

DEVELOPMENT AGREEMENT

This **DEVELOPMENT AGREEMENT** (“**Agreement**”) is entered into this 14th day of April, 2021, by and between the **STATE OF HAWAII, by its DEPARTMENT OF TRANSPORTATION** (“**HDOT**”), and **VICTORIA WARD LIMITED** (“**VWL**”), and the **HAWAII COMMUNITY DEVELOPMENT AUTHORITY**, a body corporate and a public instrumentality of the State of Hawaii (“**HCDA**”), and the **WARD VILLAGE OWNERS ASSOCIATION**, a Hawaii nonprofit corporation (“**WVOA**”), whose respective addresses are given in Paragraph 17 (Reports and Notices) of this Agreement. VWL, HDOT, HCDA and WVOA are collectively referred to as the “**Parties**”.

RECITALS:

A. The Federal Consolidated Appropriations Act of 2019 (“**Act**”) appropriated \$900 million, to be awarded by the U.S. Department of Transportation (“**U.S.DOT**”) for National Infrastructure Investments, known as the “**BUILD Transportation Grant**”.

B. The Fiscal Year 2019 BUILD Transportation grants funds are available for obligation only through September 30, 2021.

C. Obligation occurs when HDOT enters into a written agreement (“**BUILD Grant Agreement**”) with the U.S. DOT Federal Highway Administration (“**FHWA**”) and after HDOT has satisfied applicable administrative requirements, including transportation planning and environmental review requirements.

D. Any costs incurred prior to the FHWA’s obligation of funds for a project are ineligible for reimbursement.

E. All Fiscal Year 2019 BUILD Transportation grant funds must be expended (the grant obligation must be liquidated or actually paid out to HDOT) by September 30, 2026. After this date, unliquidated funds are no longer available to a project.

F. The Federal share of the cost of a project, which an expenditure is made under the BUILD Transportation grant program, may not exceed 80 percent for a project located in an urban area. Non-Federal sources of financial contributions may include State revenue, local funds originating from State or local revenue-funded programs, or private sector funds.

G. BUILD Transportation grants are reimbursable grants, which means that recipients of such grants must incur eligible project costs and then submit a request for reimbursement to the FHWA.

H. Under the BUILD Transportation grant, eligible projects include surface transportation projects that include, but are not limited to highway, bridge, or other road projects located in urban areas eligible under Title 23 of the United States Code.

I. Recognizing an opportunity to significantly improve pedestrian safety and facilitate increased pedestrian traffic in Kakaako, Oahu, State of Hawaii, HDOT and VWL collaborated on a BUILD Transportation grant application in July 2019 that proposed the construction of an elevated pedestrian walkway across Ala Moana Boulevard connecting the vicinity of the future proposed Victoria Ward Park (currently owned by VWL) with Kewalo Basin Harbor (owned by the State of Hawaii through the HCDA) all as generally depicted in Exhibit A.

J. The purpose of this Agreement is to design and construct the Ala Moana Boulevard Elevated Pedestrian Walkway project, Federal-Aid Project No. BR-092-1(029) (“**Project**”) to improve pedestrian safety and facilitate increased pedestrian traffic in Kakaako.

K. In December 2019, the U.S. DOT awarded a BUILD Transportation grant (“**Grant**”) of \$20 million to HDOT for the Project.

EXECUTION VERSION

- L. The plan is for the Project to consist of the following “**General Components**” (as shown and described in Exhibit B):
- a. A bridge structure that will span across Ala Moana Boulevard (“**Bridge**”) including the center pier, Mauka and Makai Abutments (as defined below);
 - b. The Bridge termination on the Mauka side of Ala Moana Boulevard near the VWL property line in the vicinity of the future Victoria Ward Park (“**Mauka Abutment**”);
 - c. The Bridge termination on the Makai side of Ala Moana Boulevard near the State of Hawaii (HCDA) property line in the vicinity of Kewalo Basin Harbor (“**Makai Abutment**”);
 - d. A walkway, including stairs and an Americans with Disability Act (“**ADA**”) compliant ramp, on VWL property leading up to the Mauka Abutment (“**Mauka Walkway**”);
 - e. A walkway, including stairs and an ADA compliant ramp, on State of Hawaii property leading up to the Makai Abutment (“**Makai Walkway**”);
 - f. A walkway over the Bridge to include walking surface, landscaping (“**Bridge Walkway**”); and
 - g. The Mauka Walkway, the Makai Walkway, and the Bridge Walkway are collectively referred to as the “**Walkways**”.
- M. On September 25, 2020, the parties entered into a Memorandum of Agreement (“**MOA**”) for the Project, and the Parties desire to further memorialize and detail their understandings and agreements with respect to the Project.

NOW, THEREFORE, in consideration of the respective recitals which are incorporated herein by reference, and undertakings and agreements of the Parties described herein, the Parties do hereby agree to supersede and replace the terms of the MOA with this Agreement as follows:

1. Funding.

- a. **Federal funding.** The Federal share of the Project through the Grant is described in Recitals, Items F & J herein. Federal funding is contingent on the Project being obligated as described in Recitals, Item C.
- b. **VWL funding commitment.** VWL shall provide the funding necessary to retain and manage qualified consultants to provide the services specified herein, up to a maximum of \$5 million (“**VWL Funding Commitment**”), which amount shall not be used toward the 20 percent State match required by the Grant. The Parties acknowledge and agree that: (1) all amounts funded or paid by VWL that are reasonably incurred with respect to the Project shall be credited against and shall reduce (on a dollar-for-dollar basis) the VWL Funding Commitment, regardless of when such amounts are paid or incurred and (2) should the Parties abandon the Project or terminate this Agreement at any point, HDOT shall reimburse VWL for any and all expenses reasonably incurred as determined by HDOT, which amount shall not exceed \$5 million, subject to appropriation, which HDOT will use its best efforts to obtain. VWL will provide documents supporting incurred and expended costs to HDOT, upon HDOT’s request, within a reasonable time not to exceed 30 days, unless a longer time is consented to by HDOT.

