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HAWAII COMMUNITY  
DEVELOPMENT  
AUTHORITY

BEFORE THE HAWAII COMMUNITY DEVELOPMENT AUTHORITY

OF THE STATE OF HAWAII

In re Petition of

VICTORIA WARD, LIMITED

For a Planned Development Permit for Land  
Block 1, Project 3.

) PD Permit No. KAK 16-075  
)  
) VICTORIA WARD, LIMITED'S  
) EXCEPTIONS AND/OR MOTION FOR  
) RECONSIDERATION OF FINDINGS OF  
) FACT, CONCLUSIONS OF LAW, AND  
) DECISION AND ORDER FILED  
) JANUARY 13, 2017; DECLARATION OF  
) RACE RANDLE; DECLARATION OF  
) THOMAS S. WITTEN; DECLARATION  
) OF MATT MCDERMOTT;  
) DECLARATION OF P. KAAHOHI  
) KALEIKINI

**VICTORIA WARD, LIMITED'S EXCEPTIONS AND/OR MOTION FOR  
RECONSIDERATION OF FINDINGS OF FACT, CONCLUSIONS OF LAW, AND  
DECISION AND ORDER FILED JANUARY 13, 2017**

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”). The decision-making hearing was continued to January 4, 2017 for deliberation and executive session. At the continued January 4, 2017 hearing, HCDA approved the Application, subject to twenty-six (26) conditions. On January 13, 2017, HCDA filed its Findings of Fact, Conclusions of Law, and Decision and Order (“Decision & Order”).

Condition No. 2 of the Decision & Order provides as follows, with the language at issue underlined:

Delivery of reserved housing shall be required pursuant to the Vested Rules. A minimum of 150 reserved housing units (inclusive of the additional fifty (50) reserved housing units as required under Condition No. 22) shall be provided within the Project. Prior to approval of the foundation permit by the HCDA staff, the one hundred fifty (150) reserved housing units to be provided within the Project shall be secured by the Applicant with a financial guaranty bond from a surety company authorized to do business in Hawaii, an acceptable construction set-aside letter, or other financial instruments acceptable to the HCDA Executive Director.

Condition No. 18 of the Decision & Order provides as follows, with the language at issue underlined:

Prior to HCDA staff approval of the Certificate of Occupancy (“CO”) for the Project or seven hundred thirty (730) calendar days from the approval of this Development Permit, whichever occurs first, VWL shall complete the construction of the Central Plaza on Land Block 1, which per Condition No. 8 of the WNMP D&O “will generally include the public plazas and pedestrian walkways in blocks one (1) and two (2) of the Proposed Public Facilities Plan and the open space on blocks one (1) and two (2) of the proposed Open Space Plan, as shown and indicated on pages eighteen (18) and nineteen (19), respectively, of the Petitioner’s Master Plan Application Addendum (dated September 12, 2008) and shall be at least one hundred fifty thousand (150,000) contiguous square feet.” VWL shall furnish to HCDA Executive Director copies of the following: (1) an executed construction contract between VWL and a licensed general contractor for the construction of the Central Plaza planned for Land Block 1 (“Central Plaza Construction Contract”); (2) a notice to proceed issued by VWL to such contractor for the Central Plaza Construction Contract; and (3) a

performance bond for the Central Plaza Construction Contract from a surety licensed to do business in the State of Hawaii, before start of construction of the Central Plaza.

Condition No. 22 of the Decision & Order provides as follows, with the language at issue underlined:

The modification to HAR §15-22-62 to increase the platform height to seventy five (75) feet is hereby approved, provided that there are fifty (50) additional reserved housing units provided in the Project (totaling one hundred fifty (150) reserved housing units in the Project) as additional public benefit consistent with the intent of the Vested Rules and the Mauka Area Plan. A maximum of fifteen percent (15%) of the recreation deck area elements shall be allowed an additional height of twelve (12) feet.

Pursuant to HAR §§ 15-219-32 and/or 15-219-53, VWL hereby submits these Exceptions and/or Motion for Reconsideration of Findings of Fact, Conclusions of Law, and Decision and Order Filed January 13, 2017, on the basis that the foregoing underlined provisions in Condition Nos. 2, 18, and 22 should be revised.

While HCDA has the authority to impose conditions, that authority is not unlimited. The conditions imposed must not be illegal, unreasonable, impossible to accomplish, or so burdensome or onerous that the effect is to nullify the permit.

#### **Condition No. 18**

Condition No. 18 is impossible to accomplish because the design, planning, and permitting processes (including satisfying all State Historic Preservation Division (“SHPD”) requirements) for the Central Plaza as VWL has proposed and presented to HCDA will take approximately 2 years to complete, only after which construction may commence. A more realistic timeframe, which allows the design of a Central Plaza with features and amenities that enhance the community experience, requires approximately 4 years to complete construction. Anything less will result in delivery of a temporary open space for residents and visitors which

will fall short of a more thoughtful and detailed Central Plaza that is represented in the WNMP D&O.

Condition No. 18 is also a violation of the Development Agreement, which expressly allows VWL flexibility in project phasing.

Finally, Condition No. 18 misquotes the language of the WNMP D&O.

Condition No. 18 imposes a requirement that 150,000 sf of the Central Plaza be “contiguous” which constitutes an improper attempt to amend the Ward MP, without public notice and hearing requirements. Moreover, it is impossible to provide a “contiguous” Central Plaza on Land Blocks 1 and 2, which are separated by a public street (Auahi Street) that is not owned by VWL.

The language in Condition No. 18 should be revised as follows (and as shown in redline) in order to constitute a valid condition:

#### ALTERNATIVE #1

Prior to HCDA staff approval of the Certificate of Occupancy (“CO”) for the Project or seven hundred thirty (730) calendar days from the approval of this Development Permit, whichever occurs first, VWL shall ~~complete~~ commence the construction of the Central Plaza on Land Block 1, which per Condition No. 8 of the WNMP D&O “will generally include the public plazas and pedestrian walkways in blocks ~~one~~(1) and ~~two~~(2) of the Proposed Public Facilities Plan and the open space on blocks ~~one~~(1) and ~~two~~(2) of the proposed Open Space Plan, as shown and indicated on pages ~~eighteen~~(18) and ~~nineteen~~(19), respectively, of the Petitioner’s Master Plan Application Addendum (dated September 12, 2008) and shall be at least ~~one hundred fifty thousand~~ (150,000) ~~contiguous~~ square feet.” VWL shall furnish to HCDA Executive Director copies of the following: (1) an executed construction contract between VWL and a licensed general contractor for the construction of the Central Plaza planned for Land Block 1 (“Central Plaza Construction Contract”); (2) a notice to proceed issued by VWL to such contractor for the Central Plaza Construction Contract; and (3) a performance bond for the Central Plaza Construction Contract from a surety licensed to do business in the State of Hawaii, before start of construction of the Central Plaza.

## ALTERNATIVE #2

~~Prior to HCDA staff approval of the Certificate of Occupancy ("CO") for the Project or seven hundred thirty (730) calendar days~~  
Within 4 years from the approval of this Development Permit, ~~whichever occurs first,~~ VWL shall complete the construction of the Central Plaza on Land Block 1, which per Condition No. 8 of the WNMP D&O "will generally include the public plazas and pedestrian walkways in blocks ~~one (1) and two (2)~~ of the Proposed Public Facilities Plan and the open space on blocks ~~one (1) and two (2)~~ of the proposed Open Space Plan, as shown and indicated on pages ~~eighteen (18) and nineteen (19)~~, respectively, of the Petitioner's Master Plan Application Addendum (dated September 12, 2008) and shall be at least ~~one hundred fifty thousand (150,000)~~ contiguous square feet." VWL shall furnish to HCDA Executive Director copies of the following: (1) an executed construction contract between VWL and a licensed general contractor for the construction of the Central Plaza planned for Land Block 1 ("Central Plaza Construction Contract"); (2) a notice to proceed issued by VWL to such contractor for the Central Plaza Construction Contract; and (3) a performance bond for the Central Plaza Construction Contract from a surety licensed to do business in the State of Hawaii, before start of construction of the Central Plaza.

### **Condition Nos. 2 and 22**

VWL has a legal right under the Development Agreement to utilize existing credits to fulfill reserved housing requirements. The provisions in Condition Nos. 2 and 22 requiring that VWL relinquish its rights to utilize reserved housing credits in exchange for approval of the modification is a violation of the Development Agreement and has no bearing on whether the modification satisfied all standards (which it did as is clearly set forth in FOF Nos. 144-162 of the Decision & Order).

Nonetheless, for the limited purpose of this permit, VWL will not challenge Condition Nos. 2 and 22 if HCDA will recognize that producing reserved housing units ahead of schedule and thereby creating credits (as was done in Ke Kilohana and as may be done in

‘A‘ali‘i) is of value to the community and is a cost that VWL is willing to undertake so long as it is allowed to utilize those credits in a timely fashion, and if HCDA will confirm that VWL will not be restricted in the future from utilizing its reserved housing credits. With such a confirmation, VWL will be able to consider producing more than the required 150 reserved housing units in ‘A‘ali‘i. Without such confirmation, VWL must raise its objections to Condition Nos. 2 and 22, as it diminishes the rights that VWL has under the Development Agreement. This limited waiver should not be construed to be a waiver of any other right, and VWL fully reserves all rights, and intends to, to utilize any and all reserved housing credits for any and all future projects under the Ward MP.

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## **I. STANDARDS OF REVIEW**

### **A. Exceptions**

Pursuant to HAR §15-219-53,

Where a decision is adverse to a party to the proceeding...and...[n]ot all of the members of the authority entitled to vote on any given matter have heard and examined all the evidence[,] the decision shall not be made until a proposed decision and order is served upon all the parties and any party adversely affected is afforded an opportunity to file exceptions and present argument to the authority in accordance with section 91-11, HRS.

See also HRS §91-11 (providing that “the decision, if adverse to a party to the proceeding...shall not be made until a proposal for decision containing a statement of reasons and including determination of each issue of fact or law necessary to the proposed decision has been served upon the parties, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the officials who are to render the decision, who shall personally consider the whole record or such portions thereof as may be cited by the parties”). The exceptions must be filed “within twelve days of the service of the proposed decision and order[.]” HAR §15-219-53.

A person aggrieved by an adverse decision is one who has suffered harm based upon a legal right or injury-in-fact. See Asato v. Procurement Policy Bd., 123 Hawaii 333, 344, 322 P.3d 228, 239 (2014); E&J Lounge Operating Co., Inc. v. Liquor Commission of the City and County of Honolulu, 118 Hawaii 320, 345 n.35, 189 P.3d 432, 457 n.35 (2008); Ariyoshi v. Hawaii Public Employment Relations Bd., 5 Haw. App. 533, 540, 704 P.2d 917, 924 (1985).

In this proceeding, the Decision & Order is adverse, and VWL is aggrieved by the Decision & Order, inasmuch as its legal rights under the Ward Neighborhood Master Plan (“Ward MP”), 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”) in PL MASP 13.1.3, and the Master Plan Development Agreement for the Ward MP dated December 30, 2010 (“Development Agreement”) are being violated by the imposition of certain language in Condition Nos. 2, 18, and 22 of the Decision & Order. Additionally, the imposition of a condition that is not reasonably obtainable makes it invalid, as more fully set forth herein below. Invalid conditions (such as Condition Nos. 2, 18,, and 22) that are essential to the permit invalidate the entire permit, making the Decision & Order adverse to VWL unless those conditions are amended to be reasonably obtainable.

**B. Motion for Reconsideration**

Pursuant to HAR §15-219-32, a party may submit a motion in writing setting forth the grounds for the motion including the relief sought, attaching a memorandum in support and/or declarations as required, and indicating whether a hearing is requested on the motion. “If a hearing on the motion is requested, the presiding officer shall set a date and time for hearing on the motion.” Id. If the motion involves a final determination, it cannot be determined by the presiding officer, but must come before the board for consideration. See id. Pursuant to HAR §15-219-32, there are no other requirements regarding motions; in other words, there is no requirement that the movant establish an adverse decision or injury-in-fact.

**C. HRS §91-14**

Pursuant to HAR §15-219-56, “[p]arties to a contested case proceeding may seek judicial review thereof in the manner set forth in section 91-14.” HRS §91-14 provides that “[a]ny person aggrieved by a final decision and order in a contested case...is entitled to judicial review thereof” and that such appeal shall be “instituted within circuit court ...within thirty days

after service of the certified copy of the final decision and order.” An agency’s decision may be reversed on appeal if its final decision and order is:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedure; or
- (4) Affected by other error of law; or
- (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Id.

## **II. ARGUMENT**

### **A. Condition No. 18 of the Decision & Order is unlawful and invalid.**

Condition No. 18 is unlawful and invalid because it is (1) impossible to accomplish; (2) a breach of the Development Agreement; and (3) an improper attempt to amend the Ward MP. In order to become a valid condition, Condition No. 18 must be revised as set forth below.

HAR §15-22-119 of the Vested Rules provides HCDA with the authority to impose conditions upon the approval of a planned development permit; however, this authority is not unlimited. See Donovan v. Gagnon, 522 N.E.2d 1019, 1024 (N.Y. 1988) (“We acknowledge that, in exercising their zoning powers, local authorities must consider the needs of the community as a whole. Indeed, it is for this reason that zoning decisions must be made ‘in accordance with a comprehensive plan’, rather than in response to ‘the whims of either an articulate minority or even majority of the community.’ The zoning power is not without limits, however, and its mere invocation does not excuse the arbitrary infringement of property rights.”).

Land use conditions imposed must not be so burdensome or onerous that their effect is to nullify the approved permit. See Arden H. Rathkopf et al., The Law of Zoning and Planning §60:12 (4<sup>th</sup> ed. 2016). Conditions must not be illegal or unreasonable. See id. at §60:38; Gay v. Zoning Bd. of Appeals of the Town of Westport, 757 A.2d 61, 64-65 (Conn. 2000) (recognizing that the zoning board may “attach reasonable conditions” but that “when a condition imposed by a board is unreasonable and beyond the authority of the board, ‘it may be revoked, set aside and declared void and of no force’”); Orloski v. Planning Bd. of Borough of Ship Bottom, 545 A.2d 261, 267 (N.J. 1988) (providing that the zoning board “unquestionably has the right to impose reasonable conditions” but also recognizing the “well established body of law holding that if the condition imposed is ultimately declared unlawful, variances upon which it has been engrafted must also be set aside”).

“Conditions that are impossible to satisfy are patently unreasonable...and zoning authorities may not impose such conditions on their grants of variances, regardless of whether the condition is to be fulfilled by the applicant, another agency or the zoning authority itself.” Vaszauskas v. Zoning Bd. of Appeals of Town of Southbury, 574 A.2d 212, 215 (Conn. 1990) (holding that the condition requiring the approval of a soil extraction permit was invalid where regulations specifically prohibited the removal of soil from property within a flood plain, which made the condition impossible to fulfill); see also Young Men & Women’s Hebrew Ass’n v. Borough Council of Monroeville, 240 A.2d 469 (Pa. 1968) (holding that a condition limiting access to the property was unobtainable and invalid and recognizing that “the power to thus regulate does not extend to an arbitrary, unnecessary or unreasonable intermeddling with the private ownership of property, even though such acts be labeled for the preservation of health, safety and general welfare”).

In Martland v. Zoning Commission of Town of Woodbury, 971 A.2d 53, 56-61 (Conn. 2009), the zoning commission approved a special permit allowing excavation of earth materials from a portion of a pond, subject to the condition that the applicant restore disturbed areas of the pond. The applicant argued that the condition was vague and would make the project economically and practically unfeasible. The reviewing court agreed with the applicant, also finding that there was no evidence supporting the imposition of the condition, except for “the speculative general concerns of two laypersons” who submitted public comments. The appellate court similarly agreed, reversing the zoning commission’s decision and remanding the case for further proceedings.

**1. Condition No. 18 is impossible to accomplish.**

Condition No. 18 is impossible to accomplish because it imposes a requirement to complete construction of the Central Plaza on Land Block 1 within 730 days, or 2 years, which is not reasonably obtainable by VWL or any other developer. VWL is committed to completing the Central Plaza and has already retained Studio Gang, a firm with extensive experience in planning and designing these types of plazas. See Declaration of Race Randle, attached hereto. VWL has also already retained PBR Hawaii, whose local knowledge and expertise will help ensure that the Central Plaza is completed in a way that is meaningful for residents and visitors. See id. These consultant teams are in the early stages of community outreach efforts for the Central Plaza, which is a crucial element of the planning. See id.

