**DEVELOPMENT AGREEMENT**

**NORTHWEST CORNER, VILLAGES OF KAPOLEI**

 This Development Agreement (the “Agreement”), executed on the respective dates indicated below, is effective as of   **, 20** , (“Effective Date”) by and between the **HAWAII HOUSING FINANCE AND DEVELOPMENT CORPORATION**, a public body and a body corporate and politic of the State of Hawaii, whose principal place of business and mailing address is 677 Queen Street, Suite 300, Honolulu, Hawaii 96813 ("**HHFDC**"); and \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, a Hawaii \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, whose business and mailing address is \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, Honolulu, Hawaii, \_\_\_\_\_\_ ("**Developer**").

 WHEREAS, HHFDC is the owner in fee simple of approximately 27.619 acres of land located at the northwest corner of the Villages of Kapolei, at the southeast corner of the intersection of Fort Barrette Road and Farrington Highway, at Kapolei, Oahu, Hawaii, Tax Map Key No. (1) 9-1-016: 035, as shown on the attached **Exhibit A**, which is incorporated herein by reference (“**NW Corner**”);

 WHEREAS, the NW Corner has been divided into three units under a condominium property regime (“**CPR**”) called “Northwest Corner of Villages of Kapolei” dated February 1, 2021 and recorded as Document No. T-11365412 at the Office of the Assistant Registrar, Land Court, State of Hawaii;

 WHEREAS, CPR Unit 1, 7.051 acres, is being developed by the State of Hawaii Department of Defense, through the Department of Accounting and General Services, into the Hawaii State Veterans Home (“**HSVH**”) project under a Ground Lease to the State of Hawaii Department of Defense dated September 30, 2021 and recorded as Document No. T-11608158 at said Office of the Assistant Registrar;

 WHEREAS, excluding CPR Unit 1, approximately 19.473 acres at the NW Corner are vacant and available for development (“**Property**”);

 WHEREAS, on \_\_\_\_\_\_\_\_\_\_\_\_\_\_, HHFDC issued a Request For Proposals (“**RFP**”) for the sale and/or leasehold development, ownership and operation of a mixed-use project on the Property;

 WHEREAS, on \_\_\_\_\_\_\_\_\_\_\_\_\_, Developer submitted a proposal in response to the RFP (“**Proposal**”) and proposes to develop a mixed-use project (“**Project**”) on the Property, consisting of a total of \_\_\_ residential dwelling units, \_\_\_\_\_ square feet of commercial space, \_\_\_\_ parking stalls, on-site recreation, open space and other incidental uses. \_\_\_ residential units will be Affordable Units (defined below) priced in the affordable range for households earning between \_\_\_% and \_\_\_% of the area median income (“**AMI**”) for the City and County of Honolulu (“**County**”) as established by the U.S. Department of Housing and Urban Development (“**HUD**”), \_\_\_ market-rate residential units, and \_\_\_ managers’ units;

 WHEREAS, on \_\_\_\_\_\_\_\_\_\_\_\_\_\_, the HHFDC Board of Directors approved the Developer and its Proposal for the Project (“**HHFDC For Action**”);

 HHFDC and Developer would like to enter into this Agreement for the (fee simple)(leasehold) development, ownership, sale, and operation of the Project.

 NOW THEREFORE, in consideration of the mutual covenants and agreements contained herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, HHFDC and Developer hereby agree as follows:

 **W I T N E S S E T H:**

1. Purpose

 This Agreement governs the (leasehold)(fee simple) development, ownership, rental, sale, management and operations of the Project by the Developer to be situated on the Property.

2. Project Scope

Developer shall design, construct, own, rent, manage and operate the Project in fee simple and/or leasehold, in accordance with the following:

 a. This Agreement;

 b. HHFDC For Action;

 c. RFP;

 d. Developer’s Proposal;

 e. Final plans and specification for the Project to be submitted by Developer and approved in writing by HHFDC; and

 f. Required off-site and on-site improvements and infrastructure as follows, unless otherwise approved by HHFDC:

1. A total of \_\_\_ units or approximately \_\_\_ percent (\_\_\_%) of the units will be targeted for families making \_\_\_% - \_\_\_% of the AMI for the County, adjusted for family size, as established by HHFDC for exclusive use with its programs using income amounts provided by HUD, as follows (“**Affordable Units**”):

 Affordable For-Sale Units:

 \_\_\_ units at \_\_\_% - \_\_\_% AMI

 \_\_\_ units at \_\_\_% - \_\_\_% AMI

 \_\_\_ units at \_\_\_% - \_\_\_% AMI

 \_\_\_ resident manager’s unit

 \_\_\_ units total for-sale Affordable Units

 Affordable Rental Units:

 \_\_\_ units at \_\_\_% - \_\_\_% AMI

 \_\_\_ units at \_\_\_% - \_\_\_% AMI

 \_\_\_ units at \_\_\_% - \_\_\_% AMI

 \_\_\_ resident manager’s unit

 \_\_\_ units total rental Affordable Units

 (2) Market Units:

 \_\_\_ units market priced units

 (3) Total Units in Project:

 \_\_\_ total residential units in Project

 (4) Commercial project

 (5) Parking

 (6) Amenities

 The total estimated development cost of the Project is: $ .