EXECUTION VERSION

- c. **Design and post-design.** VWL shall provide the VWL Funding Commitment to retain and manage qualified consultants, and pay for all reasonable costs, up to the maximum reimbursable cost of \$5 million, for the design and post-design services, entitlement, completion of environmental documentation, and public involvement (including, but not limited to, direct mail, newspaper advertisements, and public meetings) required under: (a) the National Environmental Policy Act (“**NEPA**”); (b) Chapter 343, Hawaii Revised Statutes, as amended (“**HRS**”); and (c) state, county, and municipal permitting requirements for the Project, including, but not limited to, the retention of, and payment to, designers, planners, engineers, environmental consultants, geotechnical consultants, landscape architects, and archaeological consultants, as necessary for the Project (the design, post- design services, entitlement, completion of environmental documentation, and public involvement tasks shall hereafter be collectively referred to as the “**VWL Obligations**”). VWL will be solely responsible for any costs and expenses to complete VWL’s Obligations in excess of \$5 million.
 - d. **State match for BUILD Transportation Grant.** HDOT shall provide the 20 percent State match required by the BUILD Transportation Grant and, should the Project cost exceed the Grant, subject to legislative appropriation, which HDOT will use its best efforts to obtain, provide the funds necessary to complete the Project.
 - e. **Financial Accounting for Construction.** HDOT is to administer the financial accounting for the construction of the Project, including, but not limited to, the timely payment for all construction costs and the processing of Federal reimbursement requests.
2. **Estimated Project Timeline.** The parties shall use reasonable efforts to facilitate and complete their respective responsibilities set forth in this Agreement in accordance with the FHWA Project’s Estimated Schedule and Critical Milestone deadlines which parties will be informed of once the U.S. Build Grant Agreement becomes effective.
3. **Plans, Specifications and Estimate.** VWL and its consultants shall provide HDOT with the Plans, Specifications and Estimate for the Project (“**PS&E**”), which shall conform to HDOT standards for review, in a timely manner, and which shall be designed to complete the Project for a base construction contract amount (excluding escalation and any construction contingency) not to exceed the Grant amount of \$20 million. HDOT shall review and approve the PS&E and provide timely comments and necessary revisions to VWL. The final PS&E shall be approved by HDOT and FHWA, in HDOT and FHWA’s reasonable discretion. The final plan tracings and original calculations shall be stamped and signed by professional engineers licensed in the State of Hawaii, submitted to the appropriate federal, State, county, and municipal departments and agencies or approval, and become the property of HDOT. Once approved, HDOT shall take full ownership of the final PS&E and accept sole responsibility for the complete performance of the PS&E on the Project.

EXECUTION VERSION

4. **Environmental Approvals and Permits.** VWL consultants shall obtain all required environmental clearances and permit approvals in a timely manner needed for the Project to secure the BUILD Grant Agreement. HDOT shall assist, review and approve the environmental documentation for compliance with NEPA and Chapter 343, HRS. HDOT shall take the lead in the public involvement process as required under the environmental review process and as customary to keep the public informed during construction.
5. **Bidding/ Construction Contract Execution.** Upon HDOT approval of the PS&E and obligation of the Project under a BUILD Grant Agreement, HDOT shall conduct the advertisement, bid opening and execution of the contract (“**CONSTRUCTION CONTRACT**”) with the successful bidder to construct the Project (“**CONTRACTOR**”) in accordance with State and federal-aid requirements and procedures. HDOT shall work in good faith and on an expedited basis to achieve a Notice to Proceed date to meet all required dates in accordance with the BUILD Grant Agreement and other requirements set forth by FHWA, provided VWL shall submit all Plans and Specifications within a timely manner.
6. **Construction Contract Terms.**
 - a. The Construction Contract entered into between HDOT and the Contractor will be based on the 2005 Standard Specifications for Road and Bridge Construction and the approved PS&E for the Project.
 - b. The HDOT shall at all times with respect to the Project, use due care for public safety. The HDOT shall include a provision in the Construction Contract with the Contractor requiring the Contractor to indemnify, defend and hold harmless the Parties to this Agreement from and against all claims and demands for damages, including reasonable attorneys’ fees and costs of defense, arising from or caused by any negligent or otherwise wrongful act or omission on the part of the Contractor.
7. **Construction Management and Inspection.**
 - a. HDOT shall provide the necessary staffing to administer and oversee the construction of the Project in accordance with FHWA and State requirements and procedures that are applicable to the Project.
 - b. HDOT shall, no less than quarterly, inform and communicate with VWL on the status of construction of the Project, including but not limited to, the construction costs and/or schedule.
 - c. VWL shall retain and manage qualified consultants and pay for post-design services during construction as part of the VWL Funding Commitment and VWL Obligations described herein.
 - d. Any site visits by VWL, HCDA or WVOA to the construction of the Project shall be coordinated with the HDOT.
 - e. VWL, HCDA or WVOA shall not communicate directly with any Contractor procured by HDOT regarding the construction of the Project.