As set forth in the Declaration of Thomas S. Witten, attached hereto, the planning (including ongoing community outreach and involvement), design, and permitting and construction process requires significantly more time to complete construction of the Central Plaza on Land Block 1 of the Ward MP. In the professional opinion of the designated expert in

this matter, the following is the estimated timeframe to complete construction of the Central Plaza on Land Block 1:

- Design, including community outreach and involvement: January 2017-July 2018
- Approvals, including SHPD requirements, infrastructure, traffic, subdivision, and HCDA: February 2017- July 2018
- Permitting, including NPDES, demolition and mass grading, civil engineering infrastructure plans and architectural building permits: April 2018-March 2019
- Demolition: Aug 2018-Nov 2018
- Archaeological work and Construction: Including data recovery field work, mass grading, water features, pavilion(s), site lighting, hardscape, irrigation and landscaping, and landscape establishment: December 2018-December 2020.

In total, it will take approximately 4 years to complete construction of the Central Plaza on Land Block 1 as represented in the WNMP D&O, with desirable qualities and features that enhance the experience for the community. See id. This timeline was developed based upon the significant development experience of VWL and the local consultants and experts engaged to work on the Central Plaza, as well as the rules and processes required prior to and during construction of the Central Plaza. See id. Without the 4-year time frame for completion, the represented Central Plaza cannot be delivered. The maximum that could be accomplished under a 2-year time frame would be either: (1) demolish buildings and merely lay down grass to create simple open space that would exist until the permanent Central Plaza planning and development process is completed and plaza constructed; or (2) the initial efforts for the represented Central Plaza, including planning, SHPD approvals, some permitting, demolition of buildings, and the initial cultural inventory work. An additional 2 years would be needed to complete permitting, cultural data recovery field work, and the actual construction of the fully planned Central Plaza

which VWL presented to HCDA. See id. In the event the 2-year requirement remains in the Decision & Order, it is crucial that HCDA understand that the Central Plaza that can be delivered within 2 years would only be temporary open space, requiring further closures as buildings around the Central Plaza are constructed and as the Central Plaza itself is re-designed and constructed.

Furthermore, many steps in this process are not under the control of VWL. Initially, the Data Recovery Plan approval by the State Historic Preservation Division (“SHPD”) is subject to processes that can often be delayed. Also of note, a significant amount of required on-site work, which is estimated to take approximately 6 months, involves cultural data recovery which timing can be impacted by findings during the effort. See Declaration of Race Randle; Declaration of Matt McDermott. This work will require the demolition of existing buildings on the site, which include industrial warehouse space and Marukai Market. See id. Final plans and construction documents for work that would include ground disturbances cannot be completed until the Data Recovery process is completed and approved by SHPD. See id. Permits cannot be obtained until after that process is completed and construction documents are finalized. See id. It is not in the best interest of the Cultural Descendants for this process to be rushed. See Declaration of P. Kaanohi Kaleikini. VWL has committed to fulfilling the SHPD requirements thoroughly and in compliance with all applicable laws. See id. Once SHPD approval has been obtained, it is reasonably expected to take 12 months to complete and receive approval on all necessary permits, including the required HCDA permit. See Declaration of Race Randle.

In light of the foregoing, the deadline in Condition No. 18 to complete construction of the Central Plaza within 2 years is impossible to accomplish under any realistic scenario and would allow only for the demolition of buildings and the clearing of the area for

temporary open space, with no features or amenities that enhance the experience for the community. Surely, it could not have been the intent of HCDA to obtain a Central Plaza that is simply a grassed area. Accordingly, Condition No. 18 should be revised to provide at least 4 years so that it is possible to accomplish the vision of the Central Plaza set forth in the Ward MP.

**2. Condition No. 18 constitutes a breach of the Development Agreement.**

In addition to being unobtainable as set forth above, Condition No. 18 is invalid because it constitutes a breach of the Development Agreement.

The elements of a breach of contract are: “(1) a legally enforceable obligation of a defendant to a plaintiff; (2) the defendant’s violation or breach of that obligation; and (3) injury or damage to the plaintiff caused by the breach of obligation.” Filak v. George, 594 S.E.2d 610, 619 (Va. 2004).

In general, parties may contract as they wish, and courts will enforce their agreements without passing on their substance.... The principle of freedom of contract is itself rooted in the notion that it is in the public interest to recognize that individuals have broad powers to order their own affairs by making legally enforceable promises.

City Express, Inc. v. Express Partners, 87 Hawaii 466, 470 n.4, 959 P.2d 836, 840 n.4 (1998).

In interpreting the contract, the starting point is the plain language of the document. If the language is plain, a court will look no further than the four corners of the document. Moreover, under the parol evidence rule, “Once the parties execute an instrument which contains their whole agreement, their previous negotiations and agreements are legally ineffective and evidence relating to those previous negotiations or agreements is irrelevant regardless of who offers it.” Akamine & Sons, Ltd. v. American Security Bank, 50 Haw. 304, 310, 440 P.2d 262, 266 (1968).

In addition to the foregoing, there is also implied in every contract in the State of Hawaii a duty of good faith and fair dealing in its performance and enforcement. See Best Place, Inc. v. Penn America Ins. Co., 82 Hawaii 120, 920 P.2d 334 (1996). This has been defined as an emphasis on “faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.” Hawaii Leasing v. Klein, 5 Haw. App. 450, 456, 698 P.2d 309, 313 (1985).

The imposition of a deadline to complete construction of the Central Plaza in Condition No. 18 breaches HCDA’s obligations and duty of good faith and fair dealing set forth in the Development Agreement. Page 61 of the Ward MP contained a section entitled “Phasing Flexibility.” Page 62 of the Ward MP, in a section entitled “Potential Phasing Strategies,” provided that it would be possible for there to be “as many as 10 to 15 different phases, implemented in response to market opportunities.” Clearly, the Ward MP included flexible phasing strategies and did not impose a timeline for completion of the Central Plaza. The WNMP D&O approved the Ward MP and the flexibility of phasing, and did not impose any deadline to complete construction of the Central Plaza.

The Development Agreement, which exists as a binding agreement between HCDA and VWL, provided that “[d]evelopment of the master plan lands identified in this Agreement shall be in conformance with the Development Rules, D&O, the PL MASP 13.1.3, and this Agreement.” Accordingly, HCDA expressly agreed to allow development of areas within the Ward MP, including the Central Plaza, to be constructed in accordance with the Ward MP (which provided for flexible phasing). If there was any doubt about the implementation of phasing under the Ward MP, paragraph 3 of the Development Agreement further 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, under the plain language of the Development Agreement, HCDA agreed to allow VWL to develop areas within the Ward MP on a flexible phasing schedule, taking into account the economic and market conditions.

The imposition of a clear deadline to develop a project within the Ward MP is clearly a violation of HCDA’s obligations under the Development Agreement. VWL has relied upon HCDA’s representations in the Development Agreement regarding phasing flexibility and has expended significant time and resources in implementing the Ward MP on a schedule that achieves a balance between market conditions, tenant relocation, and community need. HCDA cannot commit in the Development Agreement to flexible phasing for all projects within the Ward MP area, and then impose a deadline within which to complete a project. This is not only a breach of the provisions of the Development Agreement, but a breach of the duty of good faith and fair dealing. It was not within the contemplation of the parties at the time they entered the Development Agreement that HCDA would be allowed to dictate the timing of development under the Ward MP. Condition No. 18, which constitutes a breach of the Development Agreement terms and provisions, is consequently invalid and cannot stand unless revised.

**3. Condition No. 18 is an improper attempt to amend the Ward MP.**

The Ward MP was approved under the master plan provisions of HAR Chapter 15-22. Pursuant to HAR §15-22-200, the purposes of a master plan include providing “a reasonable degree of certainty in the development approval process” and “assurances to landowners, developers and investors that projects proposed within a master planned area that

are in accordance with the applicable mauka area rules in effect at the time the master plan is approved will not be restricted or prohibited at the permit stage by subsequent changes to those rules.” Moreover, one of the stated purposes of a master plan under HAR Chapter 15-22 is to “allow greater flexibility in the development of lots within master planned areas than would otherwise be possible” and that flexibility is “intended to encourage integrated developments and secure better overall planning for extensive land holdings.” Id.

A master plan is approved only after public notice and hearing requirements are satisfied, and HCDA has determined that the master plan is “consistent with the provisions of the mauka area plan” among other things. HAR §15-22-205. Importantly, “[a] master plan, once approved, may be amended or terminated, in whole or in part, by mutual consent of the authority and landowner, or their successors in interest” subject to public hearing requirements. Id.

In this case, is it undisputable that VWL did not file a petition for an amendment of the Ward MP. This proceeding is for approval of a planned development permit. The public hearings for this permit were not noticed for the purpose of amending the Ward MP, and no notice whatsoever was provided to VWL that HCDA would be attempting to amend the provision of the Ward MP.

The imposition of Condition No. 18 constitutes an improper amendment of the Ward MP because it materially and substantially alters the terms of the Ward MP. It requires delivery of the Central Plaza within a certain timeframe, as opposed to allowing for flexibility in phasing as provided for under the Ward MP and the Development Agreement. Additionally, Condition No. 18 alters the terms under which the Central Plaza is to be developed by altering the size requirements and components of the Central Plaza, in direct contradiction to Condition No. 8 of the WNMP D&O.

Condition No. 18 of the Decision & Order contains language supposedly quoted Condition No. 8 from the WNMP D&O; however, this language is inaccurate and misrepresents the actual language contained in Condition No. 8 of the WNMP D&O. An exact quote of Condition No. 8 of the WNMP D&O is as follows:

The Ward Neighborhood Commons shall be located within the area currently identified as the “Central Plaza” in the Master Plan, and will generally include the public plazas and pedestrian walkways in blocks 1 and 2 of the Proposed Public Facilities Plan and the open space on blocks 1 and 2 of the Proposed Open Space Plan, as shown and indicated on pages 18 and 19, respectively, of Petitioner’s Master Plan Application Addendum (dated September 12, 2008). Petitioner’s design and development of the commercial and residential spaces surrounding the Ward Neighborhood Commons will determine the precise land area of the commons. However, the area of the Ward Neighborhood Commons, which shall be dedicated via perpetual easement for public use gathering areas, shall be at least 150,000 square feet. Petitioner shall provide capital improvements, day to day maintenance, and security, which shall be addressed in the development agreement.

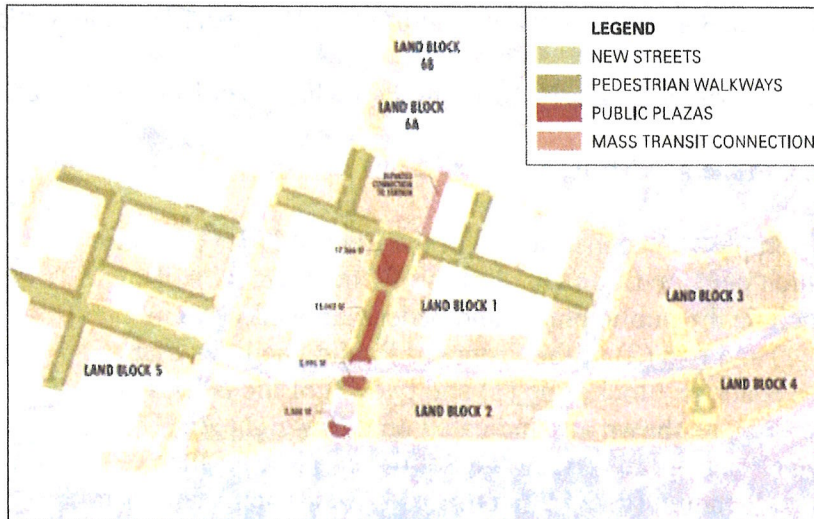
Instead of quoting Condition No. 8 above exactly, Condition No. 18 improperly added the following underlined language, which is clearly different than what is set forth in the actual language of Condition No. 8 of the WNMP D&O.

VWL shall complete the construction of the Central Plaza on Land Block 1, which per Condition No. 8 of the WNMP D&O “will generally include the public plazas and pedestrian walkways in blocks one (1) and two (2) of the Proposed Public Facilities Plan and the open space on blocks one (1) and two (2) of the proposed Open Space Plan, as shown and indicated on pages eighteen (18) and nineteen (19), respectively, of the Petitioner’s Master Plan Application Addendum (dated September 12, 2008) and shall be at least one hundred fifty thousand (150,000) contiguous square feet.”

Based upon the foregoing, Condition No. 18 of the Decision & Order misquotes Condition No. 8 of the WNMP D&O significantly, and imposes a “contiguous” requirement that is not present in

the Ward MP and was not imposed under the WNMP D&O. It is this language in Condition No. 18 that must be changed.

Condition No. 8 of the WNMP D&O required that the Central Plaza be developed in accordance with pages 18 and 19 of the Ward MP Addendum dated September 12, 2008. On page 18 of the Ward MP Addendum (dated 9/12/2008) , approximately 30,449 sf was identified as “Proposed Public Facilities” for the Central Plaza on Land Block 1, and approximately 6,495 sf for Land Block 2. A map showing the general location of the Central Plaza on Land Blocks 1 and 2 (as well as the table) was included on page 18 of the Addendum, and is set forth below. The Proposed Public Facilities Plan also identified pedestrian walkways, which totaled 51,349 sf on Land Block 1 and 0 on Land Block 2. Note that the total of the public plazas and pedestrian walkways identified for Land Blocks 1 and 2 was approximately 88,293 sf.



Proposed Public Facilities Plan

### *Proposed Public Facilities Plan*

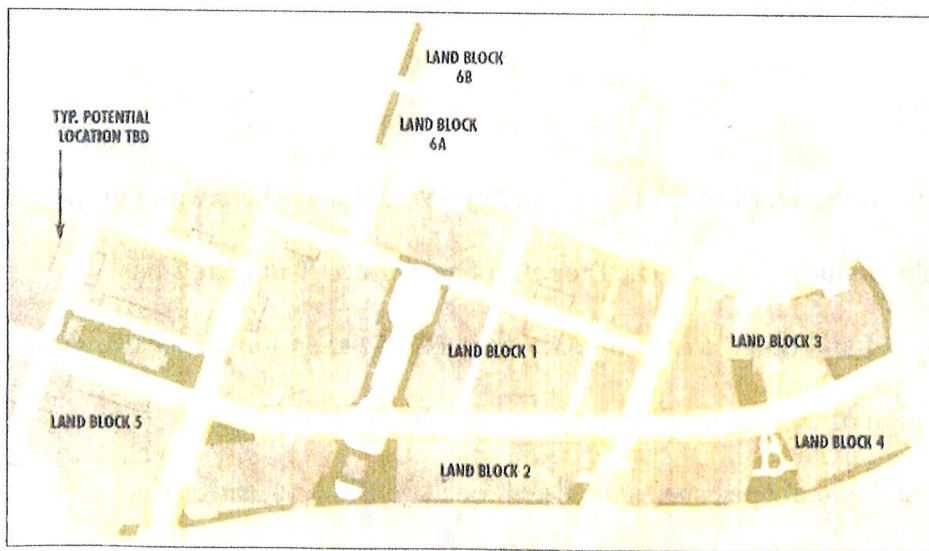
LAND BLOCK	NEW STREETS	PEDESTRIAN WALKWAYS	PUBLIC PLAZAS	MASS TRANSIT CONNECTION	
1	93,272 sf	51,349 sf	30,449 sf	10,000 sf	= 185,070 sf
2	4,199 sf	0 sf	6,495 sf	0 sf	= 10,694 sf
3	0 sf	0 sf	0 sf	0 sf	= 0 sf
4	8,027 sf	0 sf	0 sf	0 sf	= 8,027 sf
5	120,913 sf	56,270 sf	0 sf	0 sf	= 177,183 sf
6	0 sf	0 sf	0 sf	0 sf	= 0 sf
SUB TOTAL	226,411 sf	107,619 sf	36,944 sf	10,000 sf	380,974 sf
Existing Streets					-155,296 sf*
<b>TOTAL</b>					<b>225,678 sf of Public Facilities Provided as Land</b>
PUBLIC FACILITIES REQUIRED					330,053 sf
PROVIDED AS LAND					225,678 sf
BALANCE					104,375 sf

\* Streets listed as "Existing Streets" are assumed to be dedicated public streets and under state or county ownership. The "Existing Streets" deduction from the Proposed Public Facilities Plan will change if any listed street(s) or portion thereof has not been dedicated to the state or county and is not currently owned by the state or county.

On page 19 of the Ward MP Addendum (dated 9/12/2008), there was a Proposed Open Space Plan, which is included below. The Proposed Open Space Plan identified approximately 29,956 sf on Land Block 1 and approximately 68,158 sf on Land Block 2. A map showing the general location of the proposed open space was also located on page 19 and is included below. Note that the total open space identified for Land Blocks 1 and 2 was approximately 98,123 sf.

### *Proposed Open Space Plan*

LAND BLOCK	LAND AREA	10% OPEN SPACE REQUIRED	OPEN SPACE PROVIDED	PERCENTAGE
1	911,887 sf	91,189 sf	29,965 sf	3.3%
2	355,130 sf	35,513 sf	68,158 sf	19.2%
3	270,159 sf	27,016 sf	35,087 sf	13.0%
4	230,706 sf	23,071 sf	34,245 sf	14.8%
5	621,871 sf	62,187 sf	43,365 sf	7.0%
6	66,626 sf	6,663 sf	7,951 sf	11.9%
To Be Allocated Among Projects in Future Phases			26,867 sf	
<b>TOTAL</b>	<b>2,456,379 sf</b>	<b>245,638 sf</b>	<b>245,638 sf</b>	<b>10.0%</b>



Proposed Open Space Plan

Pursuant to the foregoing, in the WNMP D&O, HCDA identified the following as components of the “Ward Neighborhood Commons” or Central Plaza: (1) public plazas; (2) pedestrian walkways; and (3) open space, all of which were shown on pages 18 and 19 of the Addendum as part of the Proposed Public Facilities Plan and Proposed Open Space Plan. In other words, the 88,293 sf of public plazas and pedestrian walkways for Land Blocks 1 and 2 identified on page 18 of the Addendum (in the Proposed Public Facilities Plan), and the 98,123 sf of open space for Land Blocks 1 and 2 identified on page 19 of the Addendum (in the Proposed

Open Space Plan) were intended to be included as the “Ward Neighborhood Commons.” This adds up to approximately 186,416 sf of public plazas, pedestrian walkways, and open space on Land Blocks 1 and 2. In Condition No. 8 of the Ward MP Permit, HCDA did not require 186,416 sf to be the minimum for the Ward Neighborhood Commons; instead, HCDA chose 150,000 sf as the minimum requirement.

Most importantly, the WNMP D&O did not require that the 150,000 sf of the Central Plaza on Land Blocks 1 and 2 be “contiguous” and for good reason. Auahi Street divides Land Block 1 and Land Block 2. VWL does not own Auahi Street. It is thus impossible for VWL to deliver a Central Plaza on Land Blocks 1 and 2 with a “contiguous” 150,000 sf. It is a legal impossibility, as well as a practical impossibility. That is one of the reasons HCDA did not require a “contiguous” Central Plaza in Condition No. 8 of the WNMP D&O, and is why Condition No. 18 must be revised. It is procedurally and substantively improper for HCDA to impose additional requirements of the Ward MP in this proceeding, especially requirements that are impossible to fulfill. HCDA cannot under its own rules amend the terms of the Ward MP in this way.

**4. Notwithstanding the foregoing, VWL will not challenge Condition No. 18 if it is revised so that it is reasonably obtainable.**

Notwithstanding the fact that HCDA cannot legally impose a deadline to complete construction of the Central Plaza, VWL understands the desire of the community to obtain a Central Plaza in a timely manner, and has stated that the Central Plaza is a priority. Indeed, VWL has already taken steps toward development of the Central Plaza. However, as set forth above and in the declarations attached hereto, VWL cannot complete construction of the represented Central Plaza within 2 years; however, within 2 years, VWL can work through the initial development and approval process, and start construction of the Central Plaza with an

expectation to complete construction of the Central Plaza on Land Block 1 in approximately 4 years. This timeline allows for the obtaining of all necessary permits, including SHPD permits and work associated with SHPD requirements. Importantly, this 4-year timeline allows VWL to complete the Central Plaza on Land Block 1 that VWL has presented to HCDA as a part of its update of the Ward MP and at a level that is meaningful and appropriate for the neighborhood. Based upon the foregoing, if Condition No. 18 of the Decision & Order were revised as follows, VWL would not challenge the Decision & Order and would make every effort to deliver the Central Plaza as early as realistically possible.

#### ALTERNATIVE #1

Prior to HCDA staff approval of the Certificate of Occupancy ("CO") for the Project or seven hundred thirty (730) calendar days from the approval of this Development Permit, whichever occurs first, VWL shall ~~complete~~ commence the construction of the Central Plaza on Land Block 1, which per Condition No. 8 of the WNMP D&O "will generally include the public plazas and pedestrian walkways in blocks ~~one~~(1) and ~~two~~(2) of the Proposed Public Facilities Plan and the open space on blocks ~~one~~(1) and ~~two~~(2) of the proposed Open Space Plan, as shown and indicated on pages ~~eighteen~~(18) and ~~nineteen~~(19), respectively, of the Petitioner's Master Plan Application Addendum (dated September 12, 2008) and shall be at least ~~one hundred fifty thousand~~ (150,000) ~~contiguous~~ square feet." VWL shall furnish to HCDA Executive Director copies of the following: (1) an executed construction contract between VWL and a licensed general contractor for the construction of the Central Plaza planned for Land Block 1 ("Central Plaza Construction Contract"); (2) a notice to proceed issued by VWL to such contractor for the Central Plaza Construction Contract; and (3) a performance bond for the Central Plaza Construction Contract from a surety licensed to do business in the State of Hawaii, before start of construction of the Central Plaza.

#### ALTERNATIVE #2

~~Prior to HCDA staff approval of the Certificate of Occupancy ("CO") for the Project or seven hundred thirty (730) calendar days~~  
Within 4 years from the approval of this Development Permit,

~~whichever occurs first~~, VWL shall complete the construction of the Central Plaza on Land Block 1, which per Condition No. 8 of the WNMP D&O “will generally include the public plazas and pedestrian walkways in blocks ~~one~~ (1) and ~~two~~ (2) of the Proposed Public Facilities Plan and the open space on blocks ~~one~~ (1) and ~~two~~ (2) of the proposed Open Space Plan, as shown and indicated on pages ~~eighteen~~ (18) and ~~nineteen~~ (19), respectively, of the Petitioner’s Master Plan Application Addendum (dated September 12, 2008) and shall be at least ~~one hundred fifty thousand~~ (150,000) ~~contiguous~~ square feet.” VWL shall furnish to HCDA Executive Director copies of the following: (1) an executed construction contract between VWL and a licensed general contractor for the construction of the Central Plaza planned for Land Block 1 (“Central Plaza Construction Contract”); (2) a notice to proceed issued by VWL to such contractor for the Central Plaza Construction Contract; and (3) a performance bond for the Central Plaza Construction Contract from a surety licensed to do business in the State of Hawaii, before start of construction of the Central Plaza.

**B. Condition Nos. 2 and 22 of the Decision & Order are unlawful and invalid.**

The same provisions of law regarding the invalidity of unlawful conditions and breach of contract cited above are applicable here. Based upon the same body of law, Condition Nos. 2 and 22 of the Decision & Order are unlawful and invalid because preventing VWL from utilizing existing credits to fulfill its reserved housing requirements constitutes a breach of the Development Agreement. Moreover, approving the modification subject to this requirement is wholly improper and inconsistent with HCDA’s rules allowing for modifications. Nonetheless, VWL understands the desire for delivery of reserved housing units within the project, and VWL will not challenge these conditions if it is acknowledged that VWL can use reserved housing credits for future developments without delay.

Section 4 of the Development Agreement contains a section entitled “Reserved Housing Credits,” and provides that “HCDA will effectuate a reserved housing credit account

process that will apply to the Ward MP under the following circumstances: ...(2) if VWL and/or the beneficiaries of the Bank of Hawaii Trust and/or the First Hawaiian Bank Trust construct more reserved housing for any planned development in the Master Plan Area than is required for that project[.]” Section 4 further states that “VWL and/or the beneficiaries of the Bank of Hawaii Trust and/or the First Hawaiian Bank Trust may use their reserved housing credits to satisfy all or part of the Ward MP reserved housing requirements....” Accordingly, the Development Agreement requires HCDA to allow VWL to utilize its reserved housing credits when it has constructed more reserved housing in one project than is required. It is undisputed that VWL constructed more reserved housing units in the Ke Kilohana project than is required. VWL consequently has a legal right to utilize its existing 50 reserved housing credits toward the fulfillment of the reserved housing requirements for this project.

In addition to the foregoing, it is wholly improper and in violation of HAR Chapter 15-22 to condition approval of the modification on VWL’s relinquishment of its right to utilize its reserved housing credits. As set forth in FOF Nos. 144 through 162 of the Decision & Order, the modification satisfied all rule requirements, and should be approved on that basis alone. While HAR §15-22-22(b) allows HCDA to “impose reasonable conditions in granting a modification,” a condition that both violates the Development Agreement and requires the relinquishment of a legal right cannot be said to be “reasonable” under any circumstances.

Nonetheless, VWL understands the desire for more reserved housing units. VWL sought approval for the opportunity to provide additional reserved housing units in this project if possible, and the Decision & Order acknowledges that VWL has the option to designate additional reserved housing units. Consequently, VWL will not challenge the provisions of Condition Nos. 2 and 22 of the Decision & Order, as long as HCDA will recognize that

producing reserved housing units ahead of schedule and thereby creating credits (as was done in Ke Kilohana and as will be done in 'A'ali'i) is of value to the community and is a cost that VWL is willing to undertake so long as it is allowed to utilize those credits in a timely fashion, and if HCDA will confirm that VWL will not be restricted in the future from utilizing its reserved housing credits.

Importantly, if VWL does not challenge Condition Nos. 2 and 22 as set forth above, any waiver of VWL's right to utilize reserved housing credits for this project shall not be deemed a waiver to utilize the reserved housing credits on any future project. VWL fully intends to exercise its rights under the Development Agreement to utilize and apply its reserved housing credits generated from Ke Kilohana or Aalii or any other reserved housing credits for its next development project, as well as any and all other development projects under the Ward MP.

### III. CONCLUSION

Pursuant to the foregoing, VWL respectfully requests that HCDA reconsider and amend the foregoing conditions of its Decision & Order, and issue an amended Decision & Order at the earliest practicable time, in the interest of commencing this project (and ultimately delivery of the Central Plaza) within a timely manner.

DATED: Honolulu, Hawaii, January 23, 2017.



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J. DOUGLAS ING  
EMI MORITA KAIMULOA  
Attorneys for VICTORIA WARD, LIMITED

BEFORE THE HAWAII COMMUNITY DEVELOPMENT AUTHORITY  
OF THE STATE OF HAWAII

In re Petition of	)	PD Permit No. KAK 16-075
	)	
VICTORIA WARD, LIMITED	)	DECLARATION OF RACE RANDLE
	)	
	)	
For a Planned Development Permit for Land	)	
Block 1, Project 3.	)	

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**DECLARATION OF RACE RANDLE**

I, RACE RANDLE, hereby declare as follows:

1. I am competent to make this declaration, and I make this declaration upon personal knowledge.
2. I am the Vice President of Development for the Howard Hughes Corporation. The Howard Hughes Corporation is the parent company of Victoria Ward, Limited ("VWL").
3. I was born and raised on Oahu, graduating from Kahuku High School. I hold a Bachelor's degree in Civil Engineering and a Master's degree in Business Administration from Cal Poly, San Luis Obispo.
4. Prior to my work for the Howard Hughes Corporation, I served as a development Project Manager for Castle & Cooke Homes Hawaii and a Development Director for Forest City Hawaii. I have over 13 years of experience actively planning and developing master planned communities in Hawaii.
5. On January 14, 2009, HCDA approved the Ward Neighborhood Master Plan ("the Ward MP") pursuant to the Findings of Fact, Conclusions of Law, and Decision and Order for a Master Plan Permit ("WNMP D&O").

6. On December 30, 2010, HCDA and VWL entered into the Master Plan Development Agreement (“Development Agreement”).

7. Although nothing in the Ward MP, the WNMP D&O, or the Development Agreement requires delivery of the Central Plaza within a certain timeframe, VWL has stated that it is committed to making the Central Plaza a priority, and has made significant attempts to do so. Of note, these documents all preserve VWL’s right to sequence the phasing and delivery of projects, including the Central Plaza, according to economic and market conditions.

8. 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. VWL 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.

9. Attached is a realistic timeline of the efforts needed to complete the Central Plaza as it has been represented in the Ward Village Master Plan, including community outreach, design, approvals, permitting, tenant relocation, demolition, and construction of the Central Plaza. This is based on our development experience, understanding the local laws, rules, requirements and processes, and consultation with experts in these fields, and is expected to take approximately 4 years.

10. A significant amount of required archeological work is required before construction of the Central Plaza can begin mass grading. This work, which is estimated to take 30 months, involves cultural data recovery and approval of a Data Recovery Plan by the State Historic Preservations Division. Matt McDermott of Cultural Surveys Hawai‘i outlines the work

and time necessary to complete this process. This work will require the demolition of existing buildings on the site, which include industrial warehouse space and Marukai Market. As is well known in the development industry, there is no way to exactly determine the time it will take to obtain SHPD approval. What is set out in the attached timeline is a reasonable estimate.

11. Final plans and construction documents cannot be completed until the Data Recovery is approved by SHPD. Therefore, permits cannot be obtained until after that process is completed and construction documents are finalized. It is reasonably expected to take 12 months to complete and receive approval on all necessary permits.

12. Therefore, the SHPD process and permitting alone will require over 2 years to complete. As the attached timeline lays out, even if initial planning and design work can be done concurrently with the SHPD process, grading work on the Central Plaza cannot begin until approximately 30 months out, providing for the earliest completion of the Central Plaza in approximately 48 months.

13. Therefore, based upon a reasonable development timeline, Condition 18 of the Decision & Order is impossible to fulfill. For this reason, we are asking that the Condition be amended to allow 4 years for completion of the Central Plaza. We believe this is a reasonable request and timeframe that will assure the Board and the public that the Central Plaza will not only be completed, but will be completed at a level that is meaningful and appropriate for the redevelopment of Kaka'ako and Ward Village.

14. As stated earlier, VWL is committed to completing the Central Plaza and has already retained Studio Gang, a firm with extensive experience in planning and designing these types of plazas, and PBR Hawai'i, who's local knowledge and expertise will help ensure that the Plaza is meaningful and appropriate for Ward Village. These teams are prepared to advance the

community outreach efforts for the Central Plaza once the Decision & Order is finalized and we know that we are able to proceed with the 'A'ali'i project and comply with the requirements of the Decision & Order.

15. Furthermore, Condition 18 of the Decision & Order misquotes Condition No. 8 of the WNMP D&O. Therefore, in order to prevent any issues from arising in the future, we also request that the Decision & Order be corrected to properly quote Condition No. 8 of the WNMP D&O. We will continue our compliance with that condition as was provided for in the WNMP D&O.

I DECLARE UNDER PENALTY OF LAW THAT THE FOREGOING IS TRUE  
AND CORRECT.

DATED: Honolulu, Hawaii,

1/23/17

  
RACE RANDLE



BEFORE THE HAWAII COMMUNITY DEVELOPMENT AUTHORITY  
OF THE STATE OF HAWAII

In re Petition of	)	PD Permit No. KAK 16-075
	)	
VICTORIA WARD, LIMITED	)	DECLARATION OF THOMAS S. WITTEN
	)	
	)	
For a Planned Development Permit for Land	)	
Block 1, Project 3.	)	

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**DECLARATION OF THOMAS S. WITTEN**

I, THOMAS S. WITTEN, FASLA, hereby declare as follows:

1. I am competent to make this declaration, and I make this declaration upon personal knowledge and professional Landscape Architect expertise.
2. I am the Chairman of PBR HAWAII & Associates, Inc. PBR HAWAII & Associates, Inc. has been based in Hawaii for over 45 years and concentrates on land planning, environmental studies, landscape architecture, and graphic design. I have been a professional Landscape Architect licensed and practicing in the State of Hawaii for over 35 years.
3. I was born and raised in Hawaii, graduating from Punahou School in 1972. I hold a BA in Landscape Architecture from the University of California at Berkeley, College of Environmental Design (1976) and several professional development degrees from Harvard University, Graduate School of Design (1984-1986).
4. PBR HAWAII & Associates, Inc. was retained by the Howard Hughes Corporation to conduct community engagement and prepare and process the planned development permit for the Aalii project, as well as to prepare a landscape master plan and streetscape concepts for the Ward MP area.

5. It is my professional opinion that it is not reasonably possible for VWL to deliver the completed Central Plaza on Land Block 1 as represented in the Ward Village Master Plan pursuant to the timing requirements set forth in Condition No. 18 of the Decision & Order.

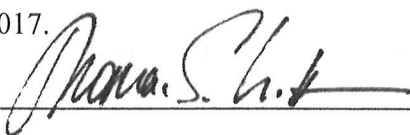
6. The planning (with ongoing community outreach and involvement), design, permitting and construction process would require significantly more time to complete this important element of the Ward Village Master Plan. Specifically, the following steps (some concurrent) and estimated timeframes to complete the Central Plaza are estimated as follows:

- Design, including community outreach and involvement: January 2017-July 2018
- Approvals, including SHPD requirements, infrastructure, traffic, subdivision, and HCDA: February 2017- July 2018
- Permitting, including NPDES, demolition and mass grading, civil engineering infrastructure plans and architectural building permits: April 2018 – March 2019
- Demolition: August 2018-November 2018
- Archaeological work and Construction: Including data recovery field work, mass grading, water features, pavilion(s), site lighting, hardscape, irrigation and landscaping, and landscape establishment: December 2018- December 2020

7. In total, to execute a project of this scale and complexity in an urban setting, it should reasonably take approximately four years to complete the Central Plaza as outlined above. There are many steps in this process that are not at the control of VWL, and thus it is unreasonable to establish an unrealistic deadline to complete the Central Plaza.

I DECLARE UNDER PENALTY OF LAW THAT THE FOREGOING IS TRUE  
AND CORRECT.

DATED: Honolulu, Hawaii, January 23, 2017.



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THOMAS S. WITTEN, FASLA

BEFORE THE HAWAII COMMUNITY DEVELOPMENT AUTHORITY  
OF THE STATE OF HAWAII

In re Petition of	)	PD Permit No. KAK 16-075
	)	
VICTORIA WARD, LIMITED	)	DECLARATION OF MATT
	)	MCDERMOTT
	)	
	)	
For a Planned Development Permit for Land	)	
Block 1, Project 3.	)	

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**DECLARATION OF MATT MCDERMOTT**

I, MATT MCDERMOTT, hereby declare as follows:

1. I am competent to make this declaration, and I make this declaration upon personal knowledge.
2. I am the Principal Investigator for Cultural Surveys Hawaii, Inc. I have over 25 years of experience in cultural and archaeological work. Cultural Surveys Hawaii, Inc. ("CSH") was retained by the Howard Hughes Corporation to conduct the archaeological work for the entire 60-acre Ward Neighborhood Master Plan ("Ward MP") area.
3. HHC's Block I development project, which includes the area that will become the Central Plaza on Land Block 1 of the Ward MP, is a project subject to Hawai'i State historic preservation review legislation: Hawai'i Revised Statutes (HRS) §6E-42 and Hawai'i Administrative Rules (HAR) §13-284.
4. This historic preservation review process must be completed before the project obtains its construction permits from the City and County of Honolulu's Department of Design and Construction (City DPP), and before project construction begins.

5. The State of Hawai'i historic preservation review process is designed to identify and mitigate a project's impacts to significant historic properties. Historic properties are defined as "any building, structure, object, district, area, or site, including *heiau* [temple] and underwater site, which is over fifty years old" (HAR §13-284-2). The six potential historic preservation review steps include the following: (1) Identification and inventory, to determine if historic properties are present in the project's area and, if so, to identify and document (inventory) them; (2) Evaluation of historic property significance; (3) Determination of project effect (impact) on significant historic properties; (4) Mitigation commitments that commit to acceptable forms of mitigation in order to properly handle or minimize impacts to significant historic properties; (5) Detailed mitigation plan, scope of work to properly carry-out the general mitigation commitments; and (6) Verification of completion of detailed mitigation plan (HAR §13-284-3).

6. For the Block I project area's historic preservation review process, CSH prepared an archaeological inventory survey plan (AISP) and an archaeological inventory survey (AIS) report; recommended mitigation measures including an archaeological monitoring program, a burial treatment program, and an archaeological data recovery program; and prepared an archaeological monitoring plan (AMP) and a burial treatment plan, which the O'ahu Island Burial Council ("OIBC") approved at its December 9, 2015 meeting. OIBC's approval came with the understanding that the specifics of the burial treatment would be clearly outlined in a subsequent burial site component of a data recovery and preservation plan ("BSCDR&PP").

7. Prior to the construction of the Central Plaza on Land Block 1 of the Ward MP, there are two outstanding historic preservation requirements: (1) preparation and SHPD acceptance of a burial site component of a preservation plan (BSCPP) for the one remaining previously identified Native Hawaiian burial site in the Block I/central plaza footprint; and (2)

completion of the Block I archaeological data recovery fieldwork, with the SHPD's acceptance of an end of fieldwork letter documenting the appropriate completion of this fieldwork.

8. The BSCPP document is straight forward and can be completed and SHPD-accepted during the archaeological data recovery program—based on the agreements on burial treatment already worked out for the Block I burial sites in the BSCDR&PP for the adjacent Block N East.

9. In terms of the construction start for the Central Plaza, the archaeological data recovery program is a much more lengthy procedure. This procedure needs to be largely complete before HHC can obtain the needed construction permits for the Central Plaza.

10. The twelve steps (steps A through L below) to complete the archaeological data recovery process and allow HHC to obtain SHPD's approval of the project, thereby allowing the City DPP to issue the needed construction permits, are listed below. Completion time for this process depends on unknown factors, particularly the SHPD review times for various documents and the time needed to obtain the SHPD's acceptance or input.

11. Three scenarios for the length of time to complete these same twelve steps (A through L) are listed below: (1) a best case schedule where SHPD is extremely responsive—this scenario is technically possible, but unlikely based on the SHPD's current workload and other commitments; (2) a realistic scenario based on CSH's past and current experience working through similar processes for similar projects; and, (3) a worst case scenario where SHPD response times are longer than normal. These scenarios are depicted in a timeline in Table 1, attached hereto.

**1. Best Case Scenario: 27 weeks to complete SHPD review of the archaeological data recovery program to the point where the City DPP can issue construction permits:**

- A. Two weeks to complete draft data recovery plan (DRP) following CSH's receiving the most recent plans for the central plaza—note the location of the data recovery (DR) investigation is contingent on the central Plaza plans
- B. One week for Hawai'i Community Development Authority (HCDA) to submit DRP to the SHPD
- C. Six weeks for the SHPD to review the DRP and provide comments and requested revisions
- D. One week for CSH to make the SHPD-requested revisions and resubmit the revised draft DRP to the SHPD
- E. Two weeks for the SHPD to review and accept the revised draft DRP
- F. Three weeks for CSH to coordinate and complete the DR fieldwork, with coordination with HHC's tenants to allow the fieldwork
- G. Two weeks for CSH to write the DR end of fieldwork letter for SHPD review
- H. One week for HCDA to submit DR end of fieldwork letter to the SHPD for their review
- I. Six weeks for the SHPD to review and provide comments/requested revisions to the DR end of fieldwork letter
- J. One week for CSH to complete the SHPD-requested revision to the DR end of fieldwork letter and resubmit the document for SHPD acceptance
- K. One week for the SHPD to accept the DR end of fieldwork letter and provide the SHPD acceptance letter
- L. One week to complete the SHPD/HHC letter exchange that documents that the Block I/central plaza project has completed Hawai'i historic preservation review process steps (pursuant to HAR 13-284-3) 1 through 5 and has an acceptable schedule for the completion of the final and sixth review step (verification of the completion of the detailed mitigation—to include the archaeological monitoring report on construction activities and the completed archaeological data recovery report).

**2. Realistic Scenario: 42 weeks to complete SHPD review of the archaeological data recovery program to the point where the City DPP can issue construction permits:**

- A. Three weeks to complete draft DRP following CSH's receiving the most recent plans for the Central Plaza—note the location of the DR investigation is contingent on the central plaza plans
- B. One week for HCDA to submit DRP to the SHPD
- C. Twelve weeks for the SHPD to review the DRP and provide comments and requested revisions
- D. Two weeks for CSH to make the SHPD-requested revisions and resubmit the revised draft DRP to the SHPD
- E. Four weeks for the SHPD to review and accept the revised draft DRP
- F. Four weeks for CSH to coordinate and complete the DR fieldwork, with coordination with HHC's tenants
- G. Two weeks for CSH to write the DR end of fieldwork letter for SHPD review
- H. One week for HCDA to submit DR end of fieldwork letter to the SHPD for their review
- I. Eight weeks for the SHPD to review and provide comments/requested revisions to the DR end of fieldwork letter

- J. One week for CSH to complete the SHPD-requested revision to the DR end of fieldwork letter and resubmit the document for SHPD acceptance
  - K. Two weeks for the SHPD to accept the DR end of fieldwork letter and provide the SHPD acceptance letter
  - L. Two weeks to complete the SHPD/HHC letter exchange that documents that the Block I/Central Plaza Project has completed Hawai'i historic preservation review process steps (pursuant to HAR 13-284) 1 through 5 and has an acceptable schedule for the completion of the final and sixth review step (verification of the completion of the detailed mitigation—to include the archaeological monitoring report on construction activities and the completed archaeological data recovery report).
- 3. Worst Case Scenario: 56 weeks to complete SHPD review of the archaeological data recovery program to the point where the City DPP can issue construction permits:**
- A. Four weeks to complete draft DRP following CSH's receiving the most recent plans for the Central Plaza—note the location of the DR investigation is contingent on the central plaza plans
  - B. One week for HCDA to submit DRP to the SHPD
  - C. Sixteen weeks for the SHPD to review the DRP and provide comments and requested revisions
  - D. Two weeks for CSH to make the SHPD-requested revisions and resubmit the revised draft DRP to the SHPD
  - E. Eight weeks for the SHPD to review and accept the revised draft DRP
  - F. Six weeks for CSH to coordinate and complete the DR fieldwork, with coordination with HHC's tenants
  - G. Two weeks for CSH to write the DR end of fieldwork letter for SHPD review
  - H. One week for HCDA to submit DR end of fieldwork letter to the SHPD for their review
  - I. Eight weeks for the SHPD to review and provide comments/requested revisions to the DR end of fieldwork letter
  - J. One week for CSH to complete the SHPD-requested revision to the DR end of fieldwork letter and resubmit the document for SHPD acceptance
  - K. Four weeks for the SHPD to accept the DR end of fieldwork letter and provide the SHPD acceptance letter
  - L. Three weeks to complete the SHPD/HHC letter exchange that documents that the Block I/Central Plaza Project has completed Hawai'i historic preservation review process steps (pursuant to HAR 13-284) 1 through 5 and has an acceptable schedule for the completion of the final and sixth review step (verification of the completion of the detailed mitigation—to include the archaeological monitoring report on construction activities and the completed archaeological data recovery report).

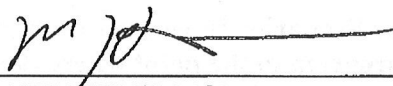
12. In my professional experience, it is impossible for VWL to deliver a completed

Central Plaza on Land Block 1 pursuant to the timing requirements set forth in Condition No. 18

of the Decision & Order due to the timing requirements of the SHPD process, which may be anywhere from 27-56 weeks, and which must be completed prior to commencing construction.

I DECLARE UNDER PENALTY OF LAW THAT THE FOREGOING IS TRUE  
AND CORRECT.

DATED: Honolulu, Hawaii, 20 January 2017.

  
\_\_\_\_\_  
MATT MCDERMOTT

#### REFERENCES CITED

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Table 1. Timeline of best case, realistic, and worst case scenarios

Weeks	Best Case Scenario (27 weeks)	Realistic Scenario (42 weeks)	Worst Case Scenario (56 weeks)	
1	A (2 weeks)	A (3 weeks)	A (4 weeks)	
2				
3	B (1 week)			
4	C (6 weeks)	B (1 week)	B (1 week)	
5		C (12 weeks)	C (16 weeks)	
6				
7				
8				
9				
10				D (1 week)
11				E (2 weeks)
12	F (3 weeks)			
13				
14				
15	G (2 weeks)			D (2 weeks)
16				
17	H (1 week)			
18	I (6 weeks)	E (4 weeks)		D (2 weeks)
19				
20		F (4 weeks)	E (8 weeks)	
21				
22		G (2 weeks)		
23				
24	H (1 week)			
25		I (8 weeks)		
26	J (1 week)			
27	K (1 week)			
28	L (1 week)			
29				
30				
31				
32				
33				
34				
35				
36				
37				
38		J (1 week)	G	

Weeks	Best Case Scenario (27 weeks)	Realistic Scenario (42 weeks)	Worst Case Scenario (56 weeks)
39		K (2 weeks)	(2 weeks)
40			H (1 week)
41		L (2 weeks)	I (8 weeks)
42			
43			
44			
45			
46			
47			
48			
49			J (1 week)
50			K (4 weeks)
51			
52			
53			
54			L (3 weeks)
55			
56			

BEFORE THE HAWAII COMMUNITY DEVELOPMENT AUTHORITY  
OF THE STATE OF HAWAII

In re Petition of	)	PD Permit No. KAK 16-075
	)	
VICTORIA WARD, LIMITED	)	DECLARATION OF P. KAANOHI
	)	KALEIKINI
	)	
For a Planned Development Permit for Land	)	
Block 1, Project 3.	)	

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**DECLARATION OF P. KAANOHI KALEIKINI**

I, P. KAANOHI KALEIKINI, hereby declare as follows:

1. I am competent to make this declaration, and I make this declaration upon personal knowledge.
2. I am a recognized by the State of Hawai'i as a Cultural Descendant of Kakaako.
3. As a Cultural Descendant, the Howard Hughes Corporation is required to consult with me regarding its Ward MP projects that affect iwi kupuna.
4. I have appreciated the consultation provided by the Howard Hughes Corporation to date. The Howard Hughes Corporation has listened to our concerns and has shown a commitment to respect the iwi kupuna in the area. The Howard Hughes Corporation has shown that it takes its responsibilities to comply with SHPD requirements seriously. This is the type of developer that I appreciate.
5. I am aware that the Howard Hughes Corporation plans to develop a portion of the Central Plaza on Land Block 1, and that iwi kupuna have been discovered on Land Block 1. I am also aware that the Hawaii Community Development Authority ("HCDA") has placed a

condition upon development of the Aalii project, requiring the Howard Hughes Corporation to deliver the Central Plaza on Land Block 1 within a 2-year timeframe.

6. While I understand the desire of the community to have a Central Plaza, this must be balanced against the need and requirement to protect and preserve iwi kupuna. Requiring delivery of the Central Plaza within a specific timeframe is inconsistent with the responsibility to develop portions that may affect iwi kupuna in a thoughtful and carefully sequenced manner. You cannot and should not rush development of an area in which iwi kupuna have been discovered.

7. The State of Hawaii and its agencies have a responsibility to ensure protection and preservation of iwi kupuna, and the condition requiring the delivery of the Central Plaza within a certain timeframe, without regard to the iwi kupuna that have been discovered in the area, appears to be in conflict with that responsibility.

I DECLARE UNDER PENALTY OF LAW THAT THE FOREGOING IS TRUE  
AND CORRECT.

DATED: Honolulu, Hawaii

January 23, 2017.

P. Kaanohe Kaleikini

P. KAANOHI KALEIKINI