision by the applicable governmental agency that a SEIS is not required as a condition to build the Workforce Housing within the Project Area, or, in the event an SEIS is required, and HP, in its discretion, elects to seek to obtain such an SEIS, HP receives final unappealable acceptance of the SEIS; or
 - ii. HP receives final discretionary unappealable approval to build the Workforce Housing at the Kaonoulu Light Industrial Subdivision.
3. The following *legal* or *regulatory* terms referred to in this Agreement shall have the following meanings:
- a. **“Bureau”** means the Bureau of Conveyances of the State of Hawai‘i.
 - b. **“Condition”** or **“Conditions”** refers to the *Conditions of Zoning* set forth in Exhibit “B” to Ordinance 3554, which conditions are numbered 1 through 30, with subparts.
 - c. **“Condition 5”** means Condition 5 of Ordinance 3554, which provides in part that HP “shall provide workforce housing in accordance with [MCC] Chapter 2.96 . . . ; provided that, 250 of the required workforce housing units shall be located at the Kaonoulu Light Industrial Subdivision”
 - d. **“County Council”** means the County Council of the County of Maui.
 - e. **“DLNR”** means the State of Hawai‘i Department of Land and Natural Resources.
 - f. **“EA”** means an environmental assessment as referred to under HRS Chapter 343.
 - g. **“EIS”** means an environmental impact statement as referred to under HRS Chapter 343.
 - h. **“FWS”** means the United States Fish and Wildlife Service.
 - i. **“HAR”** means the Hawai‘i Administrative Rules.
 - j. **“HRS”** means the Hawai‘i Revised Statutes.
 - k. **“MCC”** means the Maui County Code.
 - l. **“Phase II Approval”** means approval of the preliminary site plan for the Project at a public hearing by the Maui Planning Commission, as required by MCC § 19.45.050(B). For the purpose of any deadline that is triggered by or otherwise tied to Phase II Approval, Phase II Approval shall mean as follows:

- i. To the extent Phase II Approval is not final or is otherwise unappealable and/or not subject to administrative, regulatory or court challenge, then Phase II Approval shall be deemed to have occurred upon the issuance of the written order of the Maui Planning Commission's decision granting Phase II Approval; or,
 - ii. To the extent Phase II Approval constitutes a final determination that is appealable and/or subject to administrative, regulatory or court challenge, then Phase II Approval shall be deemed to have occurred when the decision of the Maui Planning Commission is final and no longer subject to challenge (*i.e.*, when all appeals or administrative, regulatory or court challenges to Phase II Approval have either been dismissed and exhausted, or the time to challenge Phase II Approval has expired without any such challenge being made). Further, in the event that Phase II Approval is granted, and any person or entity (other than HP) challenges that determination and thereafter successfully obtains an injunction preventing HP from proceeding with construction pending the outcome of that challenge, then HP shall have the right, but not the obligation, to continue to litigate that challenge, and the determination not to litigate shall not preclude HP from issuing a Notice of Abandonment, pursuant to Section I below.
- m. **"Project Zoning"** means the zoning approved for the Project Area, as set forth in MCC Chapter 19.90A, as promulgated by County of Maui Ordinance No. 3553, Bill No. 21 (2008), entitled *A Bill for an Ordinance Repealing Chapter 19.90, Maui County Code, and Establishing a New Chapter 19.90A, Maui County Code Pertaining to Kihei-Makena Project District 9 (Wailea 670)*. A copy of Ordinance No. 3553 is attached hereto as Exhibit "2".
 - n. **"Ordinance 3554"** means County of Maui Ordinance No. 3554, Bill No. 22 (2008), entitled *A Bill for an Ordinance to Repeal Ordinance No. 2171 (1992) and to Establish Kihei-Makena Project district 9 (Wailea 670) Zoning (Conditional Zoning), for Approximately 670 Acres Situated at Paeahu, Palauea, Keauhou, Maui, Hawai'i*. A copy of Ordinance 3554 is attached hereto as Exhibit "3".
 - o. **"SEIS"** means a "supplemental statement" as that term is defined in HAR 11-200 (the implementing rules for Chapter 343), namely, an additional environmental impact statement prepared for an action for which a statement was previously accepted, but which has since changed substantively in size, scope, intensity, use, location, or timing, among other things.
 - p. **"SHPD"** means the State Historic Preservation Division of DLNR.
4. The following *documents* referred to in this Agreement shall have the following meanings, and shall, unless otherwise stated herein, mean the final draft as accepted by any agency over which approval or acceptance is required for the particular document:

- a. **“Altenberg Report”** means the report prepared by Lee Altenberg, Ph.D., entitled *Remnant Wiliwili Forest Habitat at Wailea 670, Maui Hawai`i (2007)*, which report is referred to in Condition 27 of Ordinance 3554. The Altenberg Report is further defined and discussed in Section B(1) of this Agreement.
- b. **“AIS”** means the *Archaeological Inventory Survey* of the Project Area, a document which was prepared by Scientific Consultant Services, and which document has been reviewed and accepted as final by SHPD. The AIS is further defined and discussed in Section B(2) of this Agreement.
- c. **“CCRs”** means the declaration of conditions, covenants and restrictions created to encumber any part of the Project Area, over which enforcement rights will be given to the Master Association, or other homeowners’ associations, or to Project Area property owners.
- d. **“Conservation Easement”** means the *Conservation Easement* referred to in Condition 27 of Ordinance 3554, which will encumber the South Preserve Area, as well as the North Preserve Area. The form of the Grant of Conservation Easement pursuant to which the Conservation Easement shall be granted to the grantee identified therein is attached hereto as Exhibit “4”. The Conservation Easement is further defined and discussed in Sections B(3) and C(4) of this Agreement.
- e. **“CRPP”** means the *Cultural Resource Preservation Plan* required by the County Council to be prepared by HP, as set forth in Conditions 13 and 27 of Ordinance 3554. The CRPP is further defined and discussed in Section B(4) of this Agreement.
- f. **“FEIS”** means the *Honua`ula Final Environmental Impact Statement*, dated June 2012, prepared by HP and accepted as final by the Maui Planning Commission on or about July 25, 2012. The FEIS, consisting of three volumes, is available for review or download on the internet at:
http://oeqc.doh.hawaii.gov/Shared%20Documents/Forms/AllItems.aspx?RootFolder=%2fShared%20Documents%2fEA_and_EIS_Online_Library%2fMaui%2f2010s&View=%7bC0C5C897-3066-4821-864E-36FB3D77F5D5%7d. The FEIS is further defined and discussed in Section B(5) of this Agreement.
- g. **“HCP”** means the *Habitat Conservation Plan* for the Project required by the FWS with respect to incidental takes of endangered species as set forth in the Federal Endangered Species Act (16 U.S.C. 1531-1544). The HCP is further defined and discussed in Section B(6) of this Agreement.
- h. **“NPCP”** means the *Native Plant Conservation Plan*, required by the County Council to be prepared by HP, as set forth in Condition 27. The NPCP is further defined and discussed in Section B(4) of this Agreement.
- i. **“6E Preservation Plan”** means the document entitled *A Preservation Plan for a 670-Acre Parcel in Honua`ula . . .*, which document is required by Condition 26 of Ordinance 3554 and by HRS Chapter 6E (entitled “Historic Preservation”).

The 6E Preservation Plan is further defined and discussed in Section C(7) of this Agreement.

- j. “**Short Form**” means a concise version of this Agreement agreed to by the Parties, as more fully described in Section G(8) of this Agreement, and set forth in Exhibit “7” of this Agreement.

5. Interim Access Protocol:

- a. During periods before construction of all or portions of the Project Area is complete, or before trails have been created or improved and made open to the public, the Parties have agreed to the following “*Interim Access Protocol*”. Whenever that term is used in this Agreement, the following procedures shall apply.
- b. General Provisions:
 - i. HP shall cooperate with Plaintiffs to provide reasonable unmonitored or monitored access, as provided in this Section A(5), for all hiking, research, educational, cultural or environmental activities conducted under the auspices of the Sierra Club’s local group, the Sierra Club Maui Group, local chapter, the Sierra Club Hawaii Chapter, and the Sierra Club National Outings Program (“*Sierra Club Participants*”), which access shall not be unreasonably denied, but is subject to the terms and conditions in this Section A(5).
 - ii. HP may deny unmonitored or monitored access to Sierra Club Participants to portions of the Project Area only for reasonable periods of time during actual construction in the Project Area that is in the vicinity of the area sought to be accessed by the Sierra Club Participants, or for other safety reasons related to construction, or as otherwise expressly set forth in this Section A(5).
- c. For all forms of access under this Interim Access Protocol, including both *monitored* and *unmonitored* access, the following provisions shall apply:
 - i. HP shall facilitate access by escorting the Sierra Club Participants onto the Project Area or alternatively by providing a key for access to the Project Area, as determined by HP in its discretion.
 - ii. The Sierra Club, Maui Group will always provide a hiking guide who has general hiking safety knowledge as well as knowledge to assure none of the Sierra Club Participants accidentally harm archaeological or cultural sites or threatened or endangered species.
 - iii. Upon Sierra Club Participants providing at least 48 hours notice to HP, or a designee of HP (as identified by HP), HP shall grant the access requested

pursuant to this Section A(5), subject only to the express terms and conditions of this Section A(5).

- iv. As a condition of access pursuant to these Interim Access Protocol provisions, HP may require Sierra Club Participants to execute the form of waiver of liability ("**Waiver of Liability**") attached hereto as Exhibit "8". HP may deny access to any Sierra Club Participant who does not execute the Waiver of Liability. HP shall retain all Waivers of Liability to facilitate visits by individuals who repeatedly access the Project Area pursuant to these Interim Access Protocol provisions. HP shall establish a system for readily confirming pre-existing Waivers of Liability for such repeat Sierra Club Participants. However, if HP is unable to confirm that a Sierra Club Participant has previously signed a Waiver of Liability prior to the time of requested access, then the Sierra Club Participant(s) seeking access shall execute another Waiver of Liability prior to access.
- v. On or prior to the day of each access event, Sierra Club, Maui Group shall tender to HP a list of the Sierra Club Participants attending the access event, and a signed Waiver of Liability for each person attending the access event, except that a Waiver of Liability shall not be required for any Sierra Club Participant for whom HP has previously received a Waiver of Liability and HP has confirmed that it has such Waiver of Liability in its files. HP shall have the right, but not the obligation, to waive the requirement that the list and waiver be provided prior to access, and to allow, under certain circumstances, for such to be provided promptly following an access event, with the intent being that HP and Plaintiffs shall attempt in good faith to resolve any issues related to timing.
- vi. Attached hereto as Exhibit "9" is a copy of a certificate of insurance covering the Sierra Club that shows proof of liability insurance coverage in the amount of \$1,000,000 per occurrence, and \$2,000,000 aggregate for the upcoming year and naming HP, Landesbank Hessen-Thüringen Girozentrale, and any other lender providing financing to HP designated by HP in a written notice to Sierra Club, as additional insureds and which HP agrees it will accept with respect to the activities of the Sierra Club Participants within the Project Area permitted under this Agreement. Sierra Club shall maintain such insurance coverage, plus excess liability coverage of not less than \$5,000,000, at all times during the interim periods and a certificate of insurance evidencing such coverage will be provided to HP by Sierra Club on an ongoing annual basis prior to the expiration date of any existing insurance certificate provided to HP, as necessary, for as long as Sierra Club Participants seek access to the Project Area under the terms of this Agreement. If the Sierra Club fails to maintain such insurance coverage or to provide HP with such an annual certificate, interim access, as provided for in this Section A(5) shall be suspended. The Sierra Club shall promptly notify HP and any lenders

named as an additional insured pursuant to this Section A.5.vi in writing of any cancellation or non-renewal of such insurance coverage or any non-payment of any premiums due under the related insurance policies.

- vii. Access shall ordinarily be permitted only between the hours of 7:00 a.m. and one-half hour before sunset; provided, upon 72 hours' notice, HP shall reasonably cooperate in providing access at other occasional times for bona fide cultural ceremonies or events involving Sierra Club Participants.
- d. *Unmonitored access* by the Sierra Club Participants is permitted on the trails/roads identified on Exhibit "11". The Sierra Club Participants shall provide notification to HP's representative by telephone, which telephone number shall be provided to Sierra Club by HP or its representatives, prior to entering the Project Area for an unmonitored access event and, upon leaving the Project Area, after an unmonitored access event. It is anticipated that unmonitored access to the trails/roads identified on Exhibit "11" will be available at all times during the anticipated construction of the Project, except when the construction is specifically affecting the above-identified roads/trails.
- e. For all other parts of the Project Area other than those identified on Exhibit "11", *monitored access* may be required by HP, at HP's sole discretion. If HP requires monitored access, HP, at its own cost, shall provide a monitoring individual to accompany the Sierra Club Participants upon the Sierra Club providing notice as describe in Section A(5)(c)(iii). During monitored access, the Sierra Club Participants shall not be denied access to any part of the Project Area for the purposes permitted under this Agreement except for bona fide safety reasons, or for bona fide reasons associated with the risk of significant harm to archaeological sites or threatened or endangered species. The monitor for HP shall be required to maintain a respectful distance during any Native Hawaiian ceremonial activities taking place by any of the Sierra Club Participants.
- f. Nothing in this Section A(5), or in any other part of this Settlement Agreement, is intended by any of the Parties to interfere with any pre-existing common law or statutory right of access to any person so entitled to any portion of the Project Area protected by any such pre-existing right of access, if any.

6. **Exhibits.** Below is an outline summary of the exhibits attached to this Agreement. All exhibits attached to this Agreement are incorporated herein by this reference.

Exh. #	Description
1-A	PROJECT AREA: General Map
1-B	KANAIO KALAMA ROAD (per zoning exhibit.)
1-C	KANAIO-KALAMA ROAD <u>AND OTHER PUBLIC TRAILS</u> (as developed)
1-D	MAUI MEADOWS BUFFER AREA
1-E	SOUTH PRESERVE AREA (Map)
1-F	NORTH PRESERVE AREA (Map)
1-G	EXCLUSION PARCEL (Map)
1-H	PRESERVED DRAINAGES AND ARCHAEOLOGICAL SITES
1-I	LIGHT ORDINANCE ZONES MAP
1-J	NEW CONCEPT PLAN
1-K	LIST OF SITES IN EXCLUSION PARCEL
1-L	LIST OF ALL SITES AND FEATURES SOUTH OF WALL TO BE PRESERVED
1-M	LIST OF GPS COORDINATES OF ALL SITES/FEATURES/ETC. SOUTH OF WALL 200
1-N	MAP SHOWING GPS COORDINATES OF NORTH AND SOUTH PRESERVE BOUNDARIES
1-O	MAP OF EVERYTHING SOUTH OF WALL 200
2	ORDINANCE 3553
3	ORDINANCE 3554
4	CONSERVATION EASEMENT
5	PROPOSE CONDITION 5 AMENDMENT TO ORD 3554
6	DARK SKIES MODEL LIGHT ORDINANCE
7	SHORT FORM OF AGREEMENT
8	FORM OF WAIVER OF LIABILITY
9	SIERRA CLUB CERTIFICATE OF INSURANCE
10	MANAGEMENT PLAN FOR NORTH PRESERVE AREA
11	MAPS OF TRAILS FOR UNMONITORED USE BY SC
12	REMAINING OBLIGATIONS FOR CC&RS
13	SITES POTENTIALLY LOCATED IN DEVELOPMENT AREAS
14	MAP SHOWING LOCATION OF PROPOSED BREACHES IN WALL 200

Attached hereto is a flashdrive that contains electronic copies, including high resolutions pdfs where applicable, of all of the exhibits to this Agreement.

B. AGREEMENTS RELATING TO TRAILS AND AREAS

1. Kanaio-Kalama Road and Other Trails:

- a. MCC § 19.90A.030(A)(4) of the Project Zoning provides as follows: “Traditional native Hawaiian beach and mountain access trails across the [Project Area] shall be provided, to include the Kanaio Kalama Park Road, as shown on the map attached as Exhibit "2", which is adopted and made a part of this section by reference.” A copy of Exhibit “2” of the Project Zoning is attached to this Agreement as Exhibit “1-B”. This Exhibit provides highlighting showing the approximate location of the Kanaio-Kalama Road (a portion of which is now sometimes referred to as “the Military Road”) within the Project Area before development of the Project Area.
- b. Subject to the limitations set forth in this Section B-1, HP shall permanently preserve in favor of the public, and permanently maintain open to the public, the portion of Kanaio-Kalama Road as shown on Exhibit “1-C”, including the additional trails shown in Exhibit “1-C”. HP shall identify and memorialize these trails or public access ways as easements or restrictive covenants made in favor of the public. These public access ways shall become open to the public not later than the time that each of the adjacent subdivision infrastructure and grading improvements in the Project Area adjacent to each portion of the Kanaio-Kalama Road or the additional trails identified in Exhibit “1-C” are completed (*i.e.*, at such time that the lots within each such subdivision are ready for sale or conveyance to individuals or entities for residential construction and/or occupancy). The establishment of the easements or restrictive covenants in this Section shall be completed by no later than the time that the CCRs for the respective subdivision(s) are recorded in the Bureau.
- c. Prior to the completion of construction of the Project, the Interim Access Protocol set forth in Section A(5) of this Agreement shall be adhered to by the Parties as to access to the Kanaio-Kalama Road and other trails shown on Exhibit “1-C”.
- d. HP proposes, to the extent permitted by law, to reroute some portions of the route for Kanaio-Kalama Road during development of the Project. Plaintiffs and the County shall not have the right to initiate administrative appeals under HRS Chapter 91, or initiate a court challenge, or any other formal challenge in any judicial, regulatory, or administrative forum regarding the relocation of Kanaio-Kalama Road, as long as such relocation is only in those places as shown in Exhibit “1-C”. However, HP shall name all portions of Kanaio-Kalama Road, whether in its original location, or in its re-routed location, as the “Old Kanaio-Kalama Road”.
- e. To the extent it is permitted by law, and subject to the express rights set forth in Section A(5) relating to the Interim Access Protocol, HP and/or the Master Association retains the right to restrict the hours of public access to the trails identified in Exhibit “1-C”, but such trails shall be open from at least 7 a.m. to

one-half hour before sunset. However, after the grant of the Conservation Easement, long term public access to that portion of Kanaio-Kalama Road that is located within the South Preserve Area shall be subject, instead, only to any restrictions or conditions placed on public access by HILT (defined in Section C) in order to maintain compliance with the Conservation Easement, or the Nonprofit Fee Owner (defined in Section C), or any governmental entity.

- f. Public access issues relating to the South or North Preserve Areas are set forth in Sections B(3), B(4) and C of this Agreement. Public access to the Maui Meadows Buffer is set forth in Section B(2) of this Agreement.

2. Maui Meadows Buffer and Development Limitations in the Proximity:

- a. HP shall not develop the buffer area, of approximately twelve acres in size, adjacent to the Maui Meadows residential development, as shown generally in Exhibit "1-D", and as more specifically described and/or limited in this Section B(2) (the "MM Buffer" or alternatively the "Maui Meadows Buffer").
- b. The MM Buffer shall be a minimum of 116 feet wide in all places. The MM Buffer will comport with existing topography as generally shown in Exhibit "1-D", and as follows: Areas immediately adjacent to, and south of, the MM Buffer area shown on Exhibit "1-D" having a slope of 30% or greater shall be included within the MM Buffer up to a maximum of 400 feet from the Project Area's northern boundary. Structures of any kind shall be prohibited in the MM Buffer, thereby providing a natural buffer and open space.
- c. The MM Buffer shall also contain an approximately one acre open space area approximately aligned with the terminus of Hoala Street within Maui Meadows, and as approximately shown on the map in Exhibit "1-D", and more specifically based on the GPS coordinates set forth in Exhibit "1-D".
- d. The MM Buffer shall be landscaped in accordance with the Urban Design Review Board approved design guidelines, dated June 2010, with no yards, fences, roads, driveways or parking lots located within it, with the possible exception of HP allowing to remain certain structures constructed by residents of Maui Meadows existing as of the Effective Date of this Agreement that encroach into portions of the Project Area. The MM Buffer may be landscaped in phases, subject to each portion of the MM Buffer being completed by not later than the time that the respective adjacent subdivision infrastructure and grading improvements in the Project Area are completed (*i.e.*, at such time that the lots within each such subdivision are ready for sale or conveyance to individuals or entities for residential construction and/or occupancy); provided that upon at least three-fourths of the development of the area immediately adjacent to the MM Buffer being completed, as measured on a linear basis along the MM Buffer, the entire MM Buffer shall be fully landscaped.

- e. Trail systems within the Project Area shall be connected to trails that will be located within the MM Buffer. These trails can, subject to approval by the Maui Meadows community, be connected to and provide access from, Maui Meadows' access roads currently terminating at the Project Area boundary, thereby providing pedestrian access into the Project Area. However, vehicular access between Maui Meadows and the Project Area is prohibited. This provision shall be expressly set forth in the CCRs for the appropriate portion of the Project Area.
- f. With respect to any *Single* Family Residential Sub-District structures constructed immediately adjacent to the MM Buffer, as identified in Exhibit "1-D", the structure and use provisions of MCC § 19.90A.040(B) applicable thereto shall be further subject to the following limitations: the structure height along any northern lot boundary that is adjacent to the MM Buffer shall not exceed twenty (20) feet in height from the existing grade along the northern MM Buffer boundary, except that vent pipes, fans, chimneys, antennae, and rooftop solar collectors may exceed such height limitation by not more than ten feet. Existing grade height (*i.e.*, natural grade) shall be measured in accordance with MCC § 19.04.040.
- g. With respect to any Multi-Family Residential Sub-District structures located within the two areas adjacent to the western portion of the MM Buffer designated specifically as "MF*" in Exhibit "1-D(i)", said structures shall, in addition to the provisions of MCC § 19.90A.050(B), be subject to the following limitations: (i) with respect to those units constructed *immediately adjacent* to the MM Buffer in the two areas designated as "MF*", uses and structures are limited to duplexes or two family dwelling units; (ii) any other units constructed within the two areas designated as "MF*" shall not exceed a maximum height of thirty (30) feet, except that vent pipes, fans, chimneys, antennae, and rooftop solar collectors may exceed such height limitation by not more than ten feet. Existing grade height (*i.e.*, natural grade) shall be measured in accordance with MCC § 19.04.040.
- h. Roads or parking lots shall not be located immediately adjacent to the MM Buffer. Any roads or parking lots relating to Project shall be on the south side of any permitted residential development in the Project Area that is located adjacent to the MM Buffer.
- i. A portion of the MM Buffer shall continue along Pi'ilani Highway, and in that area, as shown on Exhibit "1-D", and provide at least forty-five (45) feet of buffer from Pi'ilani Highway from the north boundary of the Project Area to a distance running 400 feet south of the north boundary of the Project Area.
- j. Prior to the date of the hearing for Phase II Approval, but not later than eleven (11) months from the Effective Date of this Agreement, HP shall demarcate, using survey grade GPS equipment, the southern edge of the MM Buffer, as well as where adjacent areas with slopes thirty (30%) or greater, as discussed in Section B(2)(b), start and end, and demarcating the additional approximately one acre open space area as described in Section B(2)(c). Demarcation shall be by rebar

with PVC pipe and flag, with the goal being that the demarcation can be seen by a layperson. Prior to the date of the hearing for Phase II Approval, but not later than twelve (12) months from the Effective Date of this Agreement, Plaintiffs, at a mutually agreeable time, shall be provided the opportunity to inspect the demarcated boundary to assure it complies with the agreements of the Parties, as set forth in Section B(2), and as generally shown on Exhibit "1-D". Plaintiffs may additionally invite members of the Maui Meadows community to participate in this site visit. Any Plaintiff representatives or Maui Meadows community members desiring to be present at this site visit must comply with the waiver requirements set forth in Section A(5)(c)(iv) of this Agreement.

- k. The four (4) sites, one of which is located in the one acre open space area specified in Section B(2)(c) of this Agreement, and the other three of which are identified in Exhibit "1-D", which are located either within the MM Buffer or within the area immediately adjacent to the MM Buffer shall be preserved by HP.
- l. Upon completion of construction of that portion of the Project in the area adjacent to the MM Buffer, the MM Buffer shall be conveyed to the Master Association, which association shall, in the administration of the MM Buffer, be subject to the CCRs.

3. South Preserve Area:

- a. Condition 27 of Ordinance 3554, attached hereto as Exhibit "3", among other things requires HP to create a "Native Plant Preserve Area" ("NPPA"), the size of which is subject to review and approval by DLNR, FWS and the United States Corps of Engineers. Subsequent to Ordinance 3554's promulgation, HP conducted more extensive botanical surveys that greatly expanded the number of recorded native plants and their habitat area. Also subsequent to Ordinance 3554's promulgation, and partially as a result of Plaintiffs' Lawsuit, HP has conducted additional archaeological studies, which have confirmed that within the NPPA there are, in addition to rare, threatened or endangered native plants, a substantial number of significant archaeological and other important sites and features. Therefore, for the purposes of this Agreement, and the documents related to it, the Parties agree to refer to the NPPA as the "South Preserve Area" in order to reflect that the area is intended to protect and preserve, and provide for, not only rare, threatened or endangered native plants and insects, but also archaeological and other important sites and features.
- b. The following exhibits and protocol shall be used by the Parties to delineate the South Preserve Area and resolve any inconsistency found during further determination of the boundaries of the South Preserve Area:
 - i. The South Preserve Area is not governed by any size limitation stated in Condition 27 and is approximately 134 acres in size;

- ii. The boundary of the South Preserve Area is generally delineated on the New Concept Plan, Exhibit "1-J".
- iii. The boundary of the South Preserve Area is more specifically delineated on Exhibits "1-E" and "1-N". Exhibit "1-N" includes GPS coordinates of the boundaries of the South Preserve Area.
- iv. Notwithstanding any inconsistency that may later be identified between Exhibits "1-E", "1-M" or "1-N", any site or feature identified within the South Preserve Area on any one of those Exhibits shall be encompassed within the South Preserve Area, and the South Preserve Area boundary shall be not less than five (5) meters distance from the edge of any site or feature identified in Exhibits "1-E", "1-M" or "1-N", other than those listed on Exhibit "13".
- v. Subsequent to the execution of this Agreement, HP shall demarcate, using survey grade GPS equipment, the South Preserve Area so that the boundary is discernable in the field by laypersons. Demarcation shall be by rebar with PVC pipe and flag. Notwithstanding the GPS coordinates set forth in Exhibits "1-E", "1-M" or "1-N", during field work, HP shall assure that the GPS technician maintains a boundary that is not less than five (5) meters distance from the edge of any archaeological site in close proximity to the South Preserve Area boundary, which sites are shown in Exhibit "1-M", other than those listed on Exhibit "13".
- vi. Within a reasonable time prior to the date of the hearing for Phase II Approval, Plaintiffs shall be provided the opportunity on a mutually agreed upon day or days to inspect the entirety of demarcated boundary to assure it complies with the agreements of the Parties as set forth in this Section B(3).
- vii. In the event of a dispute over the accuracy of the South Preserve Area boundary and/or the location of a site/feature or potential site/feature identified for preservation in either Exhibit "1-E" or "1-N", the location shall be verified by a licensed surveyor using survey-grade equipment with Plaintiffs' representative(s) present during the verification, and the licensed surveyor's location of said site/feature shall govern. Any such dispute shall be noticed by Plaintiffs within ten (10) days after the completion of the demarcation inspection and resolved within thirty (30) days after Plaintiffs' notice to HP.
- viii. Upon completion of the above review process of the boundaries of the South Preserve Area, an amended Exhibit "1-E" and/or Exhibit "1-N" shall be prepared by HP identifying the final boundary for the South Preserve Area, and the amended exhibit shall be incorporated into this Agreement by reference.

- c. Prior to the completion of construction of the Project Area adjacent to the South Preserve Area (*i.e.*, at such time that the lots within each adjacent subdivision are ready for sale or conveyance to individuals or entities for residential construction and/or occupancy), the Interim Access Protocol set forth in Section A(5) of this Agreement shall be adhered to by the Parties with respect to access to the South Preserve Area, or unless otherwise mutually agreed to in writing between the parties.
- d. Matters governing the documentation of the plants and archaeological and cultural sites within the South Preserve Area, as well as permitted or proposed uses, and access to the South Preserve Area are set forth in the Altenberg Report, the SWCA Botanical and Wildlife Surveys and their updates (2008-2015), the Conservation Easement, the AIS, the CRPP, the FEIS, the Preservation Plan, the HCP and the NPCP, the specifics of which are referred to in Section C of this Agreement, with the exception of the SWCA surveys.
- e. HP shall submit an application to the County of Maui for approval of the fence that is specified in the HCP within thirty (30) days of Phase II Approval. HP shall strive to complete construction of the fence within 180 days after obtaining the fence permit approval, but under all circumstances shall complete the fence, pursuant to the minimum fencing requirements set forth in section 7.1.5 of the HCP, by not later than twelve (12) months after obtaining the fence permit approval from the County of Maui. HP shall consult with Plaintiffs on the location of the fence where it is in close proximity to cultural sites. Immediately after completion of the fencing, HP shall, at its sole cost, implement the ungulate management plan as set forth in the HCP.
- f. Attached hereto as Exhibit "1-O" is a map of the Project Area located south of and including the Site 200 Wall, and showing all of the archeological sites, features, and "Delisted Flagged Areas" located therein. To the extent that there is any discrepancy between the archeological sites, features and "Delisted Flagged Areas" on Exhibit "1-O" and any of the other maps that are attached to this Agreement, then it is agreed that Exhibit "1-O" is intended to be the more accurate and complete map. On Exhibits "1-E", "1-F", "1-G", "1-N" and "1-O", the sites which are labeled "Delisted Flagged Areas" represent potential sites or features which were identified by HP's consultants during HP archaeological field surveys, but which HP's archeological consultant subsequently concluded were not archeological sites, and were therefore not listed in the final AIS (hereinafter "Delisted Flagged Areas"). Plaintiffs and certain cultural practitioners contend that some of these areas may have cultural or archeological significance, and these areas have been therefore included on the maps at the request of Plaintiffs. The inclusion any of the Delisted Flagged Areas on any of the maps attached to this Settlement Agreement does not in any way indicate that HP or its archeological consultants consider such Delisted Flagged Areas to be archeologically, historically, or culturally significant, nor does it indicate any agreement that those Delisted Flagged Areas will be preserved. Those Delisted Flagged Areas that are outside of the North and South Preserve Areas are in areas

that are likely to be developed and are therefore at risk of being disturbed (See Exhibit 13 and Section G(5) of this Agreement).

4. North Preserve Area:

- a. Archaeological surveys conducted after the passage of Ordinance 3554 have resulted in the confirmation of numerous archaeological and other important sites and features north of the South Preserve Area. HP shall permanently preserve and protect all sites identified within a semi-contiguous area hereinafter referred to as the "North Preserve Area", as set forth in this Section B(4) by the Grant of the Conservation Easement.
- b. The following exhibits and protocol shall be used by the Parties to delineate the North Preserve Area and resolve any inconsistency found during determination of the boundaries of the North Preserve Area:
 - i. The boundary of the North Preserve Area is generally delineated on the New Concept Plan, Exhibit "1-J".
 - ii. The boundary of the North Preserve Area is more specifically delineated on Exhibits "1-F" and "1-N". Exhibit "1-N" includes GPS coordinates of the boundaries of the North Preserve Area.
 - iii. Notwithstanding any inconsistency that may later be identified between Exhibits "1-F", "1-M" or "1-N", any site or feature identified within the North Preserve Area on any one of those Exhibits shall be encompassed within the North Preserve Area, and the North Preserve Area boundaries shall be not less than five (5) meters distance from the edge of any site or feature identified in Exhibits "1-E", "1-M" or "1-N", other than those listed on Exhibit "13".
 - iv. Subsequent to the execution of this Agreement, HP shall demarcate, using survey grade GPS equipment, the North Preserve Area so that the boundary is discernable in the field by laypersons. Demarcation shall be by rebar with PVC pipe and flag. Notwithstanding the GPS coordinates set forth in Exhibits "1-F" or "1-N", during field work, HP shall assure that the GPS technician maintains a boundary that is not less than five (5) meters distance from the edge of any archaeological site in close proximity to the North Preserve boundary (unless included within the South Preserve Area), which sites are shown in Exhibit "1-L".
 - v. Within a reasonable time prior to the date of the hearing for Phase II Approval, Plaintiffs shall be provided the opportunity on a mutually agreed upon day or days to inspect the entirety of demarcated boundary to assure it complies with the agreements of the Parties as set forth in this Section B(4).

- vi. In the event of a dispute over the accuracy of the North Preserve Area boundaries and/or the location of a site/feature or potential site/feature identified for preservation in either Exhibit "1-F", "1-M" or "1-N", the location shall be verified by a licensed surveyor using survey-grade equipment with Plaintiffs' representative(s) present during the verification, and the licensed surveyor's location of said site/feature shall govern. Any such dispute shall be noticed by Plaintiffs within ten (10) days after the completion of the demarcation inspection and resolved within thirty (30) days after Plaintiffs' notice to HP.
 - vii. Upon completion of the above review process of the boundaries of the North Preserve Area, an amended Exhibit "1-F" and/or Exhibit "1-N" shall be prepared by HP identifying the final boundary for the North Preserve Area, and the amended exhibit shall be incorporated into this Agreement by reference.
- c. Trails within the North Preserve Area have not yet been located. Following the granting of the Grant of Conservation Easement for the North Preserve Area, as set forth in Section B(5) of this Agreement, HP shall reasonably cooperate with Plaintiffs, who may review and provide input regarding the location of such trails, to assure the trails will not harm any archaeologically or culturally sensitive area. HP shall further reasonably cooperate with Plaintiffs to establish appropriate signage in accordance with the CRPP and the 6E Preservation Plan, which signage shall be erected at HP's cost. Sierra Club's acceptance of any proposed signage cannot be unreasonably withheld. Included in the trail design shall be trails within the North Preserve Area providing access to, and within, the Triangle Area, the middle portion of the North Preserve area (in the general proximity to Kanaio Kalama Road), and the western, *makai* portion of the North Preserve Area. The North Preserve Area trails shall also have reasonable connections to the Project's larger trail system, including the trails located, or to be located, within the South Preserve Area, and trails in the trail system HP has proposed for north of Site 200 Wall. Once the trails within the North Preserve Area have been created, they shall be open to the public.
 - d. Until the completion of construction of the Project Area adjacent to the North Preserve Area, or the opening of the public trails, as provided for in Section B(4)(c), the Interim Access Protocol set forth in Section A(5) of this Agreement shall be adhered to by the Parties.
 - e. Some documentation of the native flora and fauna, and archaeological and cultural sites within the North Preserve Area, as well as some discussion of permitted or proposed uses, and access to, sites located within the North Preserve Area are set forth in the documents identified in Section B(3)(e) of this Agreement, namely, the Altenberg Report, the SWCA Botanical and Wildlife Surveys and their updates (2008-2015), the Conservation Easement, the AIS, the Preservation Plan and the HCP, which reports are referred to in greater detail in Section C of this Agreement, with the exception of the SWCA surveys.

- f. Management of the native species within the North Preserve Area shall be generally consistent with the management practices identified in Exhibit "10".

5. Grant of Conservation Easement of the North and South Preserve Areas

- a. HP shall grant to the Hawaiian Islands Land Trust ("HILT"), a Hawai'i nonprofit corporation, a Conservation Easement encompassing the North and South Preserve Areas within the timeframe and according to the terms set forth in this Section B(5).
- b. The terms of the "Grant of Conservation Easement" that will encumber the North and South Preserve Areas shall be in the form attached hereto as Exhibit "4". Subject to the agreement of the agencies that are required under Condition 27 to approve of the Grant of Conservation Easement, the Parties hereby agree that the Conservation Easement in the form attached hereto meets the minimum requirements of Condition 27 of Ordinance 3554. To the extent any agency requires a substantive change to the Conservation Easement, Plaintiffs shall be Consulted as set forth in Section C of this Agreement.
- c. The Grant of Conservation Easement encumbering the North Preserve Area and the South Preserve Area shall be executed by HP and HILT and recorded in the Bureau. Execution and recordation shall occur by not later than ninety (90) days after the later to occur of the following: (1) Phase II Approval, and (2) the earlier to occur of the two possible circumstances set forth in Subsections A(2)(k)(i) or A(2)(k)(ii), relating to Workforce Housing Approval. HP shall have the right, in its sole discretion, to convey and record the Grant of Conservation Easement prior to obtaining Phase II Approval or Workforce Housing Approval.

6. Nonprofit Fee Owner; Interim Manager

- a. For the purpose of this Subsection B(6), "**End of Construction**" shall mean completion of development of all parts of the Project that might result in the incidental taking of endangered species, as defined in the provisions in the HCP, unless determined otherwise by FWS.
- b. HP shall, within eighteen months following End of Construction, donate and convey the fee interests in the North Preserve Area and the South Preserve Area (collectively the "**Preserve Fee Interests**") to a "**Nonprofit Fee Owner**", which shall be one of the following organizations, in the following order of preference, unless otherwise mutually agreed at a later time between the Parties:
 - i. First, to the National Tropical Botanical Garden (NTBG"), a private federal corporation classified as a 501(c)(3) tax exempt organization, and registered to do business in the State of Hawai'i, subject to NTBG's agreement to accept the Preserve Fee Interests after the End of Construction. However, if NTBG declines to accept the Preserve Fee Interests within a reasonable period of time after being offered them, then;

- ii. Second, to the Office of Hawaiian Affairs (“OHA”), a corporate body and instrumentality of the State of Hawai‘i, subject to OHA’s agreement to accept the Preserve Fee Interests after the End of Construction. However, if OHA declines to accept the Preserve Fee Interests within a reasonable period of time after being offered them, then;
 - iii. Third, to HILT, subject to HILT’s agreement to accept the Preserve Fee Interests after the End of Construction, and further subject to HILT agreeing to assign the Grant of Conservation Easement to another 501(c)(3) tax exempt organization or governmental agency or instrumentality of HILT’s sole and exclusive choosing, at such time of acceptance of the Preserve Fee Interests. However, if HILT declines to accept the Preserve Fee Interests within a reasonable period of time after being offered them, then;
 - iv. Fourth, to a Hawai‘i nonprofit corporation that has obtained 501(c)(3) public charity status, which corporation would be mutually organized by Plaintiffs and HP with the charitable and corporate purpose of holding and managing the Preserve Fee Interests in perpetuity for cultural, educational, environmental, scientific, and other charitable purposes, with a maximum board of directors of six, and further with Maui Unite, or its designee, entitled to select, or alternatively veto, three of the six directors, and with HP entitled to select, or alternatively veto, three of the six directors.
- c. The Preserve Fee Interests donated and conveyed by HP to the Nonprofit Fee Owner shall be conveyed together with a reasonable right of access for roadway and utility purposes to and from public roads.
 - d. The Preserve Fee Interests conveyed to the Nonprofit Fee Owner shall not be encumbered by any form of common expense or common area assessment, including, any costs associated with respect to roadway maintenance for any private ingress/egress road(s) necessary to gain access to the Preserve Fee Interests, which costs shall be borne solely by the Master Association.
 - e. Notwithstanding the conveyance of the ownership and management obligations relating to the Preserve Fee Interests to the Nonprofit Fee Owner, HP shall fully meet the funding and endowment requirements set forth in section 8.4 of the HCP, entitled the “Funding Plan”, and the subsections thereunder (the “**HCP Funding Plan**”), which HCP Funding Plan is further described in Section C(7) of this Agreement.

- f. At the End of Construction, and after the donation and conveyance of the Preserve Fee Interests to the Nonprofit Fee Owner, the Nonprofit Fee Owner shall thereafter be solely responsible for ownership and management of the North Preserve Area and South Preserve Area, including as follows:
 - i. Compliance with any relevant terms of this Agreement;
 - ii. Compliance with the terms and conditions of the Conservation Easement;
 - iii. Compliance with the terms and conditions in the HCP relating to the South Preserve Area, if any, some of which obligations are further identified in Section C(7) of this Agreement; provided the cost of the HCP management obligations shall be funded by the HCP Funding Plan; provided further, to the extent necessary, HP shall cooperate with the Nonprofit Fee Owner in communicating to FWS the change in ownership of the Preserve Fee Interests, and in assuring that the use of the funds in the HCP Funding Plan are made available to the Nonprofit Fee Owner by FWS in order to fulfill the obligations it accepts under the HCP.
- g. In contemplation of the obligations in this Section B(6), HP, at its sole cost, shall seek and obtain within a commercially practicable time after receiving Phase II Approval, a subdivision of the Preserve Fee Interests from any other neighboring properties such that the Preserve Fee Interests will have County Tax Map Key parcel number(s) that are separate from any other lands in the Project.
- h. Between the time the fencing identified in Section B(3)(e) is completed, and the date that the Nonprofit Fee Owner takes title to the Preserve Fee Interests pursuant to the schedule set forth in this Section B(6), HP shall enter into a license agreement with any one of the above-identified organizations, selected as the potential Nonprofit Fee Owner, or such other entity mutually agreed to among HP, HILT and Plaintiffs ("Interim Manager"). The license agreement shall include provisions assuring the following protocol and cooperation:
 - i. HP shall provide the Interim Manager with reasonable access to the Preserve Fee Interests for environmental and/or cultural activities that are consistent with the objectives and not inconsistent with the terms set forth in the HCP, the CRPP, the NPCP and the 6E Preservation Plan;
 - ii. HP and the Interim Manager shall each make reasonable good faith efforts to consult with and/or cooperate with each other, for the purpose of encouraging integration between the requirements of the HCP, the CRPP, the NPCP and the 6E Preservation Plan and activities to further the activities, as set forth in the Historic Preservation Plan, and in coordination with the Cultural Advisory Committee established thereunder, to further cultural issues related to the Preserve Fee Interests, including any gathering of Native Hawaiian Plants, cultural practices within the Preserve Fee Interests, the stewardship and/or any restoration of

any archeological sites within the Preserve Fee Interests, or other issues that may arise that may impact or involve Native Hawaiian cultural issues, resources and opportunities (“Cultural Resource Integration”).

- iii. After HP, HILT, or the agents of HP begin mitigation work in the South Preserve Area, the access of the Interim Manager shall be coordinated by giving notice to HP or its designated agent, and shall be planned such that it supports, and does not interfere with, the mitigation activities of HP, HILT, or the agents of HP.
- iv. If the Interim Manager reasonably determines that any of the HP activities within the two Preserve Areas are inconsistent with this provision’s goal of furthering Cultural Resource Integration, with respect to HP’s effort in carrying out its obligations under the HCP, the 6E Preservation Plan, the NPCP, or the CRPP, then in such event, the Interim Manager shall provide written notice to HP and shall have a reasonable opportunity to present alternative solutions to the respective agencies with jurisdiction over the HCP, the 6E Preservation Plan, the NPCP or the CRPP, in order to attempt to achieve a mutually agreeable working plan consistent with the HCP, the 6E Preservation Plan, the NPCP and the CRPP. During the time that the Interim Manager is seeking to present such alternatives to the respective agencies, and until any determination by the agency is made, HP and its agents shall be allowed to continue with its activities within the two Preserve Areas.
- v. In the event that HP has a good faith basis to believe the Interim Manager’s activities violate the requirements of either the HCP, the 6E Preservation Plan, the NPCP or the CRPP, or interfere with the mitigation activities of HP, HILT, or the agents of HP, HP shall provide reasonable notice and a reasonable opportunity to cure, or, in its sole discretion, based on concern of an irreparable loss or clear violation, or the failure to promptly cure, HP may conditionally revoke the license granted to the Interim Manager under the license agreement.
- vi. In the event of a conditional revocation of the license agreement, or in the event of any other conflict or dispute between the Interim Manager and HP regarding Cultural Resource Integration, HP and the Interim Manager shall enter into good faith mediation with a mutually agreed upon mediator. During the resolution of the dispute, the Interim Manager shall cease and desist from the activity that is the subject of the dispute during mediation. The mediation shall be conducted by a mutually agreed upon mediator, and the cost of such mediation shall be shared equally by HP and the Interim Manager. In the event mediation is unsuccessful, then, at that time, HILT shall be permitted to determine whether or not the activities of the Interim Manager are inconsistent with the HCP, the 6E Preservation Plan, the NPCP, or the CRPP, or otherwise interfering with HP’s mitigation work. In the event that HILT determines that the

activities of the Interim Manager should be permitted, but HP believes in good faith that such activities constitute a violation of the HCP, the NPCP, the CRPP, or the 6E Historic Preservation Plan that will threaten the Project, then HP may, at its sole discretion, seek the opinion of the appropriate agency regarding those activities, which agency determination will be conclusive. Such mediation or determination shall not constitute cause to delay the Project in any manner, including delaying any remaining agency approval, permits, or construction activities, which shall continue during the pendency of mediation.

- i. Notwithstanding any of the provisions in this Section B(6), until conveyance of the Preserve Fee Interests to the Nonprofit Fee Owner, HP shall remain solely responsible for any mitigation required by the HCP.
- j. Additionally, notwithstanding the conveyance of title to the Nonprofit Fee Owner under the terms set forth in this Section B(6), HP reserves the right (but not the obligation) to, at any time, irrespective of conveyance to any other entity, undertake self-help within the North Preserve Area and/or South Preserve Area for the limited purpose of assuring continuing substantial compliance with the terms of the HCP. However, any such use of self-help shall be at the written request of FWS or other governmental agencies or authorities, and with prior written reasonable notice to the Nonprofit Fee Owner, along with a reasonable opportunity to cure the purported breach of the HCP terms.

7. Other Significant Areas Within the Project Area:

- a. Section 19.90A.030(A)(1) of the Project Zoning provides as follows: “Existing natural drainage ways shall remain as open spaces and their hardening shall be discouraged, provided that landscaping, walkways, bikeways, roadways, fences, drainage, and minor recreational and other structures, which do not either detract from the natural environment or adversely affect drainage ways and improvements, shall be permitted.” Section 19.90A.030(A)(3) provides: “Grading of the project site shall be encouraged to retain the existing rolling topography and natural drainageways.”
- b. Exhibit “1-H”, attached hereto, identifies the natural drainage ways within the Project Area that are subject to the provisions of §§ 19.90A.030(A)(1) and (3) (collectively the “**Preserved Drainages**”). Plaintiffs do not agree that all of the natural drainage ways within the Project are identified on Exhibit “1-H”, and reserve the right to assert that there are other natural drainage ways. HP acknowledges the Preserved Drainages may contain archaeological sites. To the extent commercially practicable, and taking into consideration the drainage needs of the Project, HP shall not disturb the Preserved Drainages, and, in particular, shall seek to the extent commercially practicable, to avoid modification of the drainage areas identified as “Priority Protection Areas” in Exhibit “1-H”. To the extent any archaeological site identified in the AIS must be destroyed, HP shall first grant Plaintiffs a reasonable opportunity, but not more than ninety (90) days

from the date the HP notifies Plaintiff that the site must be destroyed, to conduct research of, and to document, the archaeological site.

- c. HP shall preserve the three sites identified for "Preservation" in Exhibit "1-H", which are located outside of (i) the South Preserve Area, (ii) the North Preserve Area, and (iii) the MM Buffer, and possibly located inside or outside of the Preserved Drainages. These three sites shall be preserved, as well as a minimum of a five (5) meter buffer from the edge of each such site (collectively "**Additional Archaeological Preserve Areas**"). HP will provide access to these Areas before, during and after construction, consistent with the Interim Access Protocol set forth in Section A(5) of this Agreement.
- d. The fee interest in the Preserved Drainages and the Additional Archaeological Preserve Areas shall be conveyed to the Master Association following completion of all construction on the Project, which Master Association shall, in the administration of these Preserve Areas, preserve and protect them as would a reasonable steward, and provide reasonable access to them for cultural practices, research and education. This obligation of the Master Association shall be expressly set forth in the appropriate CCRs to all or portions of the Project Area. Until the Master Association is functioning, HP shall act as steward.
- e. Any of HP's construction activities that affect or occur within the Exclusion Parcel shall be subject to the monitoring and other requirements of SHPD. Irrespective of SHPD requirements, or lack thereof, HP shall not disturb or otherwise affect the archeological sites identified for "Preservation" in Exhibit "1-K" and shall establish a five meter buffer between any development activity and the edge of any of those sites. In addition, subject to final engineering and planning modifications, HP shall attempt, to the extent commercially practicable, not to disturb or destroy those sites identified for "Possible Preservation", as set forth in Exhibit "1-K".
- f. Groundwater wells south of the Site 200 Wall are prohibited. Groundwater wells are also prohibited within the first two hundred feet distance (200') of area north of the Site 200 Wall, including any underground portion of the groundwater well.
- g. In an attempt to protect both threatened species and cultural sites, HP and Plaintiffs shall attempt in good faith to determine a mutually agreeable relocation of the north-south utility road as currently shown on the south-eastern border of the NPPA on Exhibit "1-O", provided that such relocation can be done without material additional cost to HP. Plaintiffs recognize that such a utility road is required, and that, if an alternative route cannot be accommodated without material additional cost to HP, then the utility road shall be located as shown on Exhibit "1-O". In the event that agreement to relocate that road is agreed upon, then the Exhibits to this Agreement shall be modified to reflect that relocation.

8. Parking for South and North Preserve Areas. Three or more parking areas, providing not less than an aggregate of twenty-five (25) parking spaces shall be designated for public parking in reasonably close proximity to the South and North Preserve Areas, subject to the following conditions and limitations:
 - a. Temporary designations for public parking shall be made by HP, as necessary, during interim periods to carry out provisions in this Agreement providing for cultural practitioner access, or access for Plaintiffs during interim periods, including pre-construction or during-construction periods. HP shall have the right, during the development of the Project, to relocate the parking areas from time to time as necessary for construction activities. To the extent permitted by law, the parking areas do not need to be paved or curbed.
 - b. HP shall discuss with Plaintiffs where public parking will be most needed, but HP shall have ultimate discretion as to placement of parking, subject to the following: at minimum, at least five (5) of the public parking spaces shall be provided in reasonably close proximity to *each* of the following locations: (i) the Triangle Area; (ii) the Kanaio Kalama Road; and (iii) the westernmost (*makai*) portion of the North Preserve Area. The remaining ten (10) parking spaces shall be allocated by HP following discussion with Plaintiffs, and based on likely public demand for particular areas within the North or South Preserve Areas. Notwithstanding the foregoing, HP shall have the right to locate, designate and provide all public parking spaces north of the Site 200 Wall, and any construction of this parking is subject to the appropriate Maui County approvals.
 - c. The location of the public parking spaces shall be delineated on maps at the time that the subdivision maps for the areas in which the public parking spaces will be located are submitted for preliminary subdivision approval to the County. Upon the completion of construction in all pertinent areas, the public parking spaces shall be appropriately signed as being reserved for members of the public for access to the South Preserve Area or North Preserve Area.
 - d. Some parking for stewardship and maintenance vehicles within the South and North Preserve Areas will be necessary. The location and amount of reasonable parking shall be as determined by HILT in consultation with HP, and, if the fee interest has been conveyed to the Non-Profit Owner as set forth in Section B(6), then also in consultation with the Nonprofit Fee Owner.

C. **AGREEMENTS RELATING TO DOCUMENTS**

1. Altenberg Report: Plaintiffs agree that HP has met the requirements of Condition 27 with respect to the Altenberg Report. Plaintiffs shall not formally challenge in any judicial, regulatory or administrative forum any substance or procedure relating to the Altenberg Report.
2. Consultation Procedures: The following procedures shall apply whenever Plaintiffs are provided the right to be "Consulted" as used in this Section C:

- a. "Consulted" shall mean the right of Plaintiffs to review and provide comments to HP, as well as to any pertinent agency, on any document that HP supplements or amends (collectively "Amends" or "Amended Document") referred to in the applicable provision in this Section C, either voluntarily, or based on a request from a regulatory agency. Nothing contained in this Section C(2) shall require HP to delay any submissions or resubmissions of any of the documents covered hereunder.
 - b. In the event any regulatory agency requests additional information from HP, or an amendment of any of the reports or documents identified in this Section C, HP shall provide a copy of such communication or notice from the regulatory agency to Plaintiffs through their legal counsel, Tom Pierce, Attorney at Law, LLC, and confirm counsel's receipt of the same.
 - c. When HP submits any response or Amended Document to any regulatory agency regarding any of the reports or documents identified in this Section C, HP shall at the same time, or prior to that time, provide a copy of the Amended Document to Plaintiffs through their legal counsel, Tom Pierce, Attorney at Law, LLC, and confirm counsel's receipt of the same. Plaintiffs may provide written comments to the regulatory agency as well as to HP with respect to the Amended Document.
 - d. The right to be Consulted provided to Plaintiffs in this Section C does not obligate HP to revise its Amended Document, except to the extent required by existing law.
 - e. The above Consulting protocol shall in no way be interpreted to interfere with or usurp any preexisting rights of Plaintiffs to provide comments to regulatory agencies or other entities.
3. Plaintiffs reserve any and all rights to submit oral or written statements or objections to any regulatory agency or entity with respect to any additional information requested from HP by any agency or other entity, or with respect to any additional amendment of any report or document identified in this Section C required by any agency. However, Plaintiffs shall not have the right to initiate administrative appeals under HRS Chapter 91, or initiate a court challenge, or any other formal challenge in any judicial, regulatory or administrative forum of any final agency decision made with respect to any of the documents identified in this Section C.
4. AIS:
- a. The AIS is required by HRS Chapter 6E, and the rules thereunder, including HAR Chapter 13-284. The AIS must be prepared to meet the requirements of HAR Chapter 13-276. HP, after providing an opportunity for review and input by Plaintiffs, has submitted its AIS to SHPD.
 - b. After final acceptance of the AIS by SHPD, which took place on December 17, 2015, to the extent the AIS is thereafter supplemented or amended by HP or any

of its successors or assigns, Plaintiffs and Maui Cultural Lands, shall be Consulted with prior to the submission of such supplemental or amended AIS.

5. CRPP and NPCP:

- a. The CRPP is required by Condition 13 of Ordinance 3554, which provides in pertinent part: "Upon completion of the CRPP, Honua'ula Partners, LLC, its successors and permitted assigns, shall submit the plan to the State Historic Preservation Division, Department of Land and Natural Resources, and the Office of Hawaiian Affairs for review and recommendations prior to Project District Phase II approval. Upon receipt of the above agencies' comments and recommendations, the CRPP shall be forwarded to the Maui County Cultural Resources Commission for its review and adoption prior to Project District Phase II approval." After input from Plaintiffs, HP has prepared the CRPP, which HP thereafter submitted to SHPD and the Office of Hawaiian Affairs on May 18, 2016, in conformance with Condition 13 of Ordinance 3554.
- b. The NPCP is required by Condition 27 of Ordinance 3554, which also requires that the NPCP be reviewed and approved by DLNR, FWS and the U.S Army Corps of Engineers, after which it must be reviewed and approved by the Maui Planning Commission as part of the Phase II Approval process. After input from Plaintiffs, HP has prepared the NPCP, and, on or about January 6, 2016 submitted the NPCP to DLNR, FWS and the U.S. Army Corps of Engineers.
- c. After final acceptance of the CRPP and NPCP, to the extent either document is thereafter supplemented or amended by HP or any of its successors or assigns, Plaintiffs shall be Consulted with prior to the submission of such supplemental or amended documents to any of the above agencies.

6. FEIS: Plaintiffs have challenged the adequacy of the FEIS. Subject to HP fulfilling the terms and conditions of this Agreement, Plaintiffs will dismiss with prejudice their challenge to the FEIS, made through the Lawsuit, as more specifically set forth in Section H of this Agreement.

7. HCP:

- a. HP is required to prepare the HCP because of the likelihood of incidental "taking" of endangered species during the development of the Project, as defined in Section 9 of the Endangered Species Act of 1973 ("ESA"). The HCP is required before the FWS may issue HP an "incidental take" permit, as provided under section 10(a)(2)(B) of the ESA. The HCP calls for HP to fund mitigation activities within the South Preserve Area.
- b. Plaintiffs have provided input to HP regarding the HCP, some of which has been incorporated with the HCP, which HP has submitted to FWS and DLNR on or about January 5, 2016 in substantially the same form.

- c. After final acceptance of the HCP, to the extent the HCP is thereafter supplemented or amended by HP or any of its successors or assigns, Plaintiffs shall be Consulted with prior to the submission of such supplemental or amended HCP to the FWS.
- d. Section 8.4 of the HCP is entitled the "Funding Plan" (the "**HCP Funding Plan**"). Section 8.4.1 of the HCP Funding Plan designates four areas of "Habitat Mitigation Costs/ Investments": (i) "Land Costs/ Conservation Easements"; (ii) "Upfront Land Improvements/ Investments"; and (iii) "Management, Planning, Monitoring, Education, and Replacement"; and, (iv) "Post-Permit Endowment". HP shall timely remit payments for these four designated areas as required under the HCP Funding Plan within the time periods set forth in the HCP Funding Plan; provided, to the extent any of the following events are earlier than what is required by the HCP Funding Plan, the times or events set forth below shall control:
- i. With respect to any obligation relating to "Land Costs/ Conservation Easements" (*e.g.*, stewardship fees required by HILT), the funding shall occur pursuant to the time periods set forth in Section B(5) of this Agreement, which are earlier than those set forth in the HCP; and
 - ii. With respect to any "Upfront Land Improvements/ Investments" (*e.g.*, costs of fencing, or an ungulate and animal removal plan), the funding shall occur pursuant to the time period set forth in Section B(3)(e) of this Agreement, which are potentially earlier than those set forth in the HCP; and,
 - iii. By not later than ninety (90) days after the later to occur of both Phase II Approval *and* Workforce Housing Approval, HP shall donate and deposit into an escrow account established with a Hawaii-licensed escrow company selected by HP, the sum of Twenty-Five Thousand Dollars (\$25,000) ("**Interim Mitigation Funds**") for direct on-the-ground mitigation activities which are separate and distinct from any yearly fund requirements under the HCP. Thereafter, HP shall donate and deposit into said escrow account a like sum each year, until HP or its agents initiates mitigation work (other than fencing), pursuant to Section 7.3.1 of the HCP.
 - iv. The Interim Mitigation Funds shall be expended during the year in which they are deposited into the escrow account, on mitigation measures for the North Preserve Area or South Preserve Area. HP shall periodically, but not less often than semi-annually, consult with Plaintiffs in determining mitigation priorities for use of the Interim Mitigation Funds.
 - v. To the extent a license has been granted as to the South Preserve Area to an Interim Manager on an interim basis, HP shall establish protocol with such Interim Manager for relinquishment of all of the Interim Mitigation Funds to the Interim Manager for mitigation work consistent this Section C(6)(e).

8. 6E Preservation Plan:

- a. A preservation/mitigation plan (*i.e.*, the 6E Preservation Plan) for the archaeological sites for the Project Area is required by Condition 26 of Ordinance 3554, pursuant to HRS Chapter 6E, and must be approved by SHPD and the Office of Hawaiian Affairs.
- b. HP has submitted its Preservation Plan to SHPD and the Office of Hawaiian Affairs on January 21, 2016.
- c. Condition 26 requires the 6E Preservation Plan to be reviewed and approved both by SHPD and OHA prior to the date of the hearing for Phase II Approval. After final acceptance of the 6E Preservation Plan by SHPD, to the extent it is thereafter supplemented or amended by HP or any of its successors or assigns, Plaintiffs shall be Consulted with prior to the submission of such supplemental or amended 6E Preservation Plan.

9. Conservation Easement:

- a. The Grant of Conservation Easement in the form attached hereto as Exhibit "4" has been agreed to between Plaintiffs, HP and HILT. To the extent any agency with authority to do so requires changes to the grant of Conservation Easement, Plaintiffs shall be Consulted with prior to the submission of such supplemental or amended Grant of Conservation Easement incorporating the required changes. Plaintiffs may also provide their comments to the relevant agency.

D. WORKFORCE HOUSING AND THE CONDITION 5 AMENDMENT

1. Condition 5 provides in part that HP "shall provide workforce housing in accordance with [MCC] Chapter 2.96 . . . ; provided that, 250 of the required workforce housing units shall be located at the Kaonoulu Light Industrial Subdivision . . ." HP has considered seeking from the Maui County Council ("**County Council**") an amendment to Condition 5 to provide HP with the additional option to build all of the required workforce housing in the Project Area. The Parties agree to the terms and conditions set forth in this Section D with respect to HP's proposed amendment to Condition 5.
2. The amendment to Condition 5 must be the proposed verbatim amendment language attached hereto as Exhibit "5" (the "**Condition 5 Amendment**"), unless the Parties otherwise collectively agree to modifications to the Condition 5 Amendment. An agreement to modify the Condition 5 Amendment language shall not be unreasonably withheld if the County Council requests modification of the language and such request is clearly non-substantive.
3. HP shall not request amendment to any part of Ordinance 3554 other than the Condition 5 Amendment, and shall request that the County Council: (a) adopt the Condition 5 Amendment verbatim; and (b) not make any other changes to Ordinance 3554.

4. Notwithstanding the foregoing, nothing in this Subsection D shall preclude any of the Parties, or any of the Parties' successors and assigns, from seeking to amend Ordinance 3554, so long as such proposed amendment is not initiated at any agency level until *after* the County Council has either granted or rejected the Condition 5 Amendment. In such event, all Parties reserve all rights to take any position on such amendment.
5. During the effort to seek granting of the Condition 5 Amendment, the Parties recognize that they cannot reasonably stop persons, entities or agencies from requesting additional amendments to Ordinance 3554. In such event, HP, the County and Plaintiffs shall not testify in favor of, or otherwise formally advocate for, any new amendments to Ordinance 3554. Additionally, the Parties reserve the right to object to, and testify against, any proposed amendment to Ordinance 3554 other than the Condition 5 Amendment initiated by any person, entity or agency.
6. In the event that the County Council, the Maui Planning Commission, or the County Council's Land Use Committee, seeks to *add* any condition to Ordinance 3554 that HP, in its sole discretion, determines is not reasonable or in HP's best interest, then HP may withdraw the request to amend Condition 5, and the Parties shall not object to such withdrawal.
7. With the exception of the Condition 5 Amendment, in the event any person, entity or agency during the Condition 5 Amendment process proposes to *remove or substantially amend* any existing condition to Ordinance 3554 ("Proposed Additional Modification"), the Plaintiffs and/or HP may request such person, entity or agency to withdraw or retract the Proposed Additional Modification. If the Proposed Additional Modification is not withdrawn or retracted, the Parties, shall have the right to object to, testify against, and/or take other related actions against the Proposed Additional Modification. In the event a Proposed Additional Modification is nonetheless granted by the County Council, then, unless any of the additional amendments contained in the Proposed Additional Modification are collectively agreed to by HP and Plaintiffs, HP shall, to the extent permitted by law, and notwithstanding the removal or substantial amendment of any such existing condition, contained in Ordinance 3554, satisfy the following enumerated conditions in Ordinance 3554 in the form in which they are currently set forth in Ordinance 3554, which conditions are stated in Exhibit "3" attached hereto: Conditions number 1, 4, 6, 9, 11, 13, 14, 15, 16, 20, 25, 26, 27.
8. It is anticipated that the Condition 5 Amendment will be submitted to the County Council by HP within a reasonable time after execution of this Agreement. If the Condition 5 Amendment has not been granted by the Council prior to the time HP is prepared to have a Phase II Approval hearing, then HP may proceed with that hearing, so long as it notifies the Maui Planning Commission that HP is requesting the County Council to grant the Condition 5 Amendment. As part of the notification process to the Maui Planning Commission, HP shall, at least thirty (30) days prior to the Phase II Approval hearing, submit a written copy of the Condition 5 Amendment to the Maui Planning Commission, along with a written explanation that the Condition 5 Amendment is authorized under the terms of this Agreement, and HP shall provide any such additional background as to

assist the Maui Planning Commission with understanding this issue before it renders a decision at the Phase II Approval hearing.

9. Pursuant to HAR § 11-200-27, HP may seek a determination from the Maui Planning Commission (the original accepting authority and approving agency of the FEIS), or from any other agency determined to be the appropriate accepting authority or decision-maker under the circumstances, that there has been no substantial environmental change to the Project and therefore a SEIS is not required under applicable law before commencement of construction of the Workforce Housing within the Project Area, as opposed to its construction at the Kaonoulu Light Industrial Subdivision. Plaintiffs shall not formally challenge in any judicial, regulatory or administrative forum, HP's request for a determination that a SEIS is not required to construct the Workforce Housing within the Project Area; provided this does not affect HP's responsibility in certain circumstances to prepare and submit to the appropriate accepting authority a SEIS for any other changes to the Project, as provided for in Section I(3). In the event that it is determined that an SEIS is required in order to construct the Workforce Housing within the Project Area, HP shall have the right, but not the obligation, to seek to obtain such an SEIS, and the determination of HP not to seek an SEIS shall not preclude HP from giving notice of Abandonment pursuant to Section I below.
10. If HP obtains the Condition 5 Amendment, and if HP then determines to build all workforce affordable housing in the Project Area, in such instance the provisions of MCC Chapter 2.96 shall apply, however subject to the limitations and conditions set forth in the Condition 5 Amendment.
11. If HP determines to build the Workforce Housing without obtaining amendment of Condition 5 (*i.e.*, within the Kaonoulu Light Industrial Subdivision), then the terms of the Condition 5, as currently provided in Ordinance 3554 in the form attached hereto as Exhibit "3", shall apply.
12. In the event that the Condition 5 Amendment is not granted by the County Council, or is withdrawn by HP, or, alternatively, if HP determines to build the Workforce Housing at the Kaonoulu Light Industrial Subdivision, then the Parties in such circumstances reserve any and all arguments and/or challenges regarding the Workforce Housing that have been raised or that can be raised in the pending proceeding, In the Matter of the Petition of Kaonoulu Ranch, Docket No. A-94-705 before the Land Use Commission of the State of Hawai'i ("LUC"), or in any other administrative or judicial proceeding, subject only to the following reservations and limitations:
 - a. HP shall have the right, but not the obligation, to appeal any denial by the LUC or any other applicable governmental agency not to grant a requested amendment to the 1994 Finding of Fact, Conclusions of Law, and Order Docket No. A-94-705 to allow HP to build the Workforce Housing at the Kaonoulu Light Industrial Subdivision. Further, in the event that such amendment is granted, and any person or entity (other than HP) challenges that determination and thereafter successfully obtains an injunction preventing HP from proceeding with construction pending the outcome of that

challenge, then HP shall have the right, but not the obligation, to continue to litigate that challenge.

- b. Plaintiffs reserve the right to assert or claim that an EA or an EIS is required for the Workforce Housing, provided Plaintiffs are restricted and estopped from making an EA or EIS assertion or claim based on segmentation under HAR § 11-200-7, or based on any case law interpreting HAR § 11-200-7 (including but not limited to *Sierra Club v. Dep't of Transp.*, 115 Haw. 299, 167 P.3d 292 (2007)), or based on a claim that the Workforce Housing is required to be located at the Kaonoulu Light Industrial Subdivision.
 - c. If it is ultimately determined by the LUC or any other binding authority that an EA or an EIS is required for the Workforce Housing, Plaintiffs may not claim, and are estopped from asserting that the impacts of the Project need to be included in the EA or EIS for the Workforce Housing, or that an EA or an EIS for the Workforce Housing is insufficient or inadequate based on failure to consider the impacts of the Project, and Plaintiffs may not initiate administrative appeals under HRS Chapter 91, or initiate a court challenge, or any other formal challenge in any judicial, regulatory, or administrative forum on that basis.
 - d. If the LUC determines that no EA or EIS is required for the Workforce Housing, or if the LUC ultimately accepts any EA or a EIS relating to the Workforce Housing, then Plaintiffs may not appeal the LUC's decision to the Second Circuit Court or initiate administrative appeals under HRS Chapter 91, or initiate a court challenge, or any other formal challenge in any judicial, regulatory, or administrative forum, and Plaintiffs are hereby estopped from doing so.
13. In the event Condition 5 is amended, and HP voluntarily elects to place the Workforce Housing within the Project Area, and, in addition, HP constructs more than one thousand, one hundred, fifty (1,150) units within the Project Area, HP shall, notwithstanding the terms of Condition 5 or the conditions of zoning, provide an additional two acres of public park within the Project Area.

E. LIGHTING

1. The area immediately adjacent to the Maui Meadows Buffer (between the Maui Meadows Buffer and the first single family housing and multi-family area up to the first major gulch), as shown on Exhibit "1-I", shall be subject to the provisions of **Zone 1** of the Dark Sky Model Light Ordinance, pertinent sections of which are attached hereto as Exhibit "6" ("**DSM Light Ordinance**").
2. The area between the Site 200 Wall and the South Preserve Area, as shown on Exhibit "1-I", shall be subject to the provisions of **Zone 1** of the DSM Light Ordinance.
3. All VMX/commercial areas throughout the Project shall be subject to the provisions of **Zone 2** of the DSM Light Ordinance.

4. Plaintiffs and HP share the goal of minimizing ambient lighting, and will work together to achieve this goal.
5. The lighting standards and limitations set forth in this Section E and Exhibit "6" are subject to any express mandate by the County or any other governmental agency requiring greater lighting than is specified in this Section E. HP shall make commercially reasonable efforts to obtain the County's (or other agencies') agreement to the lighting standards set forth in this Section E and Exhibit "6". To this end, HP shall, at the earliest commercially practicable time, make the appropriate agencies of the County aware of the conditions in this Section E, and take any necessary actions to assure reasonable cooperation with the County in meeting the potentially more restrictive requirements set forth in this Section E and Exhibit "6", including, if necessary, a request for a variance from the County of Maui Board of Variances and Appeals. However, to the extent that the County does not approve or will not allow lighting that meets the standards set forth herein, then HP shall not be required to meet these standards; provided, however, in the event that the County does not allow or approve all or a portion of these lighting requirements, then HP shall provide notice of this to Plaintiffs' legal counsel (hereinafter "**Notification**"). Thereafter, Plaintiffs shall be given the opportunity to seek to convince the County to approve these requirements, which opportunity must be initiated within thirty (30) calendar days of Notification. During the time that Plaintiffs are having such discussions with the County, HP shall be allowed to proceed with construction or other development activity, and in no event shall Plaintiffs' discussions with the County delay HP's development activity. However, HP agrees that if Plaintiffs are successful within ninety (90) days of Notification in convincing the County to change its position, then HP will amend its plans or its construction to meet these guidelines. If Plaintiffs are successful in convincing the County to change its position after said 90 days, but no later than 180 days following Notification, then HP will amend its plans or construction to meet these guidelines, but will install such lighting only on a going forward basis; HP shall not be required to retrofit or otherwise amend or change any lighting that has already been installed or is in the process of being installed. HP will agree to include language in the CCRs or design guidelines to comply with the lighting standard and that would allow for retrofitting of lighting as part of maintenance paid from replacement reserves from the Master Association budget.
6. HP shall include the terms of this Section E, including a copy of the DSM Light Ordinance in any land sale contract, deed or declaration, to assure that all subsequent land owners are on notice of these conditions, and to assure that such conditions run with the land and are enforceable against future land owners. HP shall include such provisions as are necessary to assure that the Master Association for the Project is responsible for the enforcement of these conditions, and has sufficient powers of enforcement provided to it. HP or its successors or assigns shall certify to the Master Association, at the time of completion of any construction in these areas subject to the DSM Light Ordinance, or at the completion of the installation of any lighting in those areas, that such requirements have been met. In the event that the Master Association has not been created as of the completion of construction or lighting installation in those areas, such certification shall be provided to the Master Association at the time that it is created. This provision E(6) shall be included in the Short Form.

F. PHASE II APPROVAL

1. HP shall submit to the Maui Planning Commission for Phase II Approval the preliminary conceptual plans substantially in the form as attached hereto as Exhibit "1-J" ("**New Concept Plans**"), which plans show, among other things, the revised densities and layout of the Project necessitated by the changes to the Project resulting from the terms of this Agreement, including but not limited to, the South Preserve Area, the North Preserve Area and the Maui Meadows Buffer. HP shall additionally provide to the Maui Planning Commission the Short Form of this Agreement, substantially in the form attached hereto as Exhibit "7", along with the final form of all exhibits attached to this Agreement.
2. So long as HP's design and plan remains substantially consistent with the New Concept Plans and all of the material terms and provisions of this Agreement, Plaintiffs, and their officers and directors, acting in their official capacities, will not object to Phase II Approval before the Maui Planning Commission based on any changes in density of the Project or for any other reasons, except that Plaintiffs reserve the right to submit testimony in opposition to, or objecting to, HP's submissions to the Maui Planning Commission, if such submissions are materially inconsistent with the express terms of this Agreement, and Plaintiffs, and their officers and directors, acting in their official capacities shall not initiate administrative appeals under HRS Chapter 91, or initiate a court challenge, or any other formal challenge in any judicial, regulatory, or administrative forum challenging the Maui Planning Commission's decision to grant the Project Phase II approval.
3. Section D(8) of this Agreement (regarding the status of the Condition 5 Amendment) may require HP to provide notice to the Maui Planning Commission prior to and during the contemplated Phase II hearing.

G. MISCELLANEOUS AGREEMENTS RELATING TO THE PROJECT

1. Prior to or concurrent with any subdivision application filed with the County of Maui, HP shall conduct an additional supplemental archeological inventory level survey for land that will be developed between the Site 200 Wall and the South Preserve Area boundary to verify the original AIS and to determine if there are any other significant archeological sites. This obligation shall be recorded in the CCRs and the Short Form of this Agreement. Plaintiffs do not waive any rights that they otherwise would have, in the absence of this Agreement, to challenge any future subdivision application, including any archaeological findings or conclusions.
2. Notwithstanding any provision in this Agreement, in the event that HP or any other third party initiates an appeal from any final agency decision relating to the Project, Plaintiffs reserve the right to intervene in such appeal to assure the terms and conditions of this Agreement are adhered to, and/or fully performed, and HP shall not object to Plaintiffs' intervention to this extent.
3. HP has the right to negotiate with FWS to avoid offsite mitigation efforts, as identified in Section 3.7 of the FEIS, including avoiding the need to secure a perpetual conservation easement of approximately 350-acres on property owned by Ulupalakua Ranch, and the

continuation and expansion of restoration efforts within the Auwahi Forest Restoration Project Area. Plaintiffs waive any right to formally challenge in a judicial, regulatory or administrative forum such negotiations or conclusion by FWS.

4. HP shall adhere to the Honua`ula Design Guidelines (March 2010), attached as Appendix "A" to the FEIS; provided, where the terms and conditions of this Agreement are more restrictive, those terms and conditions shall control.
5. Exhibit "13" contains a list of certain "Agricultural Features" that were identified as such in the final AIS accepted by SHPD and "Delisted Flagged Areas" which are located south of the Site 200 Wall, but potentially outside of the South Preserve Area or North Preserve Area, and which are shown on Exhibit "1-O", but not identified for preservation in Exhibit "1-L", which are not required to be preserved under the final accepted AIS and which are not identified for preservation under the terms of this Agreement. All sites listed on Exhibit "13", shall, prior to Phase II Approval, be photographed, described in writing, and included in a comprehensive site map of such features. A copy of this report shall be provided to Plaintiffs.
6. Not less than 90 days prior to the date of the hearing for Phase II Approval, HP shall provide up to forty (40) hours of archaeologist time to assist Plaintiffs and their volunteers to affix permanent site markers on sites and features within the North Preserve Area and the South Preserve Area.
7. Attached hereto as Exhibit "14" is a concept plan showing the planned breaches in the Site 200 Wall for roadways or other access. The locations of these breaches are a best estimate, and subject to change. HP will limit the lineal feet of breach of the Site 200 Wall to no more than 380 lineal feet.
8. After the approval of the HCP, but prior to the time that HP or its agents initiates mitigation work (other than fencing), pursuant to Section 7.3.1 of the HCP, HP will permit at least yearly visits by the Hawai`i State Plant Extinction Prevention Program ("HSPEPP"). Once said mitigation work pursuant to the HCP begins, visits by HSPEPP shall be at the discretion of the entity conducting the mitigation efforts.
9. With respect to any conditions, prohibitions or restrictions intended to run with the land, which are set forth in this Agreement, notice of them shall be given to HP's successors and/or assigns, including but not limited to, the Master Association, developers, contractors, and owners, and/or to other third persons who have entered into contracts to purchase all or any portion of the Project Area, by the creation and recording of a "**Short Form**" of this Agreement, which shall be executed by the Parties substantially in the form attached hereto as Exhibit "7" concurrently with the execution of this Agreement, one of the originals of which shall be given to Plaintiffs and may thereafter be recorded in the Bureau and, which shall be made part of the encumbrances on title to the Project Area. HP shall additionally take reasonable steps to put any successor or assign to any portion of the Project Area on notice of any pertinent condition, prohibition or restriction in this Agreement, by, among other methods, referencing the recorded CCRs or, if prior to the Short Form terminating as set forth in Section I(8), the Short Form of this

Agreement in deeds of conveyance. However, this Agreement itself shall not be recorded in the Bureau or the Land Court of the State of Hawai'i. In the event of any dispute regarding the interpretation of provisions in the Short Form as compared to those in this Agreement, the provisions in this Agreement shall prevail. This term shall be expressly incorporated in the Short Form.

10. Following Phase II Approval, copies of the final, accepted versions of all documents attached to this Agreement as exhibits, as well as the Short Form of this Agreement, may, at Plaintiffs' sole discretion, be uploaded to the Sierra Club Hawai'i Chapter website, or such other website mutually agreed to by the Parties to inform the public or decision makers regarding matters relating to the Project and the Project Area. Sierra Club agrees that it will not alter any such documents that are uploaded.

H. AGREEMENTS RELATING TO LAWSUIT PROCEDURES, FEES AND COSTS

1. Upon the Effective Date of this Agreement, Plaintiffs and County shall stipulate to dismiss, with prejudice, the Lawsuit, and cooperate with HP in the filing of any necessary documents with the State of Hawai'i Second Circuit Court.
2. HP shall pay Plaintiffs' attorneys' fees and costs in the total amount of \$157,940.00, with payment to be made to Tom Pierce, Attorney at Law, LLLC, Client Trust Account. Payment of attorneys' fees and costs shall be made concurrent with the Parties' submission to the Court of the stipulation to dismiss with prejudice.
3. The County and HP agree to bear their own attorneys' fees and costs incurred in the Lawsuit.

I. SURVIVAL OF CERTAIN PROVISIONS

1. For the purpose of this Section I, any of the following two specific events or circumstances shall be deemed a "**Triggering Event**":
 - a. HP, after making reasonable, diligent and commercially practicable efforts fails to obtain Phase II Approval for the Project after having submitted a request for approval to the Maui Planning Commission in a form, or forms, substantially consistent with the New Concept Plans and all of the material terms and provisions of this Agreement; or
 - b. HP, after reasonable, diligent and commercially practicable efforts, fails to obtain Workforce Housing Approval.
2. Upon or after the occurrence of either of the two Triggering Events, HP shall have the right to serve upon Plaintiffs and the County formal written notice that it has chosen to exercise its rights under this Section I to abandon the Project ("**Abandonment Notice**"). HP shall have a period of up to three years following the occurrence of the later of any potential Triggering Event to serve on Plaintiffs and the County an Abandonment Notice, which three year period may be extended upon mutual agreement of HP and Plaintiffs, which agreement may not be unreasonably withheld if such extension is requested by HP;

provided the right to serve an Abandonment Notice shall expire six (6) years from the Effective Date of this Agreement, provided that this six year (6) period may be extended upon mutual agreement of HP and Plaintiffs, which agreement may not be unreasonably withheld if such extension is requested by HP and HP is using reasonable, diligent and commercially practical efforts to obtain Phase II Approval and/or Workforce Housing Approval, as the case may be. Such Abandonment Notice shall be served on Plaintiffs and the County by hand delivery or certified mail, with return receipt requested and received. Upon service of the Abandonment Notice, the terms and conditions of Section I(3) through I(7) and I(9) shall apply to the Parties.

3. Subsequent to service of the Abandonment Notice by HP on Plaintiffs and the County, any newly proposed development(s) of any portion of the Project Area, irrespective of when or how many such proposals are made, shall require a SEIS to be completed pursuant to the requirements of HRS Chapter 343 and HAR 11-200; provided HP shall not be obligated by the terms of this Agreement to prepare an SEIS for any development undertaken following any repeal of Project Zoning and Ordinance 3554; however, in the event of such repeal, and depending on the nature of the proposed development, HP may be required by HRS Chapter 343 to prepare an environmental assessment or an environmental impact statement, irrespective of the terms of this Agreement. This condition shall run with the land and be identified in the CCRs and the Short Form of this Agreement, which shall be recorded in Bureau, as provided by Section G(9) of this Agreement. Plaintiffs shall have all rights provided by law to comment on, and/or to challenge the SEIS. If and when Plaintiffs exercise the provisions of this Section I(3), the County and HP are barred from challenging Plaintiffs' standing or asserting the passing of any statute of limitation, or challenging whether or not the proposed development within the Project Area has changed substantively in size, scope, intensity, use, location, or timing, to require a SEIS.
4. The following provisions of this Agreement shall survive notwithstanding HP serving on Plaintiffs and the County an Abandonment Notice upon or after a Triggering Event:
 - a. HP's obligation to pay Plaintiffs' attorneys' fees and costs pursuant to Section H(2)) of this Agreement;
 - b. The following covenants, conditions and restrictions with respect to the Maui Meadows Buffer contained in Section B(2) of this Agreement ("**MM Restrictions**"), which MM Restrictions shall continue as a recorded encumbrance on the land in question and be identified in the CCRs and the Short Form:
 - i. The prohibition on development within the 116 foot wide buffer area adjacent to Maui Meadows, as set forth in Section B(2)(a) and B(2)(b) of this Agreement, and as depicted on Exhibit "1-D".
 - ii. The requirement that the buffer shall contain an approximately one acre open space, as set forth in Section B(2)(c) of this Agreement, and as depicted on Exhibit "1-D".

- iii. The requirement that the buffer shall continue along Pi'ilani Highway and provide at least forty-five (45) feet of buffer along Pi'ilani Highway, as set forth in Section B(2)(i) of this Agreement, and as depicted on Exhibit "1-D".
 - iv. The obligation not to disturb the four (4) sites identified in Exhibit "1-D", as set forth in Section B(2)(k) of this Agreement.
 - v. The obligation to erect the fence as set forth in Section (B)(3)(e) of this Agreement upon obtaining Phase II Approval.
 - vi. The terms and conditions of Section I of this Agreement, which includes the obligation of any owner of any portion of the Project Area to prepare a SEIS with respect to proposed development of any portion of the Project Area.
 - vii. The terms and conditions of Section J of this Agreement, relating to additional terms.
5. The above provisions in Section I(4), which shall survive any Abandonment Notice, shall be identified in the Short Form and in the CCRs, which shall survive this Agreement, as further provided for in Section I(8).
 6. Except as expressly identified in Section I(4), above, all other provisions in this Agreement (and all obligations of either of the Parties related thereto) shall terminate and become unenforceable upon HP's service of the Abandonment Notice to all Parties.
 7. Subsequent to Abandonment Notice by HP, the Parties shall cooperate in preparing, executing, and recording in the Bureau a document reflecting the termination of, or modification of, the CCRs and obligations contained in this Agreement, except those identified in Section I(4), which shall become CCRs that run with the land on the Project Area.
 8. Subject to limitations contained in this Section I, this Agreement shall otherwise continue in full force and effect until all portions of the Project have been developed as contemplated in the HCP and Ordinance 3554 ("**End of Development**"). At the End of Development, HP, or its successors or assigns, may cause the creation of CCRs (or the modification of any existing CCRs), which are intended to include all obligations under this Agreement (other than those covered under the Conservation Easement) that continue beyond the End of Development (the "**Remaining Obligations**"), which Remaining Obligations shall run with the land relating to the Project Area, or such applicable portions thereof, and which Remaining Obligations shall provide that Plaintiffs shall be third party beneficiaries thereof, with standing to enforce the Remaining Obligations, after giving due notice to the Master Association, and after the Master Association failing to, or refusing to, take such action deemed reasonably necessary by Plaintiffs to properly enforce any or all of the Remaining Obligations. A summary of the provisions of this Agreement that will potentially be reflected in the Remaining Obligations is attached hereto as Exhibit "12". HP or its successors and

assigns shall provide a copy of the proposed Remaining Obligations to the Parties. Upon receipt of the proposed Remaining Obligations, the Parties shall have thirty (30) days to accept or propose revisions to them that are consistent with the terms of this Agreement. If HP does not accept any of the proposed revisions, it shall give the Parties notice setting forth which revisions that HP will not accept, and providing a copy of the proposed CCRs that HP intends to record in the Bureau. Upon receipt of said copy of the proposed CCRs, the Parties shall have sixty (60) days in which to file a complaint in the Circuit Court of the Second Circuit, State of Hawai'i, requesting declaratory, injunctive, and such other consistent relief regarding the proposed CCRs, if said Party in good faith believes the proposed CCRs are not consistent with the terms of this Agreement. The filing of such a complaint shall not preclude HP from filing the CCRs in the Bureau if HP includes a provision in the CCRs acknowledging that the CCRs are subject to amendment to reflect any determination of that legal action, and that, until any final determination in such legal action, in the event of any conflict between the terms of this Agreement and the terms of the CCRs, the terms of this Agreement shall govern. Upon the recording of the later of CCRs as provided in this Section I(8), or, if applicable (in the event a complaint was timely filed as provided in this Section I(8)), upon filing of amended CCRs that are consistent with and fully address any final decision made by a court of law determining that the proposed CCRs are not consistent with the terms of this Agreement, this Agreement shall terminate and shall be of no further force or effect whatsoever, and instead shall be replaced by the recorded CCRs and other documents identified in this Agreement that implement the surviving agreements of the Parties set forth herein. The Short Form of this Agreement (Exhibit "7") shall include a provision stating that it shall automatically terminate upon the recording of the above-referenced CCRs in the Bureau and that upon said recording of the CCRs, the Short Form shall be of no further force or effect whatsoever. Any amendment of any of the Remaining Obligations ultimately set forth in the CCRs shall not be amended by the Master Association, or the members thereof, without Plaintiffs' written approval, which approval shall not be unreasonably withheld.

9. If none of the Triggering Events occur, but following conveyance of the Grant of Conservation Easement of the North Preserve Area and the South Preserve Area, if HP, or its successors and assigns, determine for any reason whatsoever and at its own discretion, not to proceed with the Project, and instead determines not to proceed with any project, or to proceed with a new and different project or development, then none of the provisions herein shall be binding upon or run with the land, other than those provisions that survive a Triggering Event as set forth in Section I(4) of this Agreement. In that event, the provisions of Section I(3) regarding preparation of a SEIS, and the associated rights of the Plaintiffs, shall apply as to any such different project or development that is proposed for the Property or the Project Area.

J. COUNTY OBLIGATIONS

1. The County does not have any affirmative obligations under this Agreement, with the exception of the following.
 - a. Under Section B.1.d. of this Agreement, the County shall not initiate administrative appeals under HRS Chapter 91, or initiate a court challenge, or any other formal challenge in any judicial, regulatory, or administrative forum regarding the relocation of Kanaio-Kalama Road, as long as such relocation is only in those places as shown in Exhibit "1-C".
 - b. Under Section D of this Agreement, nothing herein creates any obligation on the part of the County with regards to the determination of the County Council, the Maui Planning Commission, or the County Council's Land Use Committee with respect to the proposed Condition 5 Amendment, except that the County shall not object to the Condition 5 Amendment, and shall not object in the event that HIP withdraws the proposed Condition 5 Amendment.

K. ADDITIONAL TERMS

1. Voluntary Settlement: The Parties to this Settlement Agreement acknowledge and agree that each of them is entering into this Settlement Agreement freely and voluntarily and not acting under any misapprehension as to the effect hereof, and has acted and does hereby act freely and voluntarily and not under any coercion or duress.
2. No Mistake of Fact or Law: The parties hereby acknowledge that facts in addition to or different from those which are known or believed to be true may be hereinafter discovered, and the parties also acknowledge that certain documents or things or information may have been withheld in discovery based on assertions of privilege or on other grounds, which grounds may have been subject to challenge, but that it is their intention to fully and finally and forever settle and release any and all of the claims described in this Agreement. In furtherance of such intention, this Agreement shall be and remain in effect as a full and complete release with respect to the matters released herein, notwithstanding the subsequent discovery or existence of any such additional or different facts and regardless of the content of any document or thing or information withheld on the basis of privilege or other ground, and notwithstanding the subsequent occurrence of any additional injury or damage. In entering into this Settlement Agreement, each Party recognizes that no facts or representations are ever absolutely certain. Accordingly, each Party assumes the risk of any mistake, and if it should subsequently discover that any understanding of the facts or of the law was incorrect, each Party understands and expressly agrees that it shall not be entitled to set aside this Settlement Agreement by reason thereof, regardless of any mistake of fact or law.

3. Complete Bar: With the exception of the expressly provided for rights, including rights of action, set forth in various provisions in this Agreement, the execution of this Agreement is a complete and final bar to any and all claims (however denominated), actions, causes of action, claims for relief, indemnification, liability, liabilities, costs, expenses, fees, demands, injuries, losses, special, general, punitive and any other damages of whatsoever name or nature by and between them in any manner arising, growing out of, or connected with or in any manner involving, concerning, or relating to the claims asserted in the Lawsuit.
4. Merger: This Agreement, and its exhibits, constitute the entire Agreement between the Parties and supersedes any and all prior or contemporaneous discussions, agreements, representations, and warranties. The terms of this Agreement, and its exhibits, are contractual and not a mere recital. All undertakings of the Parties are supported by good, valuable and adequate consideration. The terms of this Agreement have been negotiated, and for purposes of construction or interpretation of this Agreement, no party shall be deemed to have been the author or drafter of this Agreement.
5. Mutual Representations and Warranties: The Parties hereby represent and warrant to each other the following, each of which is a continuing representation and warranty:
 - a. Each of the Parties hereto, itself or its affiliates, is the sole and lawful owner of all right, title and interest in and to every asserted claim herein. None of the Parties or its affiliates have assigned or transferred, or purported to assign or transfer, to any person or entity any claims discussed herein. The Parties shall indemnify, defend, and hold each other harmless from and against any claims, liabilities, actions, causes of action, demands, injuries, damages, costs, and expenses (including, but not limited to, reasonable attorneys' fees), based upon or arising in connection with any such prior assignment or transfer, or any such purported assignment or transfer, with respect to any claims discussed herein.
 - b. This Agreement is a valid and binding obligation of the Parties, enforceable against each of them in accordance with its terms.
 - c. Except as otherwise expressly provided in this Agreement, no consent or approval is required by any other person or entity in order for the Parties to carry out the provisions of this Agreement, and each of the Parties has obtained all necessary corporate and other approval to enter into and perform the obligations under this Agreement. In addition, each person signing this Agreement warrants that he or she is legally competent and authorized to execute this Agreement on behalf of the Party whose name is subscribed at or above such person's signature.
 - d. Each of the Parties hereto has received independent legal advice from attorneys of its choice with respect to the advisability of making the agreements provided herein and with respect to the advisability of executing this Agreement, and prior to the execution of this Agreement by the Parties hereto, their attorneys reviewed this Agreement with them and have made all desired changes.

- e. Except as otherwise expressly stated in this Agreement the Parties have not made any statement or representation to each other regarding any facts relied upon by them in entering into this Agreement, and each of them specifically does not rely upon any statement, representation, or promise of the other party hereto or any other person in entering into this Agreement, except as expressly stated in this Agreement. Each Party has relied upon its own investigation and analysis of the facts and not on any statement or representation made by any other party in choosing to enter into this Agreement and the transactions contemplated herein.
 - f. The Parties hereto and their respective attorneys have made such investigation of the facts pertaining to this Agreement and all of the matters pertaining thereto, as they deem necessary.
6. No Admission Against Interest: Nothing contained in this Agreement or negotiations and communications leading up to it shall be construed as an admission against the interest of or an admission of fault or wrongdoing by any of the Parties hereto. Except to enforce this Agreement, the terms of this Agreement, including, without limitation, the recitals and representations made by any Party shall have no force or effect and will not be binding upon, enforceable against, or deemed an admission or acknowledgment of any fact by any Party. With the exception of the Short Form and any of the attached exhibits which have been submitted to government agencies, this Agreement shall not be admissible as evidence in any action or proceeding, except to enforce this Agreement or to carry out the actions contemplated herein.
7. Notices. Unless as otherwise specifically set forth herein, any notices, requests, demands, consents and other communications provided for or permitted by this Agreement shall be given sufficiently for all purposes in writing and: (a) mailed by United States mail, addressed to such party at its post office address herein specified or the last such address designated by such party in writing to the other; or (b) sent by facsimile transmission ("Fax") to the Fax number, if any, of such party as specified herein or such other Fax number designated by such party in writing to the other. Any such written notice shall be deemed received at the time of such personal delivery, or receipt of the Fax, or at 5:00 P.M. on the third business day after being deposited with the United States mail as aforesaid, as the case may be. In addition, an attempt shall be made to provide a courtesy copy of such mailed or faxed notice via the last known email address for the receiving party. The initial addresses and Fax numbers of Plaintiffs and HP for purposes of this Section are as follows:

To Plaintiffs: Sierra Club Maui Group
P.O. Box 791180
Paia, HI 96779

Maui Unite
190 Hau'oli Street # 305
Wailuku, HI 96793
daoust@hawaii.rr.com

With a copy to: Tom Pierce Attorney at Law LLC
P.O. Box 798
Makawao, Hawaii 96768
Facsimile No.: (866) 776-6645

To HP: Honua'ula Partners, LLC
10940 Wilshire Boulevard, Suite 1240
Los Angeles, California 90024
Attn: Michael B. Rosenfeld
Facsimile No.: (310) 824-7931

With a copy to: McCorriston Miller Mukai MacKinnon LLP
Five Waterfront Plaza, Suite 400
500 Ala Moana Boulevard
Honolulu, Hawaii 96813
Attn: Clifford J. Miller, Esq.
Facsimile No.: (808) 524-8293

or, in each case, to such other address of Fax number(s) as may hereafter have been designated by such party in accordance with the above procedures.

8. Remedies: The following limitations apply to disputes arising out of this Agreement:

- a. In the event of a claimed breach of any provision of this Agreement, the Party claiming the breach shall, prior to filing any action in a court, first give written notice to the other Parties. The breaching Party shall have 30 days after receipt of written notice from the other Party in which to cure the alleged breach, or otherwise resolve the dispute. The Party alleging the breach may not unreasonably refuse to accept a Party's proposed cure of an alleged breach of an affirmative obligation set forth in this Agreement. If after 30 days the alleged breach has not been cured to the satisfaction of the Party alleging the breach, the Party alleging the breach may thereafter seek relief from a court, subject to the terms of this Section K(8).
- b. Except as set forth in Subsection K(8)(e), below, a Party's sole and exclusive remedy with respect to any dispute arising from this Agreement, including

breach and default, is limited to equitable relief, such as specific performance, declaratory judgments or injunctions, and under no circumstance shall monetary damages, attorneys' fees or costs be awarded to a prevailing Party.

- c. In the event any action should be necessary to enforce the terms and conditions of this Agreement, each Party shall bear their own attorneys' fees and costs, including the fees and costs of enforcing any court judgment.
- d. Any enforcement of this Agreement may be sought against only the Party or Parties claimed to be in breach of the Agreement, as well as against the heirs, successors, assignees, and transferees of such Parties.
- e. The limitations in this Section K(8) shall not apply to actions relating to personal injury or property damage brought by any of the Parties subsequent to the Effective Date of this Agreement, as a result of a claimed injury or property damage occurring as a result of access occurring through the Interim Access Provisions set forth in Section A(5) of this Agreement.

9. Miscellaneous:

- a. Except as provided herein, all covenants, warranties, representations, and indemnities made by the Parties to one another pursuant to this Agreement shall be and remain in full force and effect upon this Agreement becoming effective.
- b. The Parties agree to execute and deliver such other instruments and perform such acts, in addition to the matters herein specified, as may be appropriate or reasonably necessary, from time to time, to effectuate the agreements and understandings of the Parties, whether the same occur before or after the date of this Agreement.
- c. This Agreement shall inure to the benefit of and shall be binding upon the successors and assigns of the Parties hereto.
- d. The headings of all sections of this Agreement are inserted solely for the convenience of reference and are not a part of and are not intended to govern, limit, or aid in the construction or interpretation of any term or provision hereof.
- e. To the extent that performance is to be governed by time, time shall be deemed to be of the essence hereof.
- f. This Agreement is to be governed by and construed in accordance with the laws of the State of Hawai'i.
- g. This Agreement may be executed and delivered in any number of counterparts, each of which, when executed and delivered, shall be deemed an original, and all of which together shall constitute the same Agreement. This Agreement may also be executed by facsimile.

- h. This Agreement is the product of negotiations of the Parties, and in the enforcement or interpretation hereof, is to be interpreted in a neutral manner, and any presumption with regard to interpretation for or against any Party by reason of that Party having drafted or caused to be drafted this Agreement, or any portion hereof, shall not be effective in regard to the interpretation hereof.

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

SIERRA CLUB

A. Lucienne de Naie
By: A. LUCIENNE de NAIE
Its: EXECUTIVE COMMITTEE MEMBER

MAUI UNITE

Sam Daoust
By: PAM DAoust
Its: Board of Directors - Director

COUNTY OF MAUI

By: _____
Its: _____

HONUA`ULA PARTNERS, LLC

By: _____
Its: _____

h. This Agreement is the product of negotiations of the Parties, and in the enforcement or interpretation hereof, is to be interpreted in a neutral manner, and any presumption with regard to interpretation for or against any Party by reason of that Party having drafted or caused to be drafted this Agreement, or any portion hereof, shall not be effective in regard to the interpretation hereof.

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SIERRA CLUB

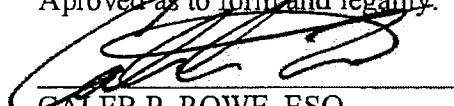
By: _____
Its: _____

MAUI UNITE


By: _____
Its: _____

COUNTY OF MAUI

Approved as to form and legality:



CALEB P. ROWE, ESQ
Deputy Corporation Counsel


By: Alan Aronkawa
Its: Maui

HONUA'ULA PARTNERS, LLC

By: _____
Its: _____

- h. This Agreement is the product of negotiations of the Parties, and in the enforcement or interpretation hereof, is to be interpreted in a neutral manner, and any presumption with regard to interpretation for or against any Party by reason of that Party having drafted or caused to be drafted this Agreement, or any portion hereof, shall not be effective in regard to the interpretation hereof.

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

SIERRA CLUB

By: _____
Its: _____

MAUI UNITE

By: _____
Its: _____

COUNTY OF MAUI

By: _____
Its: _____

HONUA'ULA PARTNERS, LLC
A Delaware Limited Liability Company

By: Michael Rosenfeld
Its: Authorized Signatory