8. Term for ROW Grant and Conditions Precedent.

- a. VWL shall:
 - i. Own the Mauka Walkway and grant HDOT a non-revocable, perpetual, non-exclusive easement for the Mauka Abutment and the construction of the Mauka Walkway, as depicted in Exhibit C, attached hereto and incorporated by reference (“**Easement P-1**”). VWL and HDOT acknowledge and agree that VWL should be compensated for granting Easement P-1 to HDOT. As such, the parties agree to obtain an appraisal of Easement P-1 to determine the fair market value of the easement prepared in adherence to appropriate Federal guidelines. After review and approval of the appraisal by HDOT, VWL shall submit a letter of donation to HDOT indicating that VWL understands it may be compensated for the fair market value of Easement P-1, as contained in Section 7.a.ii but will donate Easement P-1 to HDOT subject to approval of the Board of Land and Natural Resources (“**BLNR**”). VWL and HDOT acknowledge the preliminary appraised value of the parcel of land to be donated by VWL is Three Thousand, One Hundred and Fifty Dollars (\$3,150.00), which value shall be updated after a revised appraisal (“**Revised Appraisal**”) based on official Right of Way map is completed and accepted by HDOT. Upon completion of the Revised Appraisal, HDOT shall credit the value in the Revised Appraisal to the VWL Funding Commitment.
 - ii. Subject to 7.a.iii below, have the right to assign or otherwise transfer ownership of the Mauka Walkway to any person, entity, or association it decides, including, but not limited to WVOA and notify HDOT at least sixty (60) days prior to such assignment, transfer of ownership or other interest in the Mauka Walkway.
 - iii. Any assignment, transfer of ownership or other interest by VWL in the Mauka Walkway to WVOA, or any person, entity, or association shall be subject to the terms and obligations under this Agreement.
- b. HCDA hereby grants HDOT a non-revocable, perpetual, nonexclusive easement for the Makai Abutment and Makai Walkway, as depicted in Exhibit C, attached hereto and incorporated by reference (“**Easement P-2**”).
- c. VWL and HCDA shall:
 - i. Not make any changes to any of the proposed general components of the Project described in the Recitals Section L and in Exhibit B, including but limited to, ownership, access, operation and maintenance responsibility, safety, and other components not originally approved during HDOT’s final acceptance of the Project, unless HDOT and FHWA approves, except that VWL shall have the right to construct a connecting pathway from Victoria Ward Park to the Mauka Walkway as long as the construction of the connecting path does not affect the structural integrity of, and access to, the Mauka Walkway.

EXECUTION VERSION

- ii. Provide HDOT Licenses for Construction Parcels C-1, C-2, C-3, and C-4, and C-5.
 - d. HDOT shall:
 - i. Own the Bridge and Bridge Walkway, and have a perpetual, nonexclusive irrevocable easement, respectively, from the underlying owners to the Easement P-2 from the State of Hawaii, and Easement P-1 from VWL;
 - ii. Operate and provide structural maintenance and repair of the Bridge, Bridge Walkway, Mauka Abutment, and Makai Abutment;
 - iii. Grant VWL, WVOA or their designees, subject to BLNR approval, a nonexclusive easement to provide access to and over the Bridge Walkway from the Mauka Walkway;
 - iv. Grant HCDA, or its designee, subject to BLNR approval, a nonexclusive easement to provide access to and over the Bridge Walkway from the Makai Walkway and Kewalo Basin Harbor; and
 - v. Pay all utilities, including those for electricity usage for lighting and water usage for irrigation of the Walkways.
 - e. HCDA shall:
 - i. Authorize the closure of the Kewalo Basin Harbor parking exit and reduce parking spaces as reasonably necessary for the planning and construction of the Project;
 - ii. Grant WVOA or its designee a right of way in Kewalo Basin Harbor to provide access for WVOA to perform surface landscaping, non-structural maintenance, or repairs of the Bridge Walkway and Makai Walkway, at WVOA's expense; and
 - iii. Upon execution of this Development Agreement, the Executive Director of HCDA shall diligently seek HCDA board approval to waive any prohibition against additional improvements as contained in paragraph 4.9 or any other provision of the General Lease No. 14-1 by and between the State of Hawaii - Hawaii Community Development Authority and Kewalo Harbor, LLC, dated August 1, 2014, as amended ("**General Lease**"). Such approval shall be acquired before the project is Obligated as defined in Recital C.
- 9. **Maintenance.**
 - a. HDOT shall operate and provide structural maintenance and repair of the Bridge, Mauka Abutment, Makai Abutment and Makai Walkway.
 - i. Concrete structure
 - ii. Railings
 - b. HDOT shall pay all utilities, including those for electricity usage for lighting and water usage for irrigation of the Walkways.
 - c. WVOA shall operate and provide non-structural maintenance and repair of the Walkways at WVOA's expense, including, but not limited to, providing custodial services, landscape maintenance, and security patrols. WVOA shall also maintain non-structural planter walls, including any landscaping therein. WVOA responsibility for the landscape maintenance shall begin upon

EXECUTION VERSION

completion of Landscape Maintenance as described in the Construction Contract. WVOA responsibility of custodial services and security patrols shall begin once the Bridge is open to the public.

- d. Upon VWL's transfer of ownership of the Mauka Walkway to WVOA, WVOA shall operate the Mauka Walkway such that it is open to the public without access restrictions, except:
 - i. In the event of an emergency, as necessary to protect the health and/or safety of the public, and upon WVOA providing immediate notification to HDOT through the HDOT Tunnels Operation Center at (808) 485-6200, at the time the Mauka Walkway is being closed and at the time that it is or will be reopened. HDOT reserves the right to determine whether the situation causing the closure rises to the level of an emergency necessary to protect the health and/or safety of the public, and also reserves the right to direct reopening of the Mauka Walkway, however, WVOA expressly disclaims liability for any damages arising from and/or attributable to any decision by HDOT to direct reopening of the Mauka Walkway pursuant to this paragraph; and
 - ii. For temporary closures for landscaping, non-structural maintenance or repairs to the walkway. Any temporary closures for landscaping or non-structural maintenance or repairs to the walkway shall be approved by HDOT at least 2 weeks prior to the closure.
- e. If HDOT requires temporary closures of the walkways for structural maintenance or repairs, HDOT will inform the Parties in writing and the public at least 2 weeks prior to the closure.

10. Post Construction Changes.

- a. VWL, HCDA and WVOA shall not be allowed to:
 - i. Install and construct material improvements once the Project is accepted by HDOT.
 - ii. Make changes to the proposed General Components of the Project, as originally approved during HDOT's final acceptance of the Project without approval by HDOT.
- b. VWL may make non-structural improvements to the Mauka Walkway, subject to:
 - i. HDOT's review and approval of VWL's plans to ensure that the structural integrity, safety, or operation of the Bridge and its Walkways are not impacted; and
 - ii. VWL, or any subsequent successor or assignee, assumes full responsibility to maintain both the structural and non-structural post-construction improvements.

11. **BUILD Grant Agreement.** HDOT shall continue to be the point of contact with the FHWA with respect to the Grant, the BUILD Grant Agreement, and for this Project, and timely execute the BUILD Grant Agreement with FHWA, and take all other necessary steps to secure and administer the Grant.

12. **No Partnership or Joint Venture.** The Parties do not intend to create and shall not be held to have created a business partnership or joint venture of any sort. Nothing contained in this Agreement shall be construed to make the Parties partners or joint venturers or to render any party liable for the debts or obligations of the other, and no agency relationship shall exist between the parties.

13. **Indemnity.**
 - a. HDOT shall take responsibility, to the extent permitted by law, for damage or injury caused by HDOT's officers and employees in the scope of their employment provided that HDOT's liability for such damage or injury has been determined by a court or agreed to by HDOT. HDOT shall pay for such damage and injury provided that funds are appropriated and allotted for the purpose.
 - b. VWL shall take responsibility for damage and injury caused by VWL's officers and employees in the scope of their employment provided that the claims, damages, causes of action or suits results from any acts or omissions of the VWL.
 - c. HCDA shall take responsibility, to the extent, permitted by law, for damage or injury caused by HCDA's officers and employees in the scope of employment provided that HCDA's liability for such damage or injury has been determined by a court or agreed to by HCDA. HCDA shall pay for such damage and injury provided that the funds are appropriated and allotted for the purpose.
 - d. WVOA shall to the fullest extent permitted by law, defend, indemnify, and hold harmless VWL for any claims and/or causes of action asserted against VWL attributable to or arising from any and all work or services provided by WVOA concerning the non-structural maintenance and repair of the Walkways, including, but not limited to, custodial services, landscape maintenance, and security patrols.
 - e. WVOA shall to the fullest extent permitted by law, defend, indemnify, and hold harmless HCDA for any claims and/or causes of action asserted against HCDA attributable to or arising from any and all work or services provided by WVOA concerning the non-structural maintenance and repair of the Walkways, including, but not limited to, custodial services, landscape maintenance, and security patrols.

EXECUTION VERSION

14. **Cooperation; Further Assurances.** The Parties shall cooperate with each other and use their best efforts in carrying out their respective responsibilities and duties herein, including but not limited to the Parties' acquisition of legal rights necessary to design, construct, complete, and maintain the Project. The Parties further agree that they will not unreasonably withhold or delay any approvals, consent or authorizations, or written amendments to this Agreement required for the HDOT to timely enter into the BUILD Grant Agreement with the FHWA, or comply with the schedules set by the FHWA under the BUILD Grant Agreement. Each party agrees to use their best efforts to diligently execute, acknowledge, deliver, file, record and publish such further instruments and documents, and do all such other acts and things as may be required by law, or as may be required to carry out the purposes and intent of this Agreement.
15. **Assignment Rights.** Except as provided herein, this Agreement is neither transferable nor assignable, and any other transfer or assignment shall be null and void.
16. **Insurance Requirements.**
- a. HDOT shall require the Contractor to purchase and maintain insurance described below which shall provide coverage against claims arising out of the Contractor's operations under the contract, whether such operations be by the Contractor itself or by any subcontractor or by anyone directly or indirectly employed by any of them or by anyone for whose acts any of them may be liable. Insurance requirements of the Contractor are included in the State of Hawaii, Department of Transportation, Highways Division, Special Provisions Section 107 – Legal Relations and Responsibility to Public (Exhibit D).
 - b. VWL shall require its retained Consultants to purchase and maintain commercial general liability insurance for bodily injury and property damage with an insurer and in an amount acceptable to HDOT, which insurance policy shall cover the Project and shall maintain policy status for the full period of the Project until final acceptance of work by the State and FHWA, and thereafter through the running of the applicable statute of limitations and statute of repose. Said commercial general insurance policy shall name all Parties to this Agreement as Additional Insureds and shall provide coverage against claims arising out of the Consultant's on-going and completed operations provided pursuant to this Agreement, whether such operations be by the Consultants or its subcontractors or by anyone directly or indirectly employed by them or by anyone for whose acts any of them may be responsible, with the exception of VWL's Consultants KSF, Inc. and WSP USA Inc., who shall not be required to name WVOA as an Additional Insured, but who shall otherwise comply with these requirements. The procurement of insurance pursuant to this subsection shall not relieve or release the Consultants from their responsibilities under this Agreement or limit the amount of degree of any of their liability and shall apply in excess of

EXECUTION VERSION

and shall not be contributing with any insurance policy maintained by or for the benefit of any of the Additional Insureds and HDOT's Contractor.

- c. The retained Consultants shall also maintain professional liability insurance with an insurer and with such coverages and limits of liability acceptable to HDOT, which professional liability insurance policy shall provide coverage for all professional services provided by Consultants in connection with and for the duration such services are provided for the Project.
- d. VWL shall require VWL's Consultants to notify the Parties to this Agreement of any changes to its insurance policies or if they receive notice of cancellation of any its insurance policies evidenced on its Certificate of Insurance be canceled, limited in scope or not renewed upon expiration. VWL shall also require its Consultants to submit to and maintain with the Parties a current Certificate of Insurance, from an insurance company authorized by the laws of the State of Hawaii to issue insurance and evidencing compliance with the insurance requirements set forth in subparagraphs b and c herein, and as required by the State.

17. **Reports and Notices.** Any notice given to or served upon either of the parties hereto shall be deemed to have been sufficiently given or served for all purposes when actually delivery by hand and U.S. Postal Service certified mail, return receipt requested, delivered as follows:

- i. In the case of HDOT:

Department of Transportation
State of Hawaii
869 Punchbowl Street
Honolulu, Hawaii 96813
Attention: Highways Administrator

- ii. If to VWL:

Victoria Ward Limited
1240 Ala Moana Boulevard
Suite 200
Honolulu, Hawaii 96814

- iii. If to HCDA:

Hawaii Community Development Authority
547 Queen Street
Honolulu, Hawaii 96813
Attention: Executive Director

- iv. If to WVOA:

Ward Village Owners Association
c/o Hawaiiana Management Co. Ltd.

EXECUTION VERSION

711 Kapiolani Boulevard, Suite 700
Honolulu, Hawaii 96813

Each party shall be responsible for notifying all other Parties of any address changes. Upon failure to so notify, the other party may give notice as allowed by a court of competent jurisdiction.

18. **Force Majeure Provisions.** The term "Force Majeure Event" shall mean a cause beyond the control of the party affected, and which by reasonable efforts the party affected is unable to overcome, including only the following: (1) earthquake, volcanic eruption, fire, lightning, tornado, hurricane, tsunami, flood, or landslide; (2) drought, blight, famine, epidemic, pandemic, or quarantine; (3) war, foreign invasion, or act of terrorism; or (4) industry-wide strike, lockout, or unavailability of, or inability to obtain, labor or materials by reason of acts of any governmental body.

A party rendered unable to fulfill any obligation under this Agreement by reason of a Force Majeure Event shall: (1) give notice to all other Parties within seven (7) calendar days of the occurrence of the alleged Force Majeure Event; (2) include a documented: (a) estimate of any alleged increased costs, (b) request for extension of time, or (c) assertion of inability to perform; and (3) make reasonable efforts to reduce such costs, shorten such time, or remove such inability in the shortest possible time. The other Parties shall be excused from performance of their obligations until the party relying on Force Majeure Event shall again be in full compliance with its obligations under this Agreement.

19. **Default Provisions.** If any party defaults on or otherwise fails to comply with this Agreement, the non-defaulting party or parties shall issue a written notice of default by hand-delivery or certified mail, return receipt requested, as provided in Paragraph 17 (Reports and Notices). Such notice shall provide not less than fifteen (15) days to cure any payment default and thirty (30) days to cure any other defaults or, if such other defaults cannot be cured within thirty days, to submit a plan for curing such default to the non-defaulting parties for review and approval. If the defaulting party does not resolve, mitigate and comply with the notice or approved plan to the satisfaction of the non-defaulting parties, this Agreement, or portions thereof may be terminated in accordance with Paragraph (Termination Provisions) without prejudice to any recourse to remedies caused by such default and subject to the reimbursement requirements of Paragraph 1.b.
20. **Termination Provisions.** This Agreement shall become effective on the day and year first above written and shall continue in full force and effect for the full period of the Project until terminated by either: 1) written agreement of the Parties; 2) upon either party giving thirty (30) days' written notice as provided in Paragraph 17 (Reports and Notices), or 3) after compliance with the Default Provisions in Paragraph 19.

EXECUTION VERSION

21. **Partial Invalidity; Severability.** If any term, provision, covenant or condition in this or the application thereof to any person or circumstances shall to any extent, be held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remainder of this Agreement, or the application of such term, provision, covenant or condition of this Agreement to persons or circumstances other than those to which it is held invalid or unenforceable, shall not be affected thereby, and each term or provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law.
22. **Headings.** The headings and captions used herein are for convenience of reference only and are not to be used to construe, interpret, define, or limit the paragraphs to which they pertain.
23. **No Party Deemed Drafter.** This Agreement shall not be construed either for or against any of the parties hereto, but this Agreement shall simply be construed simply, according to its fair meaning.
24. **Authority.** Each party represents to the other that it has the power and authority to enter into this Agreement and that the person executing on its behalf has the power to do so and to bind it to the terms of this Agreement.
25. **No Waiver.** The waiver of any of the terms and conditions of this Agreement on any occasion or occasions shall not be deemed as waiver of such terms and conditions on any future occasion. No waiver shall be implied by any isolated or repeated action or non-action. To be effective, any waiver must be in writing executed by the party to be bound thereby.
26. **Memorandum of Agreement.** The Parties agree that if required by a lender, title company, government agency, or if otherwise consented to by all Parties, a Memorandum of Agreement containing the identification of the Parties, title and date of this Agreement, and property description may be recorded at either the State of Hawaii Bureau of Conveyances and/or the Office of the Assistant Registrar of the Land Court of the State of Hawaii, as may be applicable.
27. **Entire Agreement.** There are no outstanding oral agreements between the Parties hereto with respect to the subject matter of this Agreement, and this supersedes and prior negotiations, arrangements, and understandings, if any, between the parties hereto with respect to the subject matter hereof. All Exhibits attached hereto are incorporated by reference and made a part hereof.
28. **WAIVER OF JURY TRIAL. WITH THE EXCEPTION OF STATE AND FEDERAL LAWS THAT REQUIRE A TRIAL BY JURY, EACH PARTY KNOWINGLY, VOLUNTARILY AND INTENTIONALLY WAIVES ITS**

EXECUTION VERSION

RIGHT TO A TRIAL BY JURY TO THE FULLEST EXTENT PERMITTED BY LAW IN ALL ACTIONS AND OTHER LEGAL PROCEEDINGS ARISING OUT OF OR RELATING TO THIS AGREEMENT AND THE TRANSACTIONS CONTEMPLATED HEREBY. THIS WAIVER APPLIES TO ALL ACTIONS AND OTHER LEGAL PROCEEDINGS, WHETHER SOUNDING IN CONTRACT, TORT OR OTHERWISE. EACH PARTY ACKNOWLEDGES THAT IT HAS (1) RECEIVED ADEQUATE CONSIDERATION TO AFFECT SUCH WAIVER, (2) ACTED IN RELIANCE ON THE OTHER'S WAIVER AND INTENDS THAT THE SAME BE ENFORCED TO THE FULLEST EXTENT ALLOWED BY LAW, AND (3) BEEN GIVEN THE OPPORTUNITY TO CONSULT WITH INDEPENDENT LEGAL COUNSEL OF ITS CHOICE PRIOR TO EFFECTING THIS WAIVER.

29. **Execution in Counterparts.** This Agreement may be executed in counterparts, each of which shall be deemed an original, and said counterparts shall together constitute one and the same agreement, binding the Parties hereto.
30. **Governing Law.** This Agreement shall be governed and construed in accordance with the laws of the State of Hawaii, or as otherwise required by statute.
31. **Amendments.** This Agreement shall not be modified except by an instrument in writing signed by all of the Parties.

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EXECUTION VERSION

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

APPROVED AS TO FORM:

DOT:

STATE OF HAWAII

Deputy Attorney General

By _____
JADE T. BUTAY
Its Director of Transportation

EXECUTION VERSION

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

VICTORIA WARD LIMITED:

By: _____

Name: _____

Its: _____

EXECUTION VERSION

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

WARD VILLAGE OWNERS
ASSOCIATION

By: _____

Name: _____

Its: _____

EXECUTION VERSION

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

APPROVED AS TO FORM:

HCDA:

STATE OF HAWAII

Deputy Attorney General

By _____
DEEPAK NEUPANE
Executive Director

EXHIBIT A

PROPOSED GENERAL SITE PLAN FOR PROJECT

Ala Moana Boulevard Elevated Pedestrian Walkway Project

Urban

APPLICANT/SPONSOR: Hawaii Department of Transportation

BUILD GRANT AWARD: \$20,000,000

TOTAL PROJECT COST: \$30,000,000

PROJECT LOCATION: Honolulu, Hawaii

PROJECT DESCRIPTION:

The project will build a new, elevated pedestrian walkway over Ala Moana Boulevard to remove pedestrian traffic out of the existing at-grade intersection.

PROJECT HIGHLIGHTS AND BENEFITS:

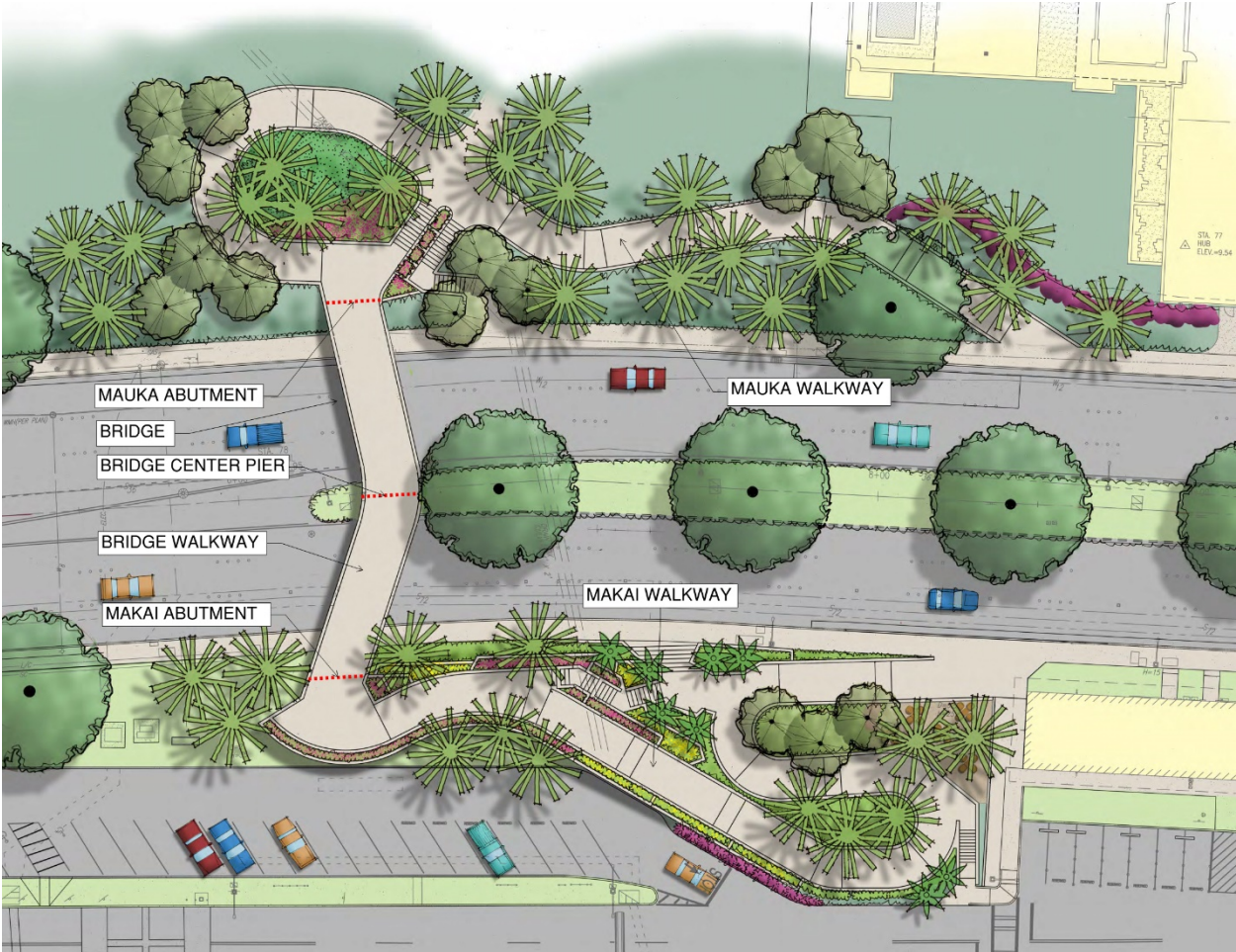
The project will provide a safe and efficient way for pedestrians to cross over the busy highway and reduce vehicle-pedestrian accidents at this intersection, where there is currently no elevated walkway over the existing state highway. The project will support quality of life by providing an increase in transportation choice for pedestrians and improving connectivity to jobs and other critical destinations.



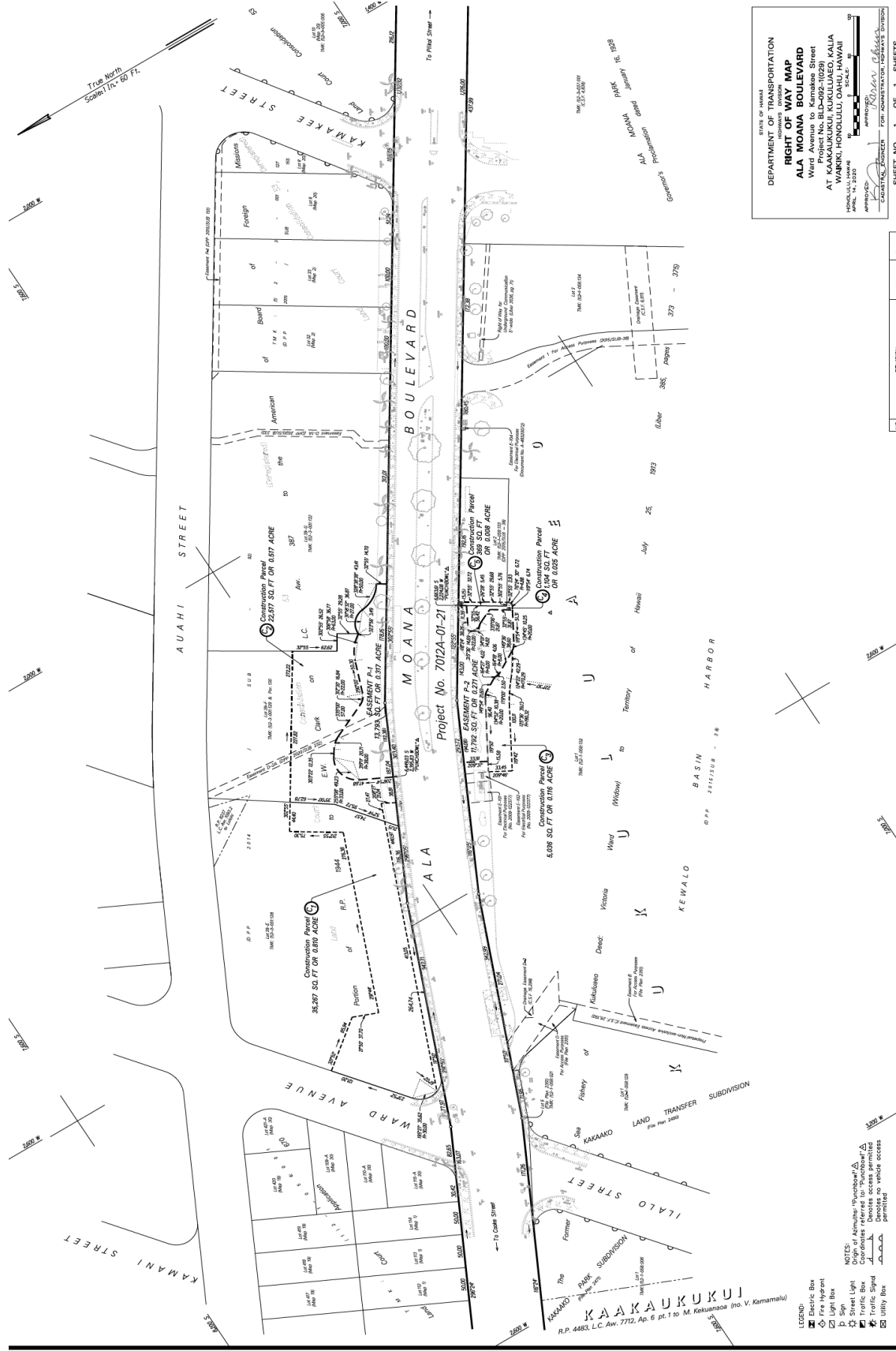
www.transportation.gov/buildgrants

EXHIBIT B

PROPOSED DEPICTION OF GENERAL COMPONENTS OF PROJECT



EXECUTION VERSION



STATE OF HAWAII
 DEPARTMENT OF TRANSPORTATION
RIGHT OF WAY MAP
ALA MOANA BOULEVARD
 Ward Avenue to Kamae Street
 Project No. BL-092-10289
 AT KA KAKAUKUKU SUBDIVISION, KAILUA
 WARD, HONOLULU, OAHU, HAWAII
 HONOLULU, HAWAII
 APPROVED: *[Signature]*
 COUNTY ENGINEER FOR ADMINISTRATION - HIGHWAYS DIVISION

SHEET NO. 1 OF 1 SHEETS

NO. _____

REVISION _____

APPROVED _____

DATE _____

- LEGEND:
- ⊠ Electric Box
 - ⊠ Fire Hydrant
 - ⊠ Light Box
 - ⊠ Street Light
 - ⊠ Traffic Box
 - ⊠ Traffic Signal
 - ⊠ Utility Box

NOTES:
 1. All lots shown are subject to the provisions of the applicable zoning ordinance referred to in the "Zoning" column.
 2. Details access permitted.
 3. Details access to utility devices permitted.

DATE	BY	DESCRIPTION

EXHIBIT D

State of Hawaii, Department of Transportation, Highways Division, Honolulu, Hawaii

Special Provisions Section 107

1 SECTION 107 - LEGAL RELATIONS AND RESPONSIBILITY TO PUBLIC

2
3 Make the following amendments to said Section:

4
5 (I) Amend Section 107.01 Insurance Requirements from lines 5 to 81 to
6 read as follows:

7
8 “(A) **Obligation of Contractor.** Contractor shall not commence any
9 work until it obtains, at its own expense, all required insurance described
10 herein. Such insurance shall be provided by an insurance company
11 authorized by the laws of the State to issue such insurance in the State of
12 Hawaii. Coverage by a “Non-Admitted” carrier is permissible provided the
13 carrier has a Best’s Rating of “A-VII” or better. The Contractor shall
14 maintain and ensure all insurance policies are current for the full period of
15 the contract until final acceptance of the work by the State.