 The applicable portion of the Property will be conveyed to the Developer in fee simple for residential for-sale projects. Commercial, residential rental and mixed-use projects without a residential for-sale component shall be conveyed in leasehold.

 Affordable Units shall be affordable to families at 140% or below the HUD AMI. At least 50% of the total residential units at the Property shall be Affordable Units. Affordable For-Sale Units shall be subject to HHFDC’s buy-back and SAE Program requirements as described in Section 8.b. of this Agreement. The Affordable Rental Units shall remain affordable for the term of the Ground Lease (defined below). The Project shall be subject to Act 100, Session Laws of Hawaii 2001—the affordable housing requirements of the Property shall be established by agreement between HHFDC and the County.

 In the event of a conflict between this Agreement, the RFP, the Developer’s Proposal, and the HHFDC For Action, the following shall control, in order of priority:

 First Priority—this Agreement, including all Exhibits hereto

 Second Priority—the HHFDC For Action

 Third Priority—the RFP, then

 Fourth Priority—the Developer’s Proposal.

3. Property Description

 The Project is located on a portion of the NW Corner at the southeast corner of the intersection of Fort Barrette Road and Farrington Highway at the Villages of Kapolei in Kapolei, Oahu, Hawaii, TMK (1) 9-1-016: 035 (por), as shown on the attached Exhibit A.

4. Term of this Agreement

 The Project shall be completed by \_\_\_\_\_\_\_\_\_\_\_\_, unless otherwise extended at the sole discretion of HHFDC (“**Completion Date**”). The term of this Agreement shall commence on the Effective Date of this Agreement and terminate one calendar year after the Completion Date defined herein, unless otherwise extended at the sole discretion of HHFDC (the “**Development Period**”).

The Project shall commence construction by \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (“**Construction Commencement Deadline**”), unless otherwise extended at the sole discretion of HHFDC.

5. Representations and Warranties of Developer

 Developer represents and warrants that:

 a. Developer has all requisite power and authority to act as developer for the Project.

 b. Developer has all requisite power and authority to enter into this Agreement. No consents or approvals are required to be obtained from any governmental body or agency for the execution and delivery of this Agreement, or, if required, the same have been obtained.

c. All tax returns and reports of Developer required by law have been duly filed and all taxes, assessments, contributions, fees, and other governmental charges (other than those presently payable without penalty or interest and those currently being contested in good faith) upon Developer's properties or assets or income have been paid and Developer has submitted applicable state and federal tax clearance certificates prior to execution of this Agreement.

 d. There is no action, suit, proceeding, or investigation pending, or to the best of Developer's knowledge, threatened against Developer, or the Project, in any court, or before or by any governmental entity from which any adverse decision might materially affect Developer's ability to observe and perform its obligations under this Agreement or under any and all other agreements and instruments to which Developer is a party.

 e. Developer is not in violation of or in default with respect to any material term or provision of any mortgage, indenture, contract, agreement, or instrument. The execution, delivery, performance of and compliance with this Agreement will not result in any such violation or be in conflict with or constitute a default under any such term or provision or result in the creation of any mortgage, lien, or charge on any of the properties or assets of Developer. There is no term or provision of a mortgage, indenture, contract, agreement, or instrument applicable to Developer or by which Developer is bound which materially and adversely affects or will materially and adversely affect the business or prospects or condition (financial or other) of Developer or Developer's properties or assets.

 f. Any financial statements of Developer delivered to HHFDC are true and correct in all respects, have been prepared in accordance with generally accepted accounting practices, and fairly represent the financial condition of Developer as of the date of financial statements. No materially adverse change has occurred in Developer’s financial condition since the date of the financial statement and the financial condition will not be materially altered during the life of this Agreement.

 g. Developer has made no contract or arrangement of any kind which would give rise to a lien on the Project.

