

CADES SCHUTTE
A Limited Liability Law Partnership

CALVERT G. CHIPCHASE 7757-0
CHRISTOPHER T. HARRISON 6486-0
1000 Bishop Street, Suite 1200
Honolulu, Hawai'i 96813-4212
Telephone: (808) 521-9220
Facsimile: (808) 540-5021
Email: cchipchase@cades.com
charrison@cades.com

Attorneys for Petitioner
THE TRUSTEES OF THE ESTATE OF BERNICE
PAUAHI BISHOP

BEFORE THE HAWAII COMMUNITY DEVELOPMENT AUTHORITY

STATE OF HAWAII

In re Application of

THE TRUSTEES OF THE ESTATE
OF BERNICE PAUAHI BISHOP

to Amend the Master Plan Permit,
File No. PL MASP 13.2.8, Issued by
Hawaii Community Development
Authority on September 2, 2009

MASTER PLAN PERMIT NO. PL MASP
13.2.8

**THE TRUSTEES OF THE ESTATE OF
BERNICE PAUAHI BISHOP'S
PETITION FOR AMENDMENT OF THE
MASTER PLAN PERMIT**

**DECLARATION OF SERGE M.
KRIVATSY**

EXHIBITS 1 – 9

**THE TRUSTEES OF THE ESTATE OF BERNICE PAUAHI BISHOP'S
PETITION FOR AMENDMENT OF THE MASTER PLAN PERMIT**

The Trustees of the Estate of Bernice Pauahi Bishop, also known as Kamehameha Schools (“**KS**”),¹ petition the Hawai‘i Community Development Authority (“**HCDA**”) to amend Master Plan Permit No. PL MASP 13.2.8, adopted on September 2, 2009, and previously amended on August 8, 2012 (together with the amendment, the “**Master Plan Permit**”). This petition is made pursuant to HAR §§ 15-22-206 and 15-217-83.

I. BACKGROUND

HCDA approved the Kaiāulu ‘o Kaka‘ako Master Plan (“**KKMP**”) on September 2, 2009. *See* September 2, 2009 Findings of Fact, Conclusions of Law, and Decision and Order for a Master Plan Permit (“**2009 Decision and Order**”) attached hereto as Exhibit 1. As required by the 2009 Decision and Order, KS and HCDA entered into the Kaka‘ako Master Plan Development Agreement (“**2009 Development Agreement**”) on October 6, 2009. *See* 2009 Development Agreement attached hereto as Exhibit 2. KS and HCDA entered into Supplement No. 1 to Master Plan Development Agreement for Kaiāulu ‘o Kaka‘ako Master Plan (“**Supplement No. 1**”) on June 20, 2011. *See* Supplement No. 1 attached hereto as Exhibit 3. Supplement No. 1 provided that a portion of the reserved housing requirements of the KKMP may be satisfied by the condominium conversion and sale of units in the Pagoda Terrace apartment complex. HCDA approved an amendment to the KKMP

¹ KS’ address is 567 South King Street, Honolulu, Hawai‘i 96813. Its telephone number is (808) 523-6200.

on August 8, 2012 (“**2012 Amendment**”) to reflect the revisions agreed to in Supplement No. 1 and address additional details regarding reserved housing, open design guidelines, initial street improvements and transactions that KS was considering at the time. *See* 2012 Amendment attached hereto as Exhibit 4.

Since the approval of the KKMP, KS and its development partners have successfully redeveloped four blocks under Increment I of the Plan. *See* Declaration of Serge M. Krivatsy (“**Krivatsy Declaration**”) ¶ 2. These projects include the residential projects of Keauhou Place, Keauhou Lane, The Collection, The Flats at Pu‘unui, 680 Ala Moana and 400 Keawe. *See id.* ¶ 2. KS also completed the SALT commercial center, which has become a popular shopping and gathering destination. *See id.* ¶ 3. Through these projects, KS has delivered 1,336 residential units, 456 (approximately 34 percent) of which meet or exceed HCDA’s affordability guidelines, approximately 184,000 square feet of new commercial space and approximately 65,000 square feet of open space. *See id.* All of these projects were completed as part of Increment I under the KKMP. *See id.*

KS continues to implement the KKMP in accordance with the 2005 Mauka Area Rules, the Master Plan Permit, the 2009 Decision and Order, the 2009 Development Agreement and the other applicable approvals and agreements and seeks to build on its progress from Increment I. *See id.* ¶ 4; *see also* HAR § 15-22-206. Specifically, in Increment II KS intends to transform the five remaining blocks into a pedestrian-oriented urban village with a variety of housing options and vibrant uses that honor the deep Hawaiian culture associated with the area. *See* Krivatsy Declaration ¶ 4.

Among its goals for Increment II are to provide even more affordable housing than originally anticipated, enhance the overall pedestrian experience in the area and create a retail center and public plaza at the intersection of Cooke and Auahi Streets. *See id.* To achieve these goals, KS requests the proposed amendments set forth in this Petition.

When the KKMP was approved in 2009, KS anticipated delivering approximately 2,750 residential units across the entire KKMP area. Based on the experience in implementing the KKMP for more than a decade, changing market conditions and community demand for smaller unit sizes, full-build out of the KKMP is now anticipated to exceed the 2,750 residential units that were originally envisioned while retaining the maximum floor area ratio (3.5) that was previously approved. These additional residential units are anticipated to be provided in seven to nine residential towers, which will also provide approximately 380,000± square feet of commercial space, 126,000± square feet of open space and 200,000± square feet of recreation space. *See id.*

II. STANDARDS

The KKMP is vested under the 2005 Mauka Area Rules. *See* HRS § 206E-7; *see also* HAR § 15-22, *et seq.* (2005). Under the 2005 Mauka Area Rules, the KKMP is intended to, among other things:

[E]ncourage investment in new development and commitment to master planning of large land holdings[;]

....

[D]erive public benefits, such as affordable housing, relocation assistance, public parking, off-site infrastructure and other public facility improvements[; and]

. . . .

[A]llow greater flexibility in the development of lots within master planned areas than would otherwise be possible through the normal lot-by-lot development approach. Such flexibility is intended to encourage integrated developments and secure better overall planning for extensive land holdings, while recognizing that full development of the area over time would occur incrementally in accordance with the planned development and base zone development requirements in effect at the time of master plan approval.

HAR § 15-22-200(d).

Under the 2005 Mauka Area Rules, master plans may be amended. Specifically, the 2005 Mauka Area Rules provide,

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, provided that if the authority determines that a proposed amendment would substantially alter the terms and conditions of the approved master plan, a public hearing on the amendment shall be held prior to the authority's approval of the proposed amendment.

Id. § 15-22-206(g).

Echoing this provision and anticipating the need for future amendments, the 2009 Decision and Order explains,

As specific projects are designed for possible development, information may arise that other modifications, variances or amendments may be necessary to implement the Master Plan that have not yet been identified by Petitioner or the HCDA. Petitioner may request such modifications, amendments and/or variances at the time of project specific applications.

Exhibit 1 (2009 Decision and Order) at 23.

Consistent with the evolving nature of a master plan, the 2009 Decision and Order further provides, “Supplemental Master Plan Development Agreement(s)

should be developed as details become available to provide the [HCDA] with assurances and/or specifications” *Id.* at 40. In accord with this provision, the Development Agreement expressly states, “KS and the HCDA may negotiate and execute an amended/modified or supplemental Master Plan Development Agreement that may address additional implementation issues.” Exhibit 2 (2009 Development Agreement) § VI.

As illustrated by Supplement No. 1 and the 2012 Amendment, the foregoing provisions provide a framework to amend the KKMP as development plans change. This flexibility has encouraged better development and enabled KS to provide the type of community benefits that master planning is intended to provide.

III. PROPOSED AMENDMENTS

There are five proposed amendments to the KKMP. These amendments are necessary to effectuate efficient development of the remainder of the KKMP while also providing opportunities to expand the amount of housing to be delivered. Each proposed amendment is discussed below. The corresponding revisions to the KKMP are shown in the proposed amended KKMP (“**Amended KKMP**”) attached hereto as Exhibit 5.

A. Extend the KKMP. For more than ten years, the KKMP has provided an effective and useful framework for greatly expanding housing opportunities in a previously underutilized area of Honolulu’s urban core, creating retail opportunities that enhance Hawai‘i’s economy and reviving and re-energizing a community. The original term of the KKMP is set to expire on September 1, 2024. Extending the

KKMP will provide KS the necessary time to respond to the changing marketplace, deliver additional housing and retail opportunities and create new jobs. An extension of the KKMP will also provide KS, its tenants and its development partners the necessary time to recover from the impacts of COVID-19. Removing unnecessary entitlement risks in this COVID-impacted environment encourages the development of housing and leads to economic benefits that are associated with construction. Developers are more likely to pursue investments in projects and community benefits knowing that they may rely on the KKMP and applicable HCDA rules for a longer period of time.

To ensure completion of the balance of the work under the KKMP and provide a stable and certain framework that will encourage developers to invest in the further development of residential units, open space, public facilities and community benefits in the Kaka'ako neighborhood, KS requests the KKMP be extended by a minimum of five years to September 1, 2029.

B. Allow the joint development of Blocks F and G as one development lot, transfer tower and floor area from Block F to Block D and confirm flexibility in the implementation of the KKMP. Under the 2009 KKMP, Block F was identified as a tower site with a FAR of 4.10. *See* Exhibit 6 (KKMP). Since then, Block F has become home to the low-rise SALT development, which is a neighborhood commercial center with active shops and restaurants serving Kaka'ako and surrounding communities. On the same block, adaptive reuse of a former office building (680 Ala Moana) provides 54 affordable rental units. This popu-

lar development resulted in excess unused floor area, which precludes the development of the originally envisioned tower on Block F. *See* Krivatsy Declaration ¶ 5. Meanwhile, the KKMP had envisioned Block D (which has not yet been redeveloped) as a lower density project consistent with what is now on Block F. *See* Exhibit 6 (KKMP); Krivatsy Declaration ¶ 5.

To reflect the existing and planned uses of Block F and the surrounding blocks, KS requests an amendment to the KKMP to jointly develop Blocks F and G as one “development lot” (identified as Joint Development Lot 1) under section 15-22-80 of the Mauka Area Rules and to transfer the tower site and excess floor area from Block F to Block D (and potentially other blocks in the KKMP based on permitted FAR) under section 15-22-203(b) of the Mauka Area Rules. *See* Krivatsy Declaration ¶ 6. Approving the requested amendment recognizes the success of the SALT development and allows the approximately 50 small businesses at SALT to continue operating in a space that has become a community resource, while also allowing KS to fulfill the vision under the KKMP. Similarly, approving the requested amendment would permit the existing rental units at 680 Ala Moana to remain.

As illustrated by the requested amendment, it has become clear over the last ten years that retaining a degree of flexibility is critical to the successful implementation of the vision for the Kaka‘ako Community Development District. Overly static and rigid planning unnecessarily complicates the development process and increases project costs. Indeed, one of the stated purposes of master planning set forth in the 2005 Mauka Area Rules is to encourage the flexibility that would otherwise not

be possible in lot-by-lot development projects. This flexibility reduces costs and allows more resources to be allocated to community benefits.

Taking these lessons to heart as KS begins the next phase of the KKMP, flexibility should be imbedded within the amended master plan in two ways. First, KS should be allowed to transfer density between the remaining blocks within the KKMP if KS does not exceed the maximum permitted floor area ratio for the KKMP. Second, KS should be allowed to move towers to different blocks within the KKMP if KS is in compliance with the 2005 Mauka Area Rules. The overall density for the KKMP, as amended, would remain the same even when density and tower locations change. This approach is consistent with the Ward Neighborhood Master Plan, which HCDA approved in January 2009. *See* Excerpts from the Ward Neighborhood Master Plan attached hereto collectively as Exhibit 7.

Amending the KKMP by adding the following text to the KKMP in the Executive Summary, Proposed Plan section and Chapter 5, Introduction will confirm the KKMP's flexibility as provided under the Mauka Area Rules:

Representations as to the establishment of specific uses and the development of specific improvements are included in the KKMP for illustrative purposes only. The plans represent possible development solutions and are not binding commitments. The actual development of individual Blocks shall remain flexible and responsive to market needs, including the ability to move tower locations and density between Blocks.

Exhibit 5 (Amended KKMP).

C. Confirm there is no impact on the balance of the KKMP in the event a project is developed under HRS chapter 201H. The development of a project

under HRS chapter 201H effectively removes the project from the KKMP. As HRS section 201H-38 provides,

The Hawaii Housing Finance and Development Corporation may develop on behalf of the State or with an eligible developer, or may assist under a government assistance program in the development of, housing projects that **shall be exempt** from all statutes, ordinances, charter provisions, and rules of any government agency relating to planning, zoning, construction standards for subdivisions, development and improvement of land, and the construction of dwelling units thereon.

HRS § 201H-38(a) (emphasis added).

To be “exempt” means to be “free or released from some . . . requirement”

Merriam-Webster Dictionary (online): <https://www.merriam-webster.com/dictionary/exempt> (accessed May 18, 2020); *cf. State v. Smith*, 103 Hawai‘i 228, 81 P.3d 408 (2003)) (“It is a cardinal rule of statutory interpretation that, where the terms of a statute are plain, unambiguous and explicit, we are not at liberty to look beyond that language for a different meaning. . . . Thus, we . . . noted that our sole duty is to give effect to the statute’s plain and obvious meaning.”) (internal citations and quotations omitted). The exemption provided by HRS section 201H-38 applies to “all statutes, ordinances, charter provisions, and rules of **any government agency relating to planning [and] zoning**” (emphasis added.) Accordingly, developing a project under HRS chapter 201H exempts the project from “all statutes, ordinances, charter provisions, and rules [of HCDA] relating to planning, zoning, construction standards . . . , development and improvement . . . , and the construction of dwelling units”

Inasmuch as an approved 201H project is exempt from HCDA rules, project components of an HCDA-approved master plan, including density, towers and resi-

dential unit totals are not governed by a master plan that was developed under HCDA rules. In other words, when a project is developed under 201H, it is removed from the KKMP by HRS § 201H-38. Consequently, development of the 201H project has no impact on the remaining area of the KKMP, and the overall development potential of the remainder of the KKMP is calculated based on the maximum allowable floor area ratio of the remaining area.

In order to encourage the development of a project in Kaka‘ako under chapter 201H, this proposed amendment would expressly provide that a 201H project is excluded from the KKMP upon the issuance of the permit required to commence construction for the 201H project. To implement this amendment, the following statement would be added to the KKMP:

Upon issuance of the permit required to commence construction of a 201H project, the 201H project, including its associated tower(s), floor area, and unit count, shall be excluded from the KKMP. The development potential of the remaining area in the KKMP may then be recalculated such that the 201H project will not affect the development of the remaining area within the KKMP. Community benefits provided on the same block as a 201H project shall not be impacted or removed from the KKMP and may be used to satisfy corresponding obligations in the KKMP.

Exhibit 5 (Amended KKMP).

D. Increase the maximum permitted floor area to account for the addition of Koula Street. KS recently determined that it owns the section of Koula Street located between Ala Moana Boulevard and Auahi Street. *See Tax Plat* (highlighted) attached hereto as Exhibit 8. KS is currently working with the City to have the City abandon all access and easement rights to this section of Koula Street. A

resolution to this effect is working its way through the City Council process. *See* Resolution 20-50 attached hereto as Exhibit 9.

The addition of this section of Koula Street to the KKMP will increase the available floor area and allow for greater flexibility under the KKMP.² Accordingly, the KKMP should be amended to increase the available floor area by 42,609 square feet based on a FAR of 3.5 multiplied by the additional land area of 12,174.14 square feet and to allow for the development of the relevant section of Koula Street as shown in the proposed Amended KKMP. As a result of this added area, statements in the KKMP regarding the total plan area and depictions of Koula Street in figures should be regarded as approximations and only for illustration purposes.

E. Allow for flexibility in the number and type of dwellings. Housing needs change. As the community and its collective preferences evolve, developers need to adapt. Having witnessed this evolution over the last ten years, KS understands that flexibility is important for the successful delivery of dwelling units.

The importance of flexibility extends to the total unit count. When the KKMP was adopted, KS planned to develop approximately 2,750 residential units. Today, KS is pleased to share that it may be possible to provide additional housing opportunities by exceeding the 2,750 residential unit count while adhering to the maximum floor area ratio (3.5) approved under the KKMP. This is possible primarily due

² Table 7-1 of the Mauka Area Plan (2011) identifies Koula Street for possible closure. Figure 9 of the Mauka Area Plan (2005) does not identify Koula as a major or local street, and page 32 notes that existing streets not needed for traffic flow or access may be closed.

The figures presented here are subject to confirmation.

to the development of more workforce and affordable housing than originally planned and the community's preference for smaller, more cost-effective units. While KS is not certain of the final count, it is certain that the development of more housing, including more reserved housing, will be of tremendous benefit to the community.

To allow flexibility in the total number of units provided under the KKMP, without exceeding the permitted floor area ratio, KS requests that any inferred ceiling on the number of units that may developed be removed and that the following text be added to the KKMP in the Executive Summary, Proposed Plan section, and Chapter 5, Introduction:

Representations as to the projected number of dwelling units are included in the KKMP only for the purpose of providing an estimate. The estimates are based on the information at the time and are not binding commitments or restrictions. The actual number and types of dwelling units shall remain flexible and responsive to market needs.

IV. CONCLUSION

While remaining faithful to the vision expressed in the KKMP, the proposed Amendment allows the vision to evolve in response to market conditions and existing and planned development within the KKMP and the wider Kaka'ako Community Development District. With the Amendment, the implementation of the KKMP will continue to provide affordable and market-priced housing, complete street concepts, smart growth features and other sustainable and environmental benefits that contribute to a walkable and livable urban community in a way that honors the area's cultural history. In these ways, granting the proposed Amendment will benefit the KKMP and the entire Kaka'ako Community Development District.

For the reasons set forth herein, the proposed Amendment is appropriate. KS respectfully requests that HCDA approve the Amendment of the KKMP.

The following exhibits are attached:

Exhibit 1: September 2, 2009 Findings of Fact, Conclusions of Law, and Decision and Order for a Master Plan Permit

Exhibit 2: 2009 Development Agreement

Exhibit 3: Supplement No. 1

Exhibit 4: 2012 Amendment

Exhibit 5: Proposed Amended KKMP

Exhibit 6: KKMP

Exhibit 7: Excerpts from the Ward Neighborhood Master Plan

Exhibit 8: Tax Plat (highlighting Koula Street)

Exhibit 9: Resolution 20-50

DATED: Honolulu, Hawai'i, February 16, 2020.

A handwritten signature in black ink, appearing to read "Calvert G. Chipchase", written over a horizontal line.

CALVERT G. CHIPCHASE
CHRISTOPHER T. HARRISON

Attorneys for Petitioner
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**DECLARATION OF SERGE M.
KRIVATSY**

I, Serge M. Krivatsy, hereby declare based upon my own personal knowledge as follows:

1. I am the Director of Planning and Development for the Kamehameha Schools (“**KS**”). I am authorized to make this declaration.

2. Since the approval of the Kaiāulu ‘o Kaka‘ako Master Plan (“**KKMP**”) on September 2, 2009, KS, along with its development partners, successfully redeveloped four blocks under Increment I of the Plan. These projects include the residential projects of Keauhou Place, Keauhou Lane, The Collection, The Flats at Pu‘unui, 680 Ala Moana and 400 Keawe.

3. KS also completed the SALT commercial center, which has become a popular shopping and gathering destination. Through these projects, KS has delivered 1,336 residential units, 456 (approximately 34 percent) of which meet or exceed HCDA’s affordability guidelines, approximately 184,000 square feet of new commercial space and approximately 64,000 square feet of open space. All of these projects were completed as part of Increment I under the KKMP.

4. KS continues to implement the KKMP in accordance with the 2005 Mauka Area Rules, the Findings of Fact, Conclusions of Law, and Decision and Order for a Master Plan Permit approving the KKMP, the Kaka‘ako Master Plan Development Agreement dated October 6, 2009 and the other applicable approvals and agreements and seeks to build on its progress from Increment I. Specifically, KS intends to transform the five remaining blocks under Increment II into a pedestrian-oriented urban village with a variety of housing options and vibrant uses that honor the deep Hawaiian culture associated with the area. Among its goals for Increment II are to provide even more affordable housing than originally anticipated, enhance the overall pedestrian experience in the area and create a retail center and public plaza at the intersection of Cooke and Auahi Streets.

5. The requested amendment seeks the time and flexibility necessary to develop Increment II. For example, Block F has become the home to the low-rise SALT development, which is a neighborhood commercial center with active shops and restaurants serving Kaka‘ako and surrounding communities. On the same block, adaptive reuse of a former office building (680 Ala Moana) provides 54 affordable rental units. This popular development resulted in excess unused floor area, which precludes the development of the originally envisioned tower on Block F. Meanwhile, the KKMP had envisioned Block D (which has not yet been redeveloped) as a lower density project consistent with what is now on Block F.

6. To reflect the existing and planned uses of Block F and the surrounding blocks, KS requests an amendment to the KKMP to jointly develop Blocks F and G

as one “development lot” (identified as Joint Development Lot 1) under section 15-22-80 of the Mauka Area Rules and transfer the tower site and excess floor area from Block F to Block D (and potentially other blocks in the KKMP based on permitted FAR) under section 15-22-203(b) of the Mauka Area Rules.

I declare under the penalty of law that the foregoing is true and correct to the best of my knowledge.

DATED: Honolulu, Hawai‘i, February 16, 2021.

A handwritten signature in black ink, appearing to read 'Serge M. Krivatsy', written over a horizontal line.

SERGE M. KRIVATSY