16
17 The Certificate of Insurance shall contain: a clause that it is agreed
18 that any insurance maintained by the State of Hawaii will apply in excess
19 of, and not contribute with, insurance provided by this policy; and shall be
20 accompanied by endorsement form CG2010 or equivalent naming the State
21 as an additional insured to the policy which status shall be maintained for
22 the full period of the contract until final acceptance of the work by State.

23
24 The Contractor shall obtain all required insurance as part of the
25 contract price. Where there is a requirement for the State of Hawaii and its
26 officers and employees to be named as additional insureds under any
27 Contractor’s insurance policy, before the State of Hawaii issues the Notice
28 to Proceed, the Contractor shall obtain and submit to the Engineer a
29 Certificate of Insurance and a written policy endorsement that confirms the
30 State of Hawaii and its officers and employees are additional insureds for
31 the specific State project number and project title under such insurance
32 policies. The written policy endorsement must be issued by the insurance
33 company insuring the Contractor for the specified policy type or by an agent
34 of such insurance company who is vested with the authority to issue a
35 written policy endorsement. The insurer’s agent shall also submit written
36 confirmation of such authority to bind the insurer. Any delays in the
37 issuance of the Notice to Proceed attributed to the failure to obtain the proof
38 of the State of Hawaii and its officers and employees’ additional insured
39 status shall be charged to the Contractor.

40
41 A mere Certificate of Insurance issued by a broker who represents
42 the Contractor (but not the Contractor’s insurer), or by any other party who
43 is not authorized to contractually name the State as an additional insured
44 under the Contractor’s insurance policy, is not sufficient to meet the
45 Contractor’s insurance obligations.

46

47 Certificates shall contain a provision that coverages being certified
48 will not be cancelled or materially changed without giving the Engineer at
49 least thirty (30) days prior written notice. Contractor will immediately provide
50 written notice to the Director should any of the insurance policies evidenced
51 on its Certificate of Insurance form be cancelled, reduced in scope or
52 coverage, or not renewed upon expiration. Should any policy be canceled
53 before final acceptance of the work by the State, and the Contractor fails to
54 immediately procure replacement insurance as specified, the State, in
55 addition to all other remedies it may have for such breach, reserves the right
56 to procure such insurance and deduct the cost thereof from any money due
57 or to become due to the Contractor.

58
59 Nothing contained in these insurance requirements is to be
60 construed as limiting the extent of Contractor's responsibility for payment of
61 damages resulting from its operations under this contract, including the
62 Contractor's obligation to pay liquidated damages, nor shall it affect the
63 Contractor's separate and independent duty to defend, indemnify and hold
64 the State harmless pursuant to other provisions of this contract. In no
65 instance will the State's exercise of an option to occupy and use completed
66 portions of the work relieve the Contractor of its obligation to maintain the
67 required insurance until the date of final acceptance of the work.

68
69 All insurance described herein shall be primary and cover the insured
70 for all work to be performed under the contract, all work performed incidental
71 thereto or directly or indirectly connected therewith, including but not limited
72 to traffic detour work, barricades, warnings, diversions, lane closures, and
73 other work performed outside the work area and all change order work.

74
75 The Contractor shall, from time to time, furnish the Engineer, when
76 requested, satisfactory proof of coverage of each type of insurance required
77 covering the work. Failure to comply with the Engineer's request may result
78 in suspension of the work, and shall be sufficient grounds to withhold future
79 payments due the Contractor and to terminate the contract for Contractor's
80 default.

81
82 **(B) Types of Insurance.** Contractor shall purchase and maintain
83 insurance described below which shall provide coverage against claims
84 arising out of the Contractor's operations under the contract, whether such
85 operations be by the Contractor itself or by any subcontractor or by anyone
86 directly or indirectly employed by any of them or by anyone for whose acts
87 any of them may be liable.

88
89 **(1) Workers' Compensation.** The Contractor shall obtain
90 worker's compensation insurance for all persons whom they employ
91 in carrying out the work under this contract. This insurance shall be
92 in strict conformity with the requirements of the most current and

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applicable State of Hawaii Worker’s Compensation Insurance laws in effect on the date of the execution of this contract and as modified during the duration of the contract.

(2) Auto Liability. The Contractor shall obtain Auto Liability Insurance covering all owned, non-owned and hired autos with a Combined single Limit of not less than \$1,000,000 per occurrence for bodily injury and property damage with the State of Hawaii named as additional insured. Refer to SPECIAL CONDITIONS for any additional requirements.

(3) General Liability. The Contractor shall obtain General Liability insurance with a limit of not less than \$2,000,000 per occurrence and in the Aggregates for each of the following:

- (a) Products - Completed/Operations Aggregate,
- (b) Personal & Advertising Injury, and
- (c) Bodily Injury & Property Damage

The General Liability insurance shall include the State as an Additional Insured. The required limit of insurance may be provided by a single policy or with a combination of primary and excess policies. Refer to SPECIAL CONDITIONS for any additional requirements.

(4) Builders Risk For All Work. The Contractor shall take out a policy of builder’s risk insurance for the full replacement value of the project work; from a company licensed or otherwise authorized to do business in the State of Hawaii; naming the State as an additional insured under each policy; and covering all work, labor, and materials furnished by such Contractor and all its subcontractors against loss by fire, windstorm, tsunamis, earthquakes, lightning, explosion, other perils covered by the standard Extended Coverage Endorsement, vandalism, and malicious mischief. Refer to SPECIAL CONDITIONS for any additional requirements.”

END OF SECTION 107

(Project No.)
107-3a

5/5/14