6. Development of Project

 a. The Developer accepts the Property in “AS IS, WHERE IS” condition without any express or implied warranties or representations. HHFDC shall incur no expenditures and liability in connection with this Agreement and the Property’s development and operation. The Developer shall be responsible for all items necessary to develop and operate the Project, including but not limited to title reports, conveyance documents, annexation documents, closing costs, planning costs, onsite and offsite improvements, rezoning, water allocation, the installation and connection of utilities to the Project and cutting, filling, and finish grading of the Property.

 b. Developer shall cause the Project to be constructed substantially in accordance with the final building plans approved by HHFDC. All construction shall be in accordance with all applicable federal, state, and municipal statutes, codes, and ordinances.

 c. Developer will devote such effort and energy as is necessary to develop the Project.

 d. All construction shall be performed in a good, workmanlike manner using new or reconditioned materials. All work shall be performed to the same standard as is customary in the Hawaii construction industry.

 e. Developer shall engage an experienced and qualified project manager to be directly responsible for managing and facilitating the development of the Project. HHFDC acknowledges that \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ shall be the project manager for development of the Project. Any changes or substitutions of said project manager shall be subject to the approval of HHFDC.

7. Minimum Prevailing Wages

 a. Developer, its contractors, and subcontractors shall pay all mechanics and laborers employed on the Project, minimum prevailing wages for the corresponding work classifications as determined by the Director of Labor and Industrial Relations pursuant to Chapter 104, Hawaii Revised Statutes (“**HRS**”). A certified copy of each weekly payroll shall be submitted to HHFDC within seven (7) calendar days after the end of each weekly payroll period. The Developer shall be responsible for the timely submission of certified copies of payrolls of all subcontractors. The certification shall affirm that payrolls are correct and complete, that the wage rates contained therein are not less than the applicable rates,that hours reported for each laborer and mechanic employed on the Project are for both covered and non-covered projects, and that the classifications set forth for each laborer and mechanic conform with the work they performed. If certified payrolls are not submitted on a timely basis, or if HHFDC finds that any laborer or mechanic employed on the Project has been or is being paid less than the applicable prevailing wages, HHFDC may terminate this Agreement pursuant to Paragraph **\_\_41\_\_**.

b. The Developer, its contractors, and subcontractors shall comply with Section 103-55, HRS, and Developer certifies that services under this Agreement in excess of $25,000 shall be performed in accordance with the requirements of Section 103-55, HRS.

 (1) The services to be rendered shall be performed by employees paid at wages or salaries not less than the wages paid to public officers and employees for similar work. For contracts for services performed by laborers and mechanics, the Developer, its contractors and subcontractors shall give a copy of the rates of wages to each laborer and mechanic employed under the contract by the Developer, its contractors and subcontractors at the time each laborer and mechanic is employed; provided that the Developer, its contractors and subcontractors do not have to provide their employees the wage rate schedules where there is a collective bargaining agreement.

 (2) For contracts or services performed by laborers and mechanics, HHFDC may withhold from the Developer so much of any accrued payments as HHFDC may consider necessary to pay to the laborers and mechanics employed by the Developer, its contractors and subcontractors on the job site the difference between the required wages and the wages received and not refunded by the laborers and mechanics.

 (3) Every contract covered by Section 103-55, HRS, for services performed by laborers and mechanics and the specifications for the contract shall contain a provision that a certified copy of all payrolls shall be submitted weekly to HHFDC for review. The Developer shall be responsible for the submission of certified copies of the payrolls of its contractors and subcontractors. The certification shall affirm that the payrolls are correct and complete, the wage rates contained therein are not less than the applicable rates, and the classifications set forth for each laborer or mechanic conform with the work the laborer or mechanic performed. Any certification discrepancy found by HHFDC shall be reported to the Developer to effect compliance. Payroll records for all laborers and mechanics working at the site of the work shall be maintained by the Developer, its contractors and subcontractors, if any, during the course of the work and preserved for a period of three years thereafter. The records shall contain the name of each employee, the employee’s correct classification, rate of pay, daily and weekly number of hours worked, deductions made and actual wages paid. The Developer, its contractors and subcontractors shall make payroll records available for examination within ten days from the date of a written request by HHFDC or any authorized representatives thereof.

 (4) For contracts for services performed by laborers and mechanics, HHFDC shall:

 (a) Pay or cause to be paid, within sixty days of a determination made by HHFDC, directly to laborers and mechanics, from any accrued payment withheld under the terms of this Agreement, any wages or overtime compensation found to be due to laborers or mechanics under the terms of the contract subject to Section 103-55, HRS; and

 (b) Order Developer to pay, within sixty days of a determination made by HHFDC, any wages or overtime compensation that the Developer, its contractors and subcontractors should have paid to any laborer or mechanic under any contract subject to Section 103-55, HRS.

 (5) Failure to comply with the conditions of Section 103-55, HRS, during the term of this Agreement to perform services shall result in cancellation of this Agreement, unless such noncompliance is corrected within a reasonable period as determined by HHFDC. Final payment under this Agreement or release of bonds or both shall not be made unless HHFDC has determined that the noncompliance has been corrected.

8.a. Residential Rental Program

Residential rental projects shall be developed and operated in leasehold under a Ground Lease as described in Paragraph  **39**  of this Agreement. Residential rental projects shall remain affordable for the term of the Ground Lease, or as otherwise approved by HHFDC.

8.b. Residential Sales Program[[1]](#footnote-2)

Developer’s entire sales program shall be reasonably monitored by HHFDC to ensure compliance with HHFDC’s requirements. HHFDC’s sales program is administered by its Real Estate Services Section in accordance with Chapter 201H, HRS, applicable provisions of Chapter 15-307, Hawaii Administrative Rules (“**HAR**”), related to the sale of the Affordable Units, and current marketing and sales policies and practices, as each may be amended from time to time (collectively, the “**HHFDC Laws**”). At a minimum, Developer’s sales program shall include all of the following:

 a. Developer shall follow HHFDC’s sales and purchaser selection requirements in the sales of the Affordable Units to applicants who meet the eligibility and qualification requirements to purchase an Affordable Unit under this Agreement and HHFDC requirements (“**Eligible Purchaser**”) attached as a part of **Exhibit B.** Developer shall prepare a written description of Developer’s sales program for HHFDC’s review and approval, which approval shall not be unreasonably withheld or delayed. The sales program of the Affordable Units must meet the requirements of HHFDC and other applicable laws relating to the sale of real property.

 The for-sale Affordable Units shall be sold at prices, which are determined to be “affordable” to Eligible Purchasers in accordance with this Agreement. The sales prices shall be provided in a form acceptable to HHFDC for review and approval. Developer agrees not to increase the sales prices of the Affordable Units during the term of this Agreement, other than in proportion to any annual increase in the AMI, without the prior written approval of HHFDC, which approval shall occur on an annual basis coincident with the publishing of the AMI by the HUD and shall otherwise not be withheld or delayed if such increased sales prices are consistent with the terms of this Agreement and do not exceed the maximum affordable sales prices allowed under this Agreement.

 In computing the maximum affordable sales prices under this Agreement, the sum of the principal, interest and Monthly Housing Expense (defined below) shall not exceed 38% of the gross monthly household income for the household size prescribed (the “**Maximum Sales Price**”) for the project unit types. Developer shall use the following assumptions: the principal and interest payments on a fixed-rate 30-year mortgage loan with an acceptable mortgage interest rate based on the Developer’s closing date, shall not exceed twenty-eight percent (28%) of the gross monthly household income for the household size prescribed for the unit types shown below with a down payment of at least five percent (5%) of the sales price. The total “**Monthly Housing Expense**” shall not exceed 10% of the gross monthly household income for the prescribed household size and unit types and shall include appropriate amounts for real property tax rate, condominium association dues and/or maintenance fees (if applicable), percentage of private mortgage insurance rate, estimated homeowner’s insurance, lease rent (if applicable), and any average monthly Community Facilities District payments. The Developer may request that the maximum affordable sales prices be adjusted from time to time to meet the current year’s AMI established by HUD for various household sizes, subject to written approval from HHFDC, which approval shall not be unreasonably withheld or delayed. The maximum sales prices will be set prior to the time of sale in accordance with the household sizes for the unit types as follows:

 Unit Type Household Size

 1 bedroom 2 persons

 2 bedrooms 3 persons

 3 bedrooms 4 persons

 4 bedrooms 5 persons

 HHFDC may request Developer to adjust such prices to be consistent with this paragraph as to the computation of the maximum sales prices. If computation of maximum sales prices are amended, Developer may request adjustment be made to meet HHFDC’s prevailing institutional practices. Developer assumes all risk, including but not limited to interest rate increases for long term mortgage loan financing and other factors that may affect the affordability and the demand for the Affordable Units.

 At Developer’s option, Developer may offer upgrade options for the Affordable Units. Such upgrades shall not increase the established affordable sales prices for the applicable Affordable Unit and must be itemized and contracted for separately from the base sales price for the Affordable Unit. The upgrade option shall not be considered in determination of affordability. The failure of a purchaser to pay or be reimbursed for the cost of upgrade options is the sole responsibility of Developer. The failure of any purchaser to close and/or pay for upgrade options shall in no way increase the established affordable sales price for the applicable Affordable Unit to the next buyer.

 b. For-sale Affordable Units shall only be sold to Eligible Purchasers whose income does not exceed one hundred forty percent (140%) of the AMI.

 c. At a minimum, the Affordable Units shall include a range/oven, range hood, garbage disposal, water heater, and refrigerator, in standard sizes selected by Developer and reasonably acceptable to HHFDC.

 d. Persons and families who apply to purchase an Affordable Unit must also satisfy all of the following requirements or conditions:

 (1) Each person shall complete, sign and deliver to Developer or Developer’s representative an Application to Purchase Real Property under 201H, HRS, in substantially the form provided by HHFDC upon initial meeting with the Developer and Developer’s sales team for the applicable project.

 (2) Each person buying an Affordable Unit must be an “Eligible Purchaser” which means a “qualified resident” as that term is defined under Sections 201H-32, HRS, and Sections 201H-47 through -51, HRS, inclusive, who demonstrates a need for assistance in obtaining housing, and satisfy all other eligibility requirements under HHFDC Laws.

 (3) The HHFDC requirements and restrictions under the HHFDC Laws (i.e., eligibility requirements, Shared Appreciation Program (defined below), Ten (10) Year Use, Sale and Transfer Restriction) shall apply to all purchasers of Affordable Units.

 Should the HHFDC Laws be amended in the future, such changes shall apply to the Project from the effective date of such amended legislation.

 (4) Eligible Purchaser applicants may select a Unit and execute a sales contract according to their property selection number (“**PSN**”). HHFDC shall provide Developer with the PSN list and instructions to implement the selection of the Affordable Units. Developer shall be responsible for expenses incurred in providing HHFDC with reports, as reasonably required by HHFDC.

 Applicants will be ranked by HHFDC on the PSN list according to the following priority: (i) size of household (households of 4 or more first, then households of 3 person, then households of 2 person, then households of 1 person); (ii) public drawing number; and (iii) HHFDC-approved preferences. The Developer shall conduct a public drawing with the assistance of Developer’s sales agent. Preferences are required to be provided to applicants who: (1) were displaced, as former owners of an HHFDC-sponsored project; (2) were displaced as former owners due to government action; (3) have relocated from public housing due to income disqualification or are residents in public housing administered by the Hawaii Public Housing Authority, or are currently residing in an HHFDC subsidized rental project and receiving rental assistance; (4) have dependents (for single family projects only); and (5) are qualified according to project household incomes.

 (5) After entering into a contract to purchase an Affordable Unit, but before closing on the purchase of the Affordable Unit, Eligible Purchasers shall be required to attend and complete a homeownership counseling and training program (homeownership counseling course) provided by the Developer, conducted by a HUD-approved housing counseling agency, and reasonably approved by HHFDC.

 (6) Each Eligible Purchaser shall commit in writing, to use the Affordable Unit as their principal dwelling, must be an owner-occupant of the Affordable Unit while HHFDC’s restrictions encumber the Unit and must sign a certificate of owner- occupancy to that effect.

 (7) The for-sale Affordable Units shall be sold subject to the following, unless HHFDC modifies or waives any of these restrictions:

 (a) HHFDC’s Ten (10) Year Use, Sale and Transfer Restriction pursuant to Sections 201H-47 through -51, HRS, inclusive.

 (b) HHFDC’s Shared Appreciation Equity Program (“**SAE Program**”) pursuant to Sections 15-308-101 to -110, HAR. HHFDC shall be entitled to a percentage share of the net appreciation and/or equity which the Eligible Purchaser shall realize under the terms of that program when the Eligible Purchaser subsequently rents, sells or transfers title without HHFDC prior written consent, the Affordable Unit or no longer uses the Affordable Unit as the Eligible Purchaser’s principal residence.

 (c) Current versions of HHFDC’s Ten (10) Year Use, Sale and Transfer Restriction and SAE Program shall be provided by HHFDC upon initial meeting with the Developer and Developer’s sales team.

 The Developer shall become familiar with the provisions of the Ten (10) Year Use, Sale and Transfer Restrictions and the SAE Program attached as a part of **Exhibit C** , and applicable rules and shall be responsible for informing applicants and Eligible Purchasers of the Affordable Units about the requirements of such provisions in the Developer’s sales program and sales documents.

 (8) Each Eligible Purchaser shall meet such other qualifications as reasonably established by HHFDC procedures or other rules adopted by HHFDC. HHFDC will inform Developer in writing about these other qualifications.

 e. Other matters affecting the sale of Affordable Units include all of the following:

 (1) As part of HHFDC’s SAE Program, before closing the initial sale of each Affordable Unit in the Project, HHFDC shall have an independent appraiser prepare an appraisal for each such individual Affordable Unit. The appraisal shall be paid for by the buyer’s additional deposits held in escrow and shall be paid directly from escrow to HHFDC’s selected appraiser. Developer shall disclose buyer’s additional cost for such approval as part of the sales contract.

 (2) Developer shall prepare the advertisement fact sheet and other sales materials and reproduce the HHFDC application and information forms. HHFDC shall review and approve in a reasonable and timely manner all sales materials prior to reproduction, distribution, and any multi-media advertising (e.g., website, TV, radio). No presales, pre-reservations or advance project information (e.g., unit type, prices, etc.), shall be released by the Developer, or its representatives prior to the initial public offering notice/advertisement.

 (3) Developer shall require that the Developer’s sales agent shall distribute applications, answer questions pertaining to applications, and receive completed HHFDC application forms. Sales agents shall review such applications for completeness before submitting to HHFDC for review.

 (4) HHFDC shall review applications for the Affordable Units to determine the eligibility and any preference of each applicant to purchase an Affordable Unit. Developer shall require that Developer’s sales agent shall cooperate with HHFDC in the review and processing of applications to purchase.

 (5) HHFDC shall prepare and provide Developer with the PSN list and instructions to Developer’s sales agent for the selection of Affordable Units by eligible applicants according to the PSN list.

 (6) Developer shall be responsible for purchasers of the Affordable Units fulfilling the requirement to complete the homeownership counseling course with a curriculum reasonably approved by HHFDC in order to close the purchase of an Affordable Unit. Developer shall require that the onsite developer shall be responsible for educating and notifying all purchasers regarding all other matters as appropriate. Such matters include but are not limited to any condominium association requirements created for a condominium project, HHFDC’s requirements and restrictions, or any other special conditions or disclosures applicable to such purchasers.

 (7) In the event an Affordable Unit has been marketed to applicants on the PSN list for forty-five (45) days, the Developer shall have the right to sell such Affordable Unit to any Eligible Purchaser with an income of one hundred forty percent (140%) or less of the AMI.

 (8) All costs to administer the sale of the Affordable Units shall be paid by Developer. These costs include, but are not limited to: advertising, printing, computer programming assistance, sales coordination, homeownership counseling, and promotion.

 f. The initial sale of each market-priced unit shall be subject to a preference to qualified residents pursuant to Sections 15-308-151 to -154, HAR, Section 201H-47(g), HRS, and Section 201H-32, HRS, which provides, in relevant part, that a qualified resident is a person who:

 (1) Is a citizen of the United States or a resident alien;

 (2) Is domiciled in the State and shall physically reside in the dwelling unit purchased;

 (3) Is at least eighteen (18) years of age; and

 (4) Meets other qualifications as determined by the onsite developer and approved by HHFDC.

g. As required by Section 15-308-152, HAR, Developer shall designate 100% of for-sale market units in the Project for sale to prospective owner-occupant “qualified residents” during an initial offering period of 30 calendar days.

For projects submitted to a condominium property regime under Chapter 514B, HRS, to ensure compliance with the owner-occupancy requirement, Developer shall elect to be subject to Chapter 514B, Part V, Subpart B, HRS (“**Subpart B**”) by written notification to the Real Estate Commission of the State of Hawaii, as provided in Section 514B-99.5, HRS.

At the time of written notification to the Real Estate Commission, Developer shall waive the following provisions of Subpart B in favor of the more restrictive requirements of Chapter 15-308, Subchapter 8, HAR:

* Section 514B-95.5, HRS;
* Section 514B-96, HRS;
* Section 514B-96.5, HRS; and
* Section 514B-98, HRS.

Developer shall provide HHFDC with the opportunity to comment on the content of Developer’s written notification before it is transmitted to the Real Estate Commission.

Developer and HHFDC hereby agree that the Real Estate Commission shall have full power and authority to enforce the provisions of Subpart B that are applied to this Project, as provided in Section 514B-98.5, HRS.

 h. Developer shall submit all of Developer’s project documents and sales materials, including the following, to HHFDC for approval (which approval shall not be unreasonably withheld or delayed) as soon as practicable and within a time frame that is consistent with the Project schedule, as amended:

1. Schedule of prices for all for-sale Units.
2. Escrow agreement.
3. Specimen form of sales contract for Affordable and market-priced Units.
4. Specimen form of deed for Affordable and market-priced Units.
5. Sales broker’s agreement.
6. Declaration of covenants, conditions, and restrictions, and supplemental declarations.
7. Community association documents, if applicable.
8. Condominium association documents, including By-Laws and House Rules.
9. Marketing plan, including all price lists and schedules.
10. Homeowner’s handbook.
11. Warranty information.
12. Certificate of owner-occupancy affidavit.

 i. Developer shall enter into a written escrow agreement with an escrow agent licensed pursuant to HRS Chapter 449. All funds received from purchasers shall be collected by the escrow agent to be disbursed in accordance with the terms of the escrow agreement.

9. Project Presentations

The Developer shall be responsible for obtaining community input on the Project from the applicable neighborhood board and/or other interested community groups, and other organizations as requested by HHFDC. The Developer shall conduct a public informational briefing on the proposed Project to the Makakilo/Kapolei/Honokai Hale Neighborhood Board No. 34 and the Villages of Kapolei Association within six months of the HHFDC Board approval of the Developer and its Proposal for development of the Property, unless otherwise extended at the sole discretion of HHFDC.

10. Environmental Assessment

The Developer shall be responsible for compliance with the requirements of HRS Chapter 343. The Developer acknowledges that a Final Environmental Impact Statement (“EIS”) for the Villages of Kapolei, dated February 1988, was accepted by the Governor on May 4, 1988 and published in the Office of Environmental Quality Control bulletin on May 8, 1988. Because of the age of the EIS, compliance with Chapter 343, HRS may require, at a minimum, additional studies such as a Cultural Impact Assessment and an EIS determination that the Project is in substantial compliance with the Villages of Kapolei EIS. If the Project is not in compliance with the Villages of Kapolei EIS, a new environmental assessment or a supplemental EIS may be required.

11. Disability and Communication Access Board

The Project shall be accessible to and usable by persons with disabilities in compliance with Section 103-50, HRS. Prior to the start of construction, Developer shall submit to HHFDC written evidence that the Project plans have been approved by the Disability and Communication Access Board, or that Section 103-50, HRS does not apply to the Project. This requirement is in addition to any other applicable requirement for accessibility such as the Fair Housing Amendments Act of 1988 (Pub. L. 100-430, approved September 13, 1988) and the Fair Housing Accessibility Guidelines (24 CFR Chapter 1).

12. Energy Conservation

To the extent possible, the Project shall comply with Section 196-9, HRS, as follows:

 a. Design and construct buildings to meet the Leadership in Energy and Environmental Design (“LEED”) silver or two green globes rating system or another comparable state-approved, nationally recognized, and consensus-based guideline, standard, or system, except when the guideline, standard, or system interferes or conflicts with the use of the building or facility as an emergency shelter.

 b. Incorporate energy efficiency measures to prevent heat gain in residential facilities up to three stories in height to provide R-19 or equivalent insulation on roofs, R-11 or equivalent in walls, and high-performance windows to minimize heat gain and, if air conditioned, to minimize cool air loss. R-value is the constant time rate resistance to heat flow through a unit area of a body induced by a unit temperature difference between the surfaces. R-values measure the thermal resistance of building envelope components such as roof and walls. The higher the R-value, the greater the resistance to heat flow. Where possible, buildings shall be oriented to maximize natural ventilation and day-lighting without heat gain and to optimize solar for water heating. This provision shall apply to new residential facilities built using any portion of state funds or located on state lands.

 c. Install solar water heating systems where it is cost-effective, based on a comparative analysis to determine the cost-benefit of using a conventional water heating system or a solar water heating system. The analysis shall be based on the projected life cycle costs to purchase and operate the water hearing system. If the life cycle analysis is positive, the facility shall incorporate solar water heating. If water heating entirely by solar is not cost-effective, the analysis shall evaluate the life cycle, cost-benefit of solar water heating for preheating water. If a multi-story building is centrally air conditioned, heat recovery shall be employed as the primary water heating system. Single family residential clients of the Department of Hawaiian Home Lands and any agency or program that can take advantage of utility rebates shall be exempted from the requirements of this paragraph so they may continue to qualify for utility rebates for solar water heating.

 d. Implement water and energy efficiency practices in operations to reduce waste and increase conservation.

 e. Incorporate principles of waste minimization and pollution prevention, such as reducing, revising, and recycling as a standard operating practice in programs, including programs for waste management in construction and demolition projects and office paper and packaging recycling programs.

 f. Use life cycle cost-benefit analysis to purchase energy efficient equipment such as Energy Star products and use utility rebates, where available, to reduce purchase and installation costs.

 g. Procure environmentally preferable products, including recycled and recycled-content, bio-based, and other resource-efficient products and materials.

13. Other Energy Conservation Measures

The Developer shall consider incorporation of sustainable and energy conservation measures into the Project, including the following (as applicable):

 a. Site homes to maximize use of natural light and ventilation over artificial light and air-conditioning;

 b. CFL or LED lighting;

 c. Energy Star appliances;

 d. Skylights to promote natural interior lighting;

 e. Solar water heating;

 f. Insulated roofs, e.g.,

1. Attic space between roof and ceiling;
2. Insulation materials;
3. Solar powered attic vents to remove hot air from attic space;

 g. High performance windows to minimize heat gain and cool air loss;

 h. Wider eaves and overhangs to create more shade earlier in the day;

1. Insulated exterior walls, e.g.,
2. Double wall;
3. Heat insulation materials, e.g., concrete;

 j. To minimize waste, installation of individual electric meters and payment of utilities by tenants;

 k. New single-family dwellings shall include a solar water heater system unless a variance is granted by the Director of the Department of Budget, Economic Development and Tourism pursuant to Section 196-6.5, HRS.

14. Water Conservation Measures

The Developer shall incorporate water efficiency best practices in the Project. At a minimum, as described in the *Water Conservation Manual for State of Hawaii Facilities,* Commission on Water Resource Management (May 2007), a copy of which is available online at files.hawaii.gov/dlnr/cwrm/planning/wcmshf2007.pdf, the Developer shall consider incorporation of the following water conservation measures into the Project:

 a. Installation of water sub-meters to each residential unit to:

1. Monitor and control abuses; or
2. Prorate water charges to each tenant;

 b. Plumbing fixtures that comply with the Energy Policy Act of 1992, e.g., ultra low flush toilets (A listing of fixtures certified by the EPA as having high water efficiency can be found at http://www.epa.gov/watersense/pp/index.htm);

 c. Horizontal axis washing machines rather than top loading washing machines;

 d. Energy Star water consuming appliances;

 e. Trees, shrubs, perennials, and ground cover rather than turf grass;

 f. Local indigenous Hawaiian plants that thrive on natural rainfall;

 g. Installation of rain shut offs and smart controllers on all automated irrigation systems to avoid landscape irrigation when raining. Any controllers which do not provide for soil moisture or evapotranspiration based response should be checked and reset at least once a month to reflect the monthly changes in evapo-transpiration rates at the site. As an alternative, provide the more automated, soil-moisture sensors on controllers;

h. Irrigation with recycled water where permitted by Department of Health regulations and is available.

1. Limit irrigation to early morning or late evening; and

 j. Maintain fixtures to repair and prevent leaks.

15. Stormwater Management

The Developer shall consider incorporation of best management practices (“BMP”) for stormwater management to minimize the impact of the Project to the existing area’s hydrology while maintaining on-site infiltration and preventing polluted runoff from storm events. Stormwater management BMPs may earn credit toward LEED Certification. More information on stormwater BMPs can be found at <http://planning.hawaii.gov/czm/initiatives/low-impact-development/>.

16. NPDES Permit

Developer shall comply with the provisions of the Clean Water Act and Chapter 342D, HRS, and Chapter 11-55, HAR, relative to the National Pollutant Discharge Elimination System (“NPDES”) permit requirements. For discharges into Class A or Class 2 State waters, the Developer may apply for an NPDES general permit coverage by submitting a Notice of Intent (“NOI”) form to the Department of Health Clean Water Branch for the type of discharge authorized by an NPDES general permit applicable to this Project, including but not limited to storm water associated with construction activity and construction dewatering effluent. For types of wastewater not covered by general permit coverage or wastewater discharging into Class 1 or Class AA State waters, an NPDES individual permit may be required. Developer shall not proceed with construction until the applicable NPDES permits are obtained. Developer shall ensure that its contractors understand and comply with the permit requirements and Developer is responsible to secure its contractor’s indemnification of and holding the State of Hawaii and HHFDC harmless with respect to the actions of its contractors.

17. Hawaiian and Indigenous Plants

a. The Developer shall comply with Section 103D-408, HRS, for the incorporation of Hawaiian plants in new or renovated landscaping of any project developed with public moneys within the following timetable:

 1. By January 1, 2019, Hawaiian plants shall constitute a combined minimum of ten per cent of the total plant footprint for landscaping plans, designs, and specifications;

 2. By January 1, 2025, Hawaiian plants shall constitute a combined minimum of twenty-five per cent of the total plant footprint for landscaping plans, designs, and specifications; and

 3. By January 1, 2030, Hawaiian plants shall constitute a combined minimum of thirty-five per cent of the total plant footprint for landscaping plans, designs, and specifications;

 Provided that:

 1. Suitable cultivated plants can be made available for this purpose without jeopardizing wild plants in their natural habitat; and

 2. Wherever and whenever possible, Hawaiian plants shall be used for landscaping on, and sourced from, the island and ahupua’a in which the species was found or known to occur prior to European contact.

b. The Project shall utilize indigenous species of plants for its landscaping whenever and wherever feasible pursuant to Section 15-307-27(9), HAR.

18. Market Study

HHFDC may require the Developer to submit a current comprehensive market analysis substantiating the feasibility of any portion of the Project. The specifications and scope of the market study shall be determined by HHFDC.

19. On-site and Off-site Infrastructure

 Developer shall be responsible to build and maintain all on-site and off-site infrastructure, including but not limited to, planning, design, payment of permit fees, and infrastructure such as roadways, waterlines, sewers, drainage, and electrical, telephone, gas, and cable television lines, conduits, and hookups.

The Developer shall be responsible for all County Department of Public Works requirements for infrastructure.

20. Interim and Permanent Financing

 Developer shall be responsible for securing all funding necessary for the development, construction, rental, management or operation of the Project. HHFDC makes no commitment to lend additional money for this Project.

 The Ground Lease shall not be subordinated to Developer’s financing.

21. GET Exemