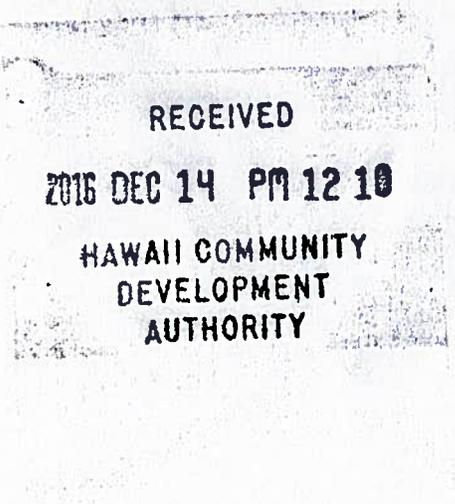


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BEFORE THE HAWAII COMMUNITY DEVELOPMENT AUTHORITY  
OF THE STATE OF HAWAII

In re Petition of ) PD Permit No. KAK 16-075  
)  
) VICTORIA WARD, LIMITED'S POST-  
VICTORIA WARD, LIMITED ) HEARING MEMORANDUM  
)  
)  
For a Planned Development Permit for Land )  
Block 1, Project 3. )

**VICTORIA WARD, LIMITED'S POST-HEARING MEMORANDUM**

On December 7, 2016, VICTORIA WARD, LIMITED's ("VWL") application ("Application") for a development permit pursuant to Chapter 206E of the Hawaii Revised Statutes ("HRS"), Chapter 15-22 ("Vested Rules" or "2005 Rules") and Chapter 15-219 of the Hawaii Administrative Rules ("HAR") for a proposed mixed-use, high-rise condominium project known as Land Block 1, Project 3 of the Ward Neighborhood Master Plan ("Project"), came on for decision-making before the Hawaii Community Development Authority ("HCDA" or the "Authority"). Subsequent to the close of evidence, the HCDA Board Chair directed VWL to file a post-hearing memorandum no later than December 14, 2016 addressing public comments made at the December 7, 2016 hearing "which made factual assertions, suggested

conclusions of law and actions by the board for the board to take.” December 7, 2016

Transcripts, at p.110.

Pursuant to order of the HCDA Board Chair, VWL hereby submits this post-hearing memorandum addressing the following issues raised by Sharon Moriwaki, President of Kakaako United, in her December 7, 2016 letter (“Moriwaki Comments”), Galen Fox, in his December 6, 2016 letter (“Fox Comments”), and Michelle Matson, in her December 7, 2016 letter (“Matson Comments”), as well as other comments made at the December 7, 2016 hearing (the commenters will hereinafter collectively be referred to as “Commenters”). Below is a brief summary of the claims asserted by Commenters, and responses to those claims. A more detailed discussion is thereafter presented.

#### **BRIEF SUMMARY OF CLAIMS & RESPONSES**

**CLAIM 1 – VWL should seek an amendment for a single mixed-use zone based upon Condition No. 4 of the WNMP D&O.**

This is inaccurate. Condition No. 4 of the WNMP D&O required an amendment of the 2005 Rules. However, the 2005 Rules were repealed, and the State Deputy Attorney General opined that it was legally impossible to amend rules that had been repealed. Based upon the repeal of the 2005 Rules, HCDA issued a Declaratory Order on October 10, 2012, removing the requirement to amend the repealed 2005 Rules and applying a mixed-use zone across the Ward MP. This Declaratory Order was not appealed and exists as a binding order of HCDA. It is procedurally improper for this Declaratory Order to be challenged now.

**CLAIM 2 – The 300-foot tower spacing rule should not be broken, and VWL should be required to construct a 180-foot tower in this location.**

This is inaccurate. The 2005 Rules expressly provide that a 300-foot tower separation should exist where “practicable.” This is not an absolute rule, and having a reduced

tower separation is not a violation of rule. VWL has established through substantial and undisputed evidence that a 300-foot tower separation is impracticable, and there is no contrary evidence in the record. Moreover, the claim that a 180-foot tower should be constructed in this location shows a lack of understanding regarding the flexible nature of the master plan approval process. A taller building in this location is what has allowed VWL to reduce the number of towers within the Ward MP from approximately 22 to 16 to accommodate concerns expressed by Commenters.

**CLAIM 3 - The podium height modification should be denied because VWL should have known about the constraints, including the inability to construct subsurface and the rail alignment.**

This is inaccurate. There is no evidence in the record whatsoever to support these claims. In fact, the substantial evidence of record provides a very different reality. The substantial evidence illustrates that the constraints were unknown at the time of Ward MP approval, that the modification will create an active streetscape, be aesthetically superior, and allow the construction of more reserved housing units. The modification is consistent with previous HCDA decisions, and HCDA has already issued binding findings of fact that the modification satisfies the rule requirements. A departure from these findings of fact will re-write a significant component of the Ward MP, and be questionable where there is no evidence in the record to justify a denial of the modification.

**CLAIM 4 – The 2005 Rules require each development to have industrial use.**

This is inaccurate. There is no requirement in the 2005 Rules to provide industrial floor space. Instead, the inclusion of industrial floor space is voluntary and provides a bonus for greater FAR. HCDA staff acknowledged on the record that VWL is not in violation of any rule requirement to provide industrial use.

**CLAIM 5 – VWL is in violation of the Ward MP by failing to begin physical construction of the Central Plaza and Diamond Head Plazas.**

This is inaccurate. As was pointed out at the November 3, 2016 hearing, there is no specific deadline in the Ward MP, the WNMP D&O, or the Development Agreement. In fact, imposing a deadline would be contrary to the contractual language in the Development Agreement allowing phasing priorities to be flexible. Nonetheless, VWL has stated on the record that the Central Plaza remains a priority, and obtained the permit to develop the first portion of the Central Plaza on Land Block 2 in 2014, only 1 year after obtaining its first development permits in 2013. The priority of developing the Central Plaza must be balanced with the negative impact it would have on displacing tenants, which is why Condition No. 11 of the WNMP D&O envisioned VWL creating other spaces within the Ward MP first in order to relocate tenants. Moreover, VWL has agreed to develop the second portion of the Central Plaza on Land Block 1 prior to obtaining the COO for this Project.

**CLAIM 6 - Dangers exist in Kakaako because of underground caves and streams and reflective glass, requiring the imposition of an impact fee.**

This is inaccurate. Careful studies, thorough environmental reviews and analysis, cultural surveys, and existing construction have failed to show any danger because of these alleged items. Glass reflectivity has been an important issue for HCDA, and VWL has committed to complying with all such rules in construction of any project.

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**I. DISCUSSION**

**A. The Declaratory Order was correctly approved by HCDA, was not timely challenged, and exists today as a binding order of the Authority.**

Commenters argue that “the Authority erroneously allowed Howard Hughes to avoid seeking the amendment or variance for a ‘single mixed-use’ zone.” Moriwaki Comments, at p.1. Commenters’ arguments are based upon a misunderstanding of legal processes and requirements, as well as a misunderstanding of the factual history leading up to the issuance of the single-mixed use designation. The Declaratory Order was validly issued by HCDA on October 10, 2012 after a public hearing process, was not appealed, and exists today as a binding order of the Authority.

On January 14, 2009, HCDA approved the Ward MP pursuant to the Nunc Pro Tunc Order re: Hearing Officer’s Proposed Findings of Fact, Conclusions of Law, and Decision and Order for a Master Plan Permit (“WNMP D&O” or “Ward MP”). Condition No. 4 of the WNMP D&O required VWL to amend the 2005 Rules for the following items:

- (1) Deletion of the Halekauwila Extension;
- (2) Deletion of the park/parking garage facility along the Halekauwila Extension; and
- (3) Designation of a single “mixed-use” land use designation to replace the “mixed-use commercial” (MUZ-C) and “mixed-use residential” (MUZ-R) land use designations.

VWL was preparing to seek an amendment of the 2005 Rules pursuant to Condition No. 4 of the Ward MP. However, on November 11, 2011, the 2005 Rules were repealed in their entirety, and a new set of rules was adopted (“2011 Rules”). Based upon the repeal of the 2005 Rules, VWL sought an opinion from the Deputy Attorney General regarding whether VWL should continue to seek an amendment for rules that were already repealed.

VWL was informed by the Deputy Attorney General that it was legally impossible and improper to amend rules that had been repealed. This opinion was based upon well-established legal principles, which state that repealed rules are incapable of being amended. See State v. Taplin, 247 A.2d 919, 926 (Maine 1968) (recognizing that “an amendatory act which attempts to amend an act which has previously been repealed, whether by express or implied repeal, is itself void and of no effect”); State v. Blackwell, 99 S.E.2d 867, 868 (N.C. 1957) (“[T]he amendatory act...purportedly amends a statute which had been repealed. Thus the amendatory act...is a nullity. This is so for the reason that where, as here, an entire independent section of a statute is wiped out of existence by repeal, there is nothing to amend.”); Griffin Telephone Corp. v. Public Service Comm’n, 138 N.E.2d 150, 152 (Indiana 1956) (noting the “well settled authority that an act which attempts to amend a non-existent law or section, is itself void and of no legal effect”).

The Deputy Attorney General advised VWL to file a petition for a declaratory order pursuant to HAR §15-219-83 to address how the repeal of the 2005 Rules and the adoption of the 2011 Rules would apply to the Ward MP. In compliance with the advice of the Deputy Attorney General, VWL filed a petition for declaratory order, which was publicly noticed and set for hearing. On October 10, 2012, after public hearing and comments, the Authority issued the Declaratory Order Re: Applicability of Condition No. 4 of Nunc Pro Tunc Order Re: Hearing Officer’s Proposed Findings of Fact, Conclusions of Law, and Decision and Order for a Master Plan Permit, Issued January 14, 2009 (“Declaratory Order”).

In the Declaratory Order, HCDA confirmed that VWL was no longer obligated to amend the 2005 Rules by Condition No. 4 of the Ward MP due to the legal impossibilities of amending repealed rules, and the adoption of the 2011 Rules, which applied a single mixed-use

designation to the Ward MP area and all other areas of the Kakaako Community Development District based upon an accepted environmental impact statement and a fully vetted public hearing process.

Pursuant to Hawaii Revised Statutes (“HRS”) §91-14, there was a period of 30 days in which to appeal the issuance of the Declaratory Order. No appeal was filed. The Declaratory Order became a binding and legally valid document issued by HCDA. In reliance upon the Declaratory Order, VWL planned and sought approval for 3 projects in 2013 (Ke Kilohana, Waiea, and Anaha), 1 project in 2014 (Gateway), and 1 project in 2015 (Ae’o). VWL expended substantial sums of money and resources in reliance on the Declaratory Order and the HCDA approved development permits.

At this point, it is untimely for Commenters to argue that the Declaratory Order was erroneous. Commenters’ arguments in this regard should be precluded. See State ex rel. Kobayashi v. Zimring, 58 Haw. 106, 126, 566 P.2d 725, 737 (1977) (“[T]he doctrine of equitable estoppel is fully applicable against the government if it is necessary to invoke it to prevent manifest injustice.”); Boskoff v. Yano, 217 F. Supp. 2d 1077, 1089 (D. Haw. 2001) (noting that the government’s words or conduct may prevent it from later asserting a different state of things if there has been detrimental reliance upon the government’s words or conduct).

More importantly, however, Commenters’ arguments are based upon a mistaken understanding of the legal processes and requirements applicable when rules are repealed, as set forth above. Commenters cannot be allowed to undermine components of the Ward MP that were validly approved by HCDA pursuant to a fully vetted public hearing process, and which have been implemented by VWL in reliance upon those validly issued orders.

**B. The plain language of HAR §15-22-143 permits a tower separation of less than 300 feet, and consequently, there is no rule violation.**

Commenters argue that there is a “300-foot separation rule” and that HCDA should not allow that rule to be broken. Moriwaki Comments, at p.1; Matson Comments, at p.1. Commenters also claim that the Ward MP “called for a 180 foot high, mid-rise residential/office building” and that VWL “should be bound to its master plan of a 180-foot building or return to the Authority with a design that meets the 300-foot rule.” Moriwaki Comments, at p.1. Commenters’ reading of HAR §15-22-143 is not consistent with the plain language of the rule which allows for a reduced tower separation where impracticable. Moreover, Commenters’ ignore the fact that the Ward MP was a flexible document, which permitted VWL to reduce the number of towers from 22 to 16, to orient the towers in a mauka-makai direction to preserve views, and to adapt to changing market conditions and other factors, including burial issues, which were unknown at the time.

The rule of statutory construction, which is applicable to agency rules, is that a statute or rule must be applied according to its plain and ordinary meaning, as set forth in the language of the statute or rule. Under the principles of statutory construction, the fundamental starting point in statutory construction is to look to the language of the statute itself. See Morgan v. Planning Dep’t, County of Kauai, 104 Hawaii 173, 185, 86 P.3d 982, 994 (2004) (“[T]his court’s chief duty is to ascertain and give effect to the legislature’s intention to the fullest degree, which is obtained primarily from language contained in the statute itself. When a law is enacted, a presumption exists that the words in the statute express the intent of the legislature.”). Words are typically given their common meanings. See Keliipuleole v. Wilson, 85 Hawaii 217, 225, 941 P.2d 300, 308 (1997). Where there is no ambiguity in the plain language of the statute or rule, resort to extrinsic aids, such as legislative history, is not appropriate. See Morgan, 104

Hawai'i at 179-80, 86 P.3d at 988-89; State v. Ganal, 81 Hawaii 358, 373, 917 P.2d 370, 385 (1996). Instead, the statute must be applied pursuant to the legislature's intent as set forth in the plain meaning of the statute.

Pursuant to HAR §15-22-143, "to the extent practicable, tower spacing shall be ...at least 300 feet between the long parallel sides of neighboring towers...." Pursuant to the plain language of the rule, the 300-foot tower spacing is applicable to the extent practicable. It is thus inaccurate to state that the rule is being "broken" when it has been thoroughly and undisputedly demonstrated that it is impracticable to locate the towers 300 feet apart.

Commenters ignore the substantial amount of evidence regarding the constraints on the Project site which make it impracticable to locate the Project tower 300 feet away from the neighboring tower, claiming that VWL "knew each challenge at the time it was siting projects on its 60 acres under the Ward MP." Moriwaki Comments, at 4. Commenters, however, do not cite to any record evidence that VWL was aware of these constraints prior to the Ward MP approval.

For this Project, there was substantial evidence that a 300-foot tower spacing between the Project and the adjacent building at the Ae'o Project is not practicable due to the following site constraints: (1) iwi kupuna burial preserves; (2) planned HRTP/HART station and guideway easement; (3) roadway alignment connectivity; (4) existing infrastructure easements; and (5) conformance with urban design/planning principles.

The three burial sites identified in Land Block 1 that are planned to be preserved in place and treated appropriately under an approved Burial Treatment Plan were found during the archaeological inventory surveys for the Land Block 1 projects. See Exhibit J (Matt

McDermott Testimony). As set forth in Matt McDermott's sworn testimony, the fieldwork was accomplished between May 5, 2014 and October 10, 2015:

Fieldwork for the original Block N East project area was accomplished between 5 May 2014 and 10 October 2015 under the general supervision of Matt McDermott, M.A. (principal investigator) by Ena Sroat, B.A. (project director) and Megan Hawkins, M.A. (project supervisor). This work required approximately 137 person-days to complete and was carried out following the State Historic Preservation Division's (SHPD) acceptance of the archaeological inventory survey plan for the original Block N East....

Thirty-five backhoe-assisted test excavations were completed, including both exterior (parking lot/road) and interior (warehouse space) locations. Test excavations were distributed throughout the project area in order to provide comprehensive testing coverage. Upon discovery of a burial cluster in Test Excavation 14, seven additional test excavations were added to define the boundaries of the burial cluster. On average, each test excavation measured approximately 2 ft by 20 ft (0.6 m by 6.1 m) and terminated at the upper boundary of the coral shelf or just below the water table, whichever was encountered first.

....

Human skeletal remains (*iwi kūpuna*) encountered during subsurface testing were handled in compliance with HRS §6E-43 and HAR §13-300 in consultation with the O'ahu Island Burial Council (OIBC) and the SHPD. All potential human skeletal remains were examined and identified by CSH osteologists (Malina Reveal, M.Sc., and/or Josie Yucha, M.S.) and the SHPD was notified immediately of all *iwi kūpuna* finds. An email summary of the find was provided to the SHPD and the OIBC within 24 hours of the initial identification and documentation. Additional investigation within the vicinity of the *iwi kūpuna* was conducted only following the concurrence of the SHPD. 'Ōiwi Cultural Resources LLC cultural monitors were on site during the AIS fieldwork and assisted in the treatment of all *iwi kūpuna* with appropriate cultural protocol.

The fieldwork in 2014-2015 was conducted in accordance with the SHPD-approved cultural impact assessment for the entire 60-acre Ward MP area, the archaeological inventory report and studies, as well as the December 4, 2008 Settlement Agreement between Edward Ayau and VWL ("Settlement Agreement"). Based upon the *iwi kupuna* discovered, the Project location was relocated and re-designed so as to comply with the desires of the Cultural Descendants to preserve the *iwi kupuna* in place. See Exhibit J (Matt McDermott Testimony), at

p.4 (“After completion of fieldwork and the preparation of the initial draft of the AIS report for the original Block N East project area, HHC redesigned the Block N East project area and the build-out within that project area.... Burial sites that had been documented during the AIS for the original Block N East project area are no longer considered to be within the boundaries of the revised project area....”).

The substantial evidence, including testimony and the cultural studies, undisputedly establish that the iwi kupuna were discovered recently, that VWL responded appropriate to the iwi kupuna finds by consulting with Cultural Descendants and agreeing to burial preserves that required VWL to re-design the Project. Commenters’ claims that VWL should have known about these constraints on the Project site demonstrate a complete lack of knowledge regarding the archaeological studies conducted to date, the Settlement Agreement that VWL is bound by, and the efforts made by VWL to respect the wishes of the Cultural Descendants.

In addition to the foregoing, the Planned H RTP/HART Station and Guideway Easement was not certain at the time of the Ward MP approval in 2009. On page 77 and 78 of the Ward MP Application, it stated,

Several alignment alternatives were studied in the vicinity of Ward Neighborhood including various options on Halekauwila Street, Queen Street, Kawaiahao Street and Waimano Street.... The preferred alignment selected in the Alternatives Analysis Report travels via Halekauwila Street and Queen Street in the vicinity of Ward Neighborhood.

A station would be provided near Ward Avenue, although the exact location has yet to be determined. GGP has met with, and will continue to meet with, the City to discuss the transit alignment, as well as the location of the transit station in Ward Neighborhood.

The final environmental impact statement (“FEIS”) for the HRTP/HART Station and Guideway was not issued until June 2010, and accepted by the Governor on December 16, 2010.

Moreover, the final supplemental environmental statement (“FSEIS”) required by Judge Tashima was not issued until September 2013, and the federal litigation related to the guideway was not concluded until February 2014. See Honolulutraffic.com v. Fed. Transit Admin., 742 F.3d 1222 (9<sup>th</sup> Cir. Feb. 18, 2014). Accordingly, Commenters cannot claim that VWL should be handcuffed by a transit alignment and station that were not certain at the time of the Ward MP approval. Instead, HAR §15-22-143 specifically provides for the situation where impracticabilities limit the use of a parcel. There was undisputed evidence that the impact to the planning of this Project and Land Block 1 has been significant with a substantial amount of acreage being isolated or encumbered by HART use.

Finally, Commenters’ arguments that a 180-foot tower should be constructed on the Project site because that is what the Ward MP shows demonstrates a misunderstanding of the master plan approval process. When the Ward MP was approved in 2009, it was approved as a conceptual plan. The purpose of the Ward MP was to vest VWL under the 2005 Rules so that VWL could confidently invest money, time, and resources into the long-term planning of 60 acres over a period of 15 years, without the threat of the 2005 Rules becoming inapplicable and requiring VWL to constantly re-design every time the rules were amended. Under HAR §15-22-200, that is the purpose of a master plan:

- (a) ... Master plans are intended to encourage timely development, reduce the economic cost of development, allow for the orderly planning and implementation of public and private development projects, and **provide a reasonable degree of certainty in the development approval process.**

- (b) A further purpose of this subchapter is to derive public benefits, such as affordable housing, relocation assistance, public parking, off-site infrastructure and other public facility improvements.... Such public benefits may be negotiated by the authority **in exchange for greater development flexibility....**
- (c) An approved master plan will provide assurance to landowners, developers and investors that **projects proposed within a master planned area ...will not be restricted or prohibited at the permit stage by subsequent changes to those rules....**
- (d) A further purpose of this subchapter is to **allow greater flexibility** in the development of lots within master planned areas....

Consistent with HAR §15-22-200, the flexibility of an approved master plan is what has allowed VWL to reduce the number of towers in the Ward MP from approximately 22 to 16. See November 2, 2016 Transcripts (Tom Witten Testimony), at p.124. When VWL was acquired by HHC, this reduction in the number of towers was made in response to community input. If applied consistently as is required, Ms. Moriwaki's complaint that the Ward MP should be bound to a 180-foot building in this location would also require VWL to maintain the 22 towers originally envisioned for the Ward MP area. This could not have been what Ms. Moriwaki intended by her comments. Indeed, Ms. Moriwaki asked HCDA to limit the Ward MP to "a total of nine towers only," which means she is asking HCDA to adhere to some components of the Ward MP and not others. However, this is not a proceeding to amend the already-approved Ward MP, and there is nothing in the Ward MP requiring VWL to construct a 180-foot tower in the Project location. VWL's reduction in the number of towers for the Ward MP, its commitment to orient the towers in a mauka-makai direction to preserve views, its respect for the Cultural Descendants, and agreement to provide the mid-block connectivity are all in an effort to create a vibrant, walkable, and desirable community, as envisioned by the Mauka Area Plan.

The undisputed evidence presented by VWL demonstrates that there are significant site constraints on Land Block 1, which were unknown previously and which caused VWL to re-design the Project. VWL should not be faulted by Commenters for attempting in good faith to accommodate varied interests, which resulted in a tower spacing of approximately 200 feet between the long parallel sides of the Project's building and the adjacent building at the Ae'o project (KAK 14-074). This is exactly the kind of situation that the rule in HAR §15-22-143 was designed to address because it is impracticable to locate the towers 300 feet apart.

- C. **The modification for podium height is consistent with and has already been ruled by HCDA to satisfy the standards in HAR §15-22-22 and HAR §15-22-120.**

The Project requires a single modification to HAR §15-22-62 to increase the platform height from 45 to 75 feet which will allow the parking structure to be moved up and away from the street, allowing for commercial spaces and residential units to be built within the platform which creates a pedestrian-friendly experience. Commenters argue that the modification should be denied because VWL “knew or should have known and addressed in its master planning any problems due to subsurface construction or need for ceiling height clearances; provides no industrial or community service uses within the platform nor significant public facilities, especially public open space, in excess of the minimum.” Moriwaki Comments, at p.5. Commenters also argue that when a podium is raised above 45 feet “the requirement for 20% of recreational space within each project envisioned as an interconnected network” is lost. Commenters’ arguments are in contradiction to the undisputed and substantial amount of evidence presented in this proceeding.

Pursuant to HAR §15-22-22 of the Vested Rules, the Authority may consider modifications to specific rule provisions when:

- (1) The modification would provide flexibility and result in a development that is practically and aesthetically superior to that which could be accomplished with the rigid enforcement of this chapter;
- (2) The modification would not adversely affect adjacent developments or uses; and
- (3) The resulting development will be consistent with the intent of the mauka area plan.

Pursuant to HAR §15-22-120 of the Vested Rules, the Authority may grant modifications as part of the planned development permit review process to the following items:

- (1) View corridor setbacks;
- (2) Yards;
- (3) Loading space;
- (4) Parking;
- (5) Minimum and maximum ratio of residential and commercial space;
- (6) Towers, as follows:
  - (A) Tower footprint area:
    - (i) For buildings within the district utilized by the general public but limited to: auditoriums, community centers, and churches; or
    - (ii) For those portions of towers below sixty-five feet in height.
  - (B) Number of towers: The maximum number of towers may be modified for all structures within the area bounded by Punchbowl, King, South, and Pohukaina Streets;
- (7) **Platform heights may be commensurately modified to exceed forty-five feet where:**
  - (A) **Subsurface construction is infeasible; [or]**
  - (B) **Design requirements for ceiling height clearances require height adjustment; [or]**
  - (C) **Industrial, commercial, residential or community service uses are substantially located**

- within the platform, especially along streets or public spaces; or**
- (D) **Significant public facilities or pedestrian features are provided at the street level, especially arcades or publicly accessible open space in excess of the minimum grade-level open space;**
- (8) Number of reserved housing units and the cash-in-lieu of providing reserved housing units; and
- (9) Open space, as follows:
- (A) Obstructions overhead that enhance utilization and activity within open spaces or do not adversely affect the perception of open space; and
- (B) Height from sidewalk elevation of four feet may be exceeded at a maximum height-to-length of 1:12 if superior visual relief from building mass results.

There was substantial and reliable evidence presented that the requested modification to increase the maximum platform height from 45 to 75 feet in height satisfies the standards for modifications under the Vested Rules. These modifications allow the parking structure to be moved up and away from the street, ultimately providing space for commercial and residential to be built within the platform. These elements, rather than the parking structure, will face the street, creating a more aesthetically pleasing and pedestrian friendly façade. See Exhibit A (Application); Exhibit D-1 (Race Randle Modification Testimony); Exhibit F-2 (Tom Witten Modification Testimony); Exhibit G-2 (David Akinaka Modification Testimony); November 3, 2016 Transcripts, at pp.33-55.

VWL also demonstrated that, pursuant to HAR §15-22-120, it satisfied not one, but three different standards which allow the modification to be granted. See id. VWL demonstrated that subsurface construction is infeasible. See id. The Project is located in Flood Zone AE with Base Flood Elevations of 7 feet and 8 feet above Mean Sea Level, which makes it infeasible to build an underground parking structure. See id. VWL demonstrated that

minimizing subsurface excavation and consequently minimizing the potential of disturbing cultural and historic properties underground is a response to the desires of the Cultural Descendants. See id. Indeed, at the December 7, 2016 hearing, Ms. Dawn Chang testified to the Settlement Agreement and the commitment to listen to Cultural Descendants. See December 7, 2016 Transcripts (Dawn Chang Testimony), at pp.105-109. VWL demonstrated that commercial and residential uses are substantially located within the platform of the building. Finally, VWL demonstrated that significant public facilities or pedestrian features are being provided at the street level, and will be publicly accessible and in excess of the minimum grade-level open space.

The argument by Commenters that the Mauka Area Plan “requires 20 percent of the project for common areas of landscaped open space, recreation space, and community service uses at that platform level” in order to obtain a modification is based upon a misreading of the 2005 Rules and the Mauka Area Plan. See December 7, Transcripts (Sharon Moriwaki Testimony), at p.77. HAR §15-22-22 and HAR §15-22-120 contain the ONLY standards and rules that apply to a modification.

While Ms. Moriwaki fails to cite to any specific pages or provisions in the Mauka Area Plan in her argument, it is assumed that Ms. Moriwaki is referring to page 51 of the Mauka Area Plan which states, “Ten percent of the lot area shall be provided as open space at grade. An additional 20 percent of the lot area shall be provided as open space at grade or at any elevation up to the platform deck level in all projects obtaining a planned development permit.” Note, however, that this section of the Mauka Area Plan is entitled “Open Space Areas.” The term “open space areas” is defined differently from “open space.” Pursuant to HAR §15-22-5, “open space” is defined as “noncontiguous, unbuilt and unobstructed spaces at grade between and

adjacent to public and private structures,” whereas “open space areas” are defined as “noncontiguous, unbuilt and unobstructed spaces between and adjacent to public and private structures which may be at grade or on upper levels.” Page 51, the page Ms. Moriwaki was presumably referring to in the Mauka Area Plan, makes clear distinctions between “open space” and “open space areas.”

HAR §15-22-64 governs “open space” and provides in relevant part that “the minimum amount of open space shall be the lower of: (A) Ten per cent of the lot area; or (B) Twenty-five per cent of the lot area less required yard areas.” HCDA staff thoroughly reviewed the Application and found that the Project satisfied the open space requirements in HAR §15-22-64. Indeed, HCDA Staff noted that the Project triggers an open space requirement of approximately 9,207 square feet; however, the Project will provide approximately 17,000 square feet of open space, which “equates to approximately eighteen percent (18%) of the Project site being dedicated to open space, which is more than the required ten percent (10%) per the Vested Rules.” See Staff Proposed D&O. at FOF 58.

There is no rule in the Vested Rules regarding “open space areas.” Nonetheless, a review of the “open space areas” of the Project reveals that the Project is providing approximately 44,060 square feet of “open space areas” as defined by the Vested Rules, which equates to approximately forty-eight percent (48%) of the lot area, which is significantly more than the 20% Ms. Moriwaki referred to on Page 51 of the Mauka Area Plan. This “open space area” includes approximately 17,000 square feet of “open space” at grade, approximately 1,940 square feet of outdoor recreation space at grade, and approximately 25,120 square feet of outdoor recreation space at the platform level. Consequently, Ms. Moriwaki’s arguments may be based

upon a misreading or misinterpretation of what the 2005 Rules and the Mauka Area Plan require with regard to “open space” and “open space areas”.

Moreover, while Ms. Moriwaki and Mr. Fox allege that the platforms were “supposed to be for everybody” and not “for residents’ exclusive use,” neither of them cite to any specific provisions of the Vested Rules or Mauka Area Plan requiring “open space areas” (the only portion of “open space” located at platform level) to be accessible to members of the public. See Moriwaki Comments, at p.5. Fox Comments, at p.1; December 7, 2016 Transcripts, at p.83. While the Mauka Area Plan at one point envisioned “upper level system [to] allow people to move throughout the Mauka Area without going to the street level without its accompanying automobiles,” nothing in the Vested Rules imposes this requirement. See Mauka Area Plan, at p.15.

Importantly, this “upper level system” of pedestrianways connecting buildings has never been a part of the Ward MP approved by HCDA, or for that matter, any other master plan approved for Kakaako. This proceeding to approve the Project cannot and should not be used by Ms. Moriwaki or Mr. Fox or anyone else to attempt to challenge items in the Ward MP that were validly approved and implemented more than 7 years ago in a binding decision and order. If Ms. Moriwaki or Mr. Fox wanted to challenge the essential elements of the Ward MP, they had the opportunity to do so during the extensive public comment and hearing process that occurred in 2008 and 2009 when the Ward MP was before HCDA. Failing to do so, they cannot now retrospectively ask HCDA to require VWL to make fundamental changes to its approved Ward MP.

Contrary to what Commenters claim, the modification is not only consistent with the Mauka Area Plan, but it is encouraged by the Mauka Area Plan. The Mauka Area Plan and

Vested Rules provide flexibility for large developments and adopt an approach that departs from the rigidities of lot-by-lot development, allowing the community to receive public amenities that would otherwise be unavailable. The Vested Rules expressly provide that “the authority shall interpret these rules to encourage flexibility of design.” HAR §15-22-1. The Mauka Area Plan expressly provides that its vision is to create the vertical mixing of uses, locate commercial at grade, and create pedestrian-oriented residential, commercial, social and recreational activities. See Mauka Area Plan, at pp.2, 10, 12, 22.

To create the vision and meet the goals identified in the Mauka Area Plan, the following elements were described:

- “Commercial uses requiring easy access to automotive traffic could also locate at grade.” MAP p.13.
- “Large scale developments or superblocks are proposed to make the mixed-use concept work most efficiently.” MAP p.13.
- “Most developments in the Mauka Area will be encouraged to have common urban design features for the purpose of creating a desirable and functional community. These features are tastefully designed platforms, decks, and towers.” MAP p.14.
- Creating a level “with pedestrian-oriented residential, commercial, social and recreational activities....” MAP p.23.

The overwhelming evidence demonstrated that the modification contributes to the mixed-use live, work, play vision of the Mauka Area Plan. The modifications will allow the vertical mixing of uses: residential units in the tower and platform, and commercial in the platform, allowing the parking structure to be pulled up and away from the street, creating a more aesthetically appealing and superior pedestrian and living experience. See Exhibit D-1 (Race Randle Modification Testimony); Exhibit F-2 (Tom Witten Modification Testimony);

Exhibit G-2 (David Akinaka Modification Testimony); November 3, 2016 Transcripts, at pp.33-55.

Most importantly, HCDA already ruled that this modification, in particular, satisfies the standards of HAR §15-22-22 and HAR §15-22-120. In FOF No. 62 of the Ward MP, this modification was identified:

“Increase the maximum podium or street front element height from 45 feet to 65 feet for parcels fronting Ala Moana Boulevard and to 75 feet for all other parcels not directly fronting Ala Moana Boulevard, which will allow retail, restaurants and residential units to be built within the podium and parking structures to be moved up and away from the street, creating a more aesthetically pleasing and pedestrian friendly facade”[.]

In FOF No. 103 of the WNMP D&O, the Authority determined that “increasing the podium height allows for retail, restaurants, office, and residential units to be built within the podium” and the “additional podium height offers the opportunity to move a parking structure up and away from the street, occupying a smaller floor plate and making room for alternative uses” which uses “can then surround the garages.”

In FOF No. 106 of the WNMP D&O, the Authority determined that the modifications as presented satisfied the standard for granting modifications under HAR §15-22-22, stating that the modifications:

“(a) will result in a development that is consistent with the intent of the Mauka Area Plan and Rules; (b) will provide flexibility for different uses and various design strategies noted in the Master Plan, including concealed parking structures and pedestrian-friendly facades, which will result in a development that is practically and aesthetically superior to one which could be accomplished without such modifications; (c) will not adversely affect adjacent developments or uses; and (d) are necessary to implement the mixed-use, live-work-play neighborhood vision of the Master Plan and Mauka Area Plan.”

The foregoing Findings of Fact cannot be ignored. These Findings of Fact constitute “law of the case” inasmuch as they constitute prior rulings issued by HCDA that are binding. See Wong v. City and County of Honolulu, 66 Haw. 389, 396, 665 P.2d 157, 162 (1983) (The law of the case doctrine precludes the relitigation of “all prior rulings in a particular case, including rulings made by the judge him[her]self.”); see also Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 816 (1988) (“[T]he [law of the case] doctrine applies as much to the decisions of a coordinate court in the same case as to a court’s own decisions.”); Fought & Co. v. Steel Eng’g and Erection, Inc., 87 Hawaii 37, 48-49, 951 P.2d 487, 498-99 (1998) (law of the case includes issues either expressly or impliedly determined); Weinberg v. Mauch, 78 Hawaii 40, 47, 890 P.2d 277, 284 (1995) (same); Rail N Ranch Corp. v. Arizona, 441 P.2d 786, 788-89 (Ariz. Ct. App. 1968) (noting that the law of the case doctrine provides for the “orderly processing and expeditious resolution of controversy in a particular lawsuit” by disallowing repetitious review of an issue). As a rule of practice, the law of the case “normally commands adherence.” Glover v. Fong, 42 Haw. 560, 578 (1958). Moreover, the law of the case applies equally to administrative decisions. See 2 Admin. L. & Prac. § 5:67 (2d ed.) (“The ‘law of the case’ doctrine applies to administrative adjudicative decisions. That doctrine prevents the relitigation of a settled issue in an individual case and requires the agency to adhere to decisions made in earlier proceedings.”).

It matters not that in COL No. 13 of the Ward MP the Authority required that any requested modifications additionally be addressed and evaluated as part of the individual planned development review process for each project. This was really a technicality, inasmuch as HCDA could not give a blanket approval for this modification without having concrete tower plans to approve, as would be provided at the development permit stage. Knowing full well what it was

accomplishing, HCDA issued FOF 62, 103, and 106 of the WNMP D&O, finding that the modification to 75-feet satisfied the rule requirements. There was no evidence presented by Commenters whatsoever that this binding “law of the case” should or could be legally abandoned at this point.

**D. Industrial use is not required by the Vested Rules, and VWL is not in any violation of the Ward MP or the Vested Rules with regard to industrial use.**

Commenters claim that the rules provide that “each development shall include light and service industrial floor space,” but Commenters do not cite to a single rule provision containing this language. Moriwaki Comments, at p.1. Without a citation, Commenters ask HCDA to require VWL to “designate specific areas for light or service industrial use.” *Id.* HCDA, however, has no authority under the 2005 Rules to require VWL to provide industrial use. A review of the statutory provision and rules indicate that industrial use is not required, but is merely encouraged, and that those who provide industrial use obtain a 0.3 bonus in FAR for providing such industrial use. HCDA staff has acknowledged that VWL is not in any violation of the Vested Rules regarding industrial use, and VWL fully intends to comply with all applicable rules regarding industrial use.

HRS §205E-33 provides that “existing and future industrial uses shall be permitted and encouraged in appropriate locations within the district. No plan or implementation strategy shall prevent continued activity or redevelopment of industrial and commercial uses which meet reasonable performance standards.” Thus, by the plain language of this statutory provision, industrial use is not required, but encouraged.

The 2005 Rules similarly do not require, but encourage industrial uses. See HAR §§15-22-31(2) and 15-22-33(2) (identifying one of the goals of zoning to “encourage industrial uses in appropriate areas provided they meet reasonable performance standards”). In order to

encourage industrial uses, HAR §15-22-61(b) provides for “a bonus, not to exceed 0.3 FAR,...for the amount of the industrial use....” Consistent with this rule, the Ward MP provided in relevant part as follows:

46. Land Uses/Area: The Master Plan proposes a mixed-use development including residential, retail, office, commercial, and industrial uses.... [including] Industrial – 736,914 square feet. Although this is the maximum floor area requested for each use, Petitioner is requesting that the allocation of floor area for each use be flexible to accommodate changing market conditions and the evolving needs of the community.....

....

69. Density/Floor Area: HAR §15-22-116 allows a maximum density of 3.5 FAR for projects with a minimum land area of 80,000 square feet. This section also provides the 0.3 FAR bonus for any planned development that provides industrial use, among other uses. The Master Plan proposed 9,334,240 square feet of floor area on approximately 59.96 acres of land.... This translates to a density of 3.8 FAR, including a bonus of 0.3 FAR....

VWL has every intention of complying with the provisions of the Ward MP and the 2005 Rules regarding industrial use. Indeed, at the December 7, 2016 hearing, HCDA staff confirmed that industrial use is not required, but is encouraged by a 0.3 bonus to FAR, and that VWL is not in violation of any rule regarding industrial use. See December 7, 2016 Transcripts (Deepak Neupane Testimony), at pp.36-39. Nonetheless, VWL will agree to provide the HCDA Executive Director with a program for providing industrial floor area within the Ward MP, as is contained in Condition No. 5 of the Staff Proposed D&O.

**E. VWL is in compliance with all provisions of the Ward MP relating to the Central Plaza.**

Commenters request that HCDA “deny the permit until Applicant can implement Ward MP promises,” including “building according to schedule the required 2005 MP public

places, including the Central Plaza and Diamond Head Plazas.” Moriwaki Comments, at p.2. Commenters also argue that the “Ward MP promised 6.5 acres for public plazas and 7.6 acres for new public streets and pedestrian ways” and ask “Where are these public spaces other than on paper?” Moriwaki Comments, at p.2. VWL is not in violation of any provisions of the Ward MP, and has consistently indicated that the Central Plaza remains a priority.

At the November 3, 2016 HCDA hearing, VWL provided to HCDA board members a detailed description of the provisions of the Ward MP, the WNMP D&O, and the December 30, 2010 Master Plan Development Agreement (“Development Agreement”). Page 61 of the Ward MP contained a section entitled “Phasing Flexibility” and stated, in relevant part, “While no specific phasing sequence is defined, it is intended that public spaces will be developed earlier in the sequence, allowing residential, office and retail buildings to draw on a ‘bank’ of public spaces that are already in place.” On page 62 of the Ward MP, in a section entitled “Potential Phasing Strategies,” the narrative provided that it would be possible for there to be “as many as 10 to 15 different phases, implemented in response to market opportunities.” The table right below the narrative identified three stages of priorities: (1) initial, (2) mid-range, and (3) longer term, and identified the Central Plaza as one of the “initial” potential phasing “priorities”.

Pages 20 and 21 of the September 12, 2008 Addendum to the Ward MP were labeled “Possible Development Lots for Phase 1,” and Paragraph 3 of the Development Agreement provided that the “initial and future phases of implementation of the Ward MP shall be in conformance with the provisions in the Ward MP and/or any supplemental development agreement(s) which might be entered into by VWL and the HCDA. The phasing and timing of development under the Ward MP is intended to be flexible to give VWL the ability to adapt to

economic and market conditions.” Accordingly, all of the documents approving the Ward MP acknowledge the flexible nature of phasing and do not in any way impose or require the Central Plaza be delivered in any specific phase.

Notwithstanding the foregoing, VWL has and will continue to make the Central Plaza a priority. VWL obtained its first planned development permits in 2013 (Ke Kilohana, Waiea, and Anaha). In 2014, just a year after its first development permits were obtained, VWL obtained a permit for the first portion of the Central Plaza located on Land Block 2 of the Ward MP between the two buildings of the Gateway project. It is thus inaccurate for Commenters to claim that “there is no sign of the proposed 3.25 acre Central Plaza.” Moriwaki Comments, at p.6. Indeed, VWL has already recorded with the Bureau of Conveyances the public facility dedication documents setting aside the approximately 34,371 square foot area for the Central Plaza on Land Block 2 in Document No. 601710534. See Exhibit A (Application).

Additionally, VWL is willing to commit to Condition No. 17 of the Staff Proposed D&O, which states that VWL will start construction of the Central Plaza on Land Block 1 prior to the Certificate of Occupancy for the Project.

While Commenters complain that they do not see any physical construction of the Central Plaza yet, it is important to note that the areas in which the Central Plaza will be located currently house many local small businesses. For instance, constructing the Central Plaza on Land Block 2 will require demolishing the entire Ward Warehouse structure. Similarly, constructing the Central Plaza on Land Block 1 will require demolishing Marukai, which exists as the only grocery store serving the area (until Whole Foods is constructed with the Aeo project). Ensuring that businesses were not displaced without relocation assistance was one of the cornerstones of the Ward MP. The previous HCDA Board felt so strongly about relocation

assistance that it cited to the relocation assistance provisions of HAR §15-22-200(b) in Finding of Fact No. 44 of the WNMP D&O, and it imposed Condition No. 11 of the WNMP D&O. Condition No. 11 provides: “Petitioner shall provide relocation assistance to affected tenants, first, by relocating businesses to other spaces within the Ward Master Plan area, to the extent feasible, and if infeasible, by working with a commercial broker to assist these businesses in locating alternative space.”

What Commenters are asking VWL to do is demolish the structures and replace them with the Central Plaza without any plan whatsoever to relocate these businesses. This is not what HCDA envisioned when it imposed Condition No. 11 of the Ward MP. Instead, HCDA envisioned VWL creating other spaces within the Ward MP area in which tenants could relocate to, prior to demolishing structures housing tenants. VWL has taken this responsibility seriously, as it values each and every one of its tenants. And, the public testimony provided in this proceeding is a testament to VWL’s efforts to take care of the tenants. See December 7, 2016 Transcripts (Testimony of Rod Tengan, Michael Cummins, and Cindy Kouchi), at p. 90, 95-96, and 99-100. VWL has proceeded with development under the Ward MP in a thoughtful manner, sequencing each project so as to ensure the least amount of displacement, while also recognizing its commitment to deliver wonderful public facilities to future residents, including the Central Plaza.

The table below, also included in the Project’s Application, details the public facility dedications that have occurred to date, which includes the land for the Central Plaza on Land Block 2, of approximately 34,371 square feet. With this Project, VWL will have made approximately 158,201 square feet of public facility dedications. This amounts to approximately 3.63 acres of public facilities.

Table 5-4 Ward Village Public Facilities Dedication.

WARD VILLAGE PUBLIC FACILITIES DEDICATION	
<b>Credit from Pre- Ward MP Projects</b>	
<b>Item</b>	<b>Dedication Area</b>
"2003 Credits" from transfer of lands to HCDA	42,564 sf
Ward Village Shops Ph 1A, 1B, and 2A	(3,893 sf)
Ward Entertainment Center	(142 sf)
Ward Centre	(234 sf)
Ward Village Shops JDA (Jan. 23, 2009) Exemption	571 sf
Queen/Kamakee Intersection Improvements	<u>715 sf</u>
<b>Subtotal - Credit from Pre-Ward MP Projects [a]</b>	<b>39,581 sf</b>
<b>Ward MP Dedications</b>	
<b>Location</b>	<b>Dedication Area</b>
KAK 13-036 [LB2-P1] Waiea [Doc A-52480775]	521 sf
KAK 13-037 [LB3-P1] Anaha [Doc A-52480776]	353 sf
KAK 13-037 [LB3-P1] Anaha [Doc A-52480777]	496 sf
KAK 13-037 [LB3-P1] Anaha [Doc A-52480777]	431 sf
KAK 13-037 [LB3-P1] Anaha [Doc A-52480779]	902 sf
KAK 13-038 [LB5-P1] Ke Kilohana [Doc A-52480780]	1,785 sf
Halekauwila Street Transfer to HCDA [Doc A-55070352]	37,261 sf
KAK 14-066 [LB2-P2] Gateway Park [Doc A-60100943] - Central Plaza Ph 1	34,371 sf
LB1: Sidewalk Easements A-1 to A-5 [2015/SUB-19] - Pending	4,500 sf
LB1: Driveway Easement A-6 [2015/SUB-19] - Pending	<u>38,000 sf</u>
<b>Subtotal - Ward MP Dedications [b]</b>	<b>118,620 sf</b>
<b>Total Dedications to Date [a + b]</b>	<b>158,201 sf</b>
<b>Required Public Facilities Dedication</b>	
<b>Project</b>	<b>Dedication Area</b>
KAK 13-036 [LB2-P1] Walea	21,029 sf
KAK 13-037 [LB3-P1] Anaha	25,796 sf
KAK 13-038 [LB5-P1] Ke Kilohana	3,092 sf
KAK 14-066 [LB2-P2] Gateway Towers	31,163 sf
KAK 14-074 [LB1-P2] Ae'o	24,051 sf
'A'ali'i [LB1-P3]	<u>24,788 sf</u>
<b>Total Required Dedication</b>	<b>129,919 sfsf</b>
<b>Remaining Balance (exceeding requirements)</b>	<b>28,282 sf</b>

With the significant public facility dedications occurring to date, it is disingenuous for Commenters to imply that VWL has not lived up to its “Ward MP promises.” Moriwaki Comments, at p.2. VWL has satisfied all of the public facility requirements, and Ms. Matson’s argument regarding 60-90 acres of public open space is not rule-based and cannot serve to impose any type of impact fee. Matson Comments, at p.1. Again, any comments regarding the amount of public facility requirements of the Ward MP should have been and were

addressed during the public comment and hearing process back in 2008-2009, which resulted in HCDA approving the Ward MP subject to the Vested Rules and the conditions contained in the WNMP D&O. This proceeding cannot change components of the Ward MP that were approved, and which VWL relied upon in implementing development under the Ward MP over the previous 7 year period.

**F. The impact fee requested by Ms. Matson cannot be based upon speculation, is not appropriate for this proceeding, and is wholly unsupported.**

One of the final issues presented by Ms. Matson for the first time in this proceeding, or for any Ward MP project, is her claims that there are “underground caves and streams” in “Honolulu’s subsurface layers” that may be punctured and/or redirected “to allow for construction of high-density development foundations” and that there is a public safety issue regarding reflective glass exteriors. Matson Comments, at p.1. Ms. Matson also asks that HCDA require HHC to “establish and fund a perpetual scale-based flood mitigation and remedial impact fee following development of reflective glass towers and impervious ground surfaces as well as construction blockage and diversion of underground streams....” Matson Comments, at p.1.

As with some of the other comments from Commenters, Ms. Matson’s allegations in this regard are procedurally improper. Her comments regarding the diversion of underground streams and the establishment of fees should have been raised, and were not, during the public comment and hearing process in 2008-2009 approving the Ward MP. Ms. Matson is not making a comment regarding this Project, but is claiming that the entirety of the Ward MP area is “riddled” with these underground conditions which should be addressed. In addition to being untimely, Ms. Matson does not cite to any evidence whatsoever for this allegation. The establishment of an impact fee cannot be based upon speculation.

Importantly, the environmental impact statement prepared by HCDA for the Kakaako Community Development District, accepted by the Governor on November 3, 2010, did not identify any of the conditions as problems that Ms. Matson now suggests require an impact fee. The environmental impact statement for HCDA's TOD Overlay Plan, accepted by the Governor on June 16, 2015, also did not identify any of these conditions as problems, even when proposing higher density around transit stations. Additionally, HCDA staff confirmed at the December 7, 2016 hearing that the Vested Rules contain limits on reflectivity, which VWL must adhere to, which HCDA staff carefully monitor prior to approving the foundation permit, and which are covered in Condition No. 20 of the Staff Proposed D&O. See December 7, 2016 Transcripts (Deepak Neupane Testimony), at pp.46-48, 62-63. Accordingly, HCDA should decline to entertain Ms. Matson's comments, which are untimely, inappropriate for this proceeding, and unsupported by any evidence of record.

## II. CONCLUSION

VWL has prepared this post-hearing memorandum pursuant to the HCDA Board Chair's request in an effort to answer questions and allegations presented by Commenters of the Project at the December 7, 2016 HCDA hearing. VWL respectfully requests that HCDA approve the Project as requested based upon the substantial and reliable evidence presented in this proceeding, which has not been disputed by any party to the proceeding.

DATED: Honolulu, Hawaii, December 14, 2016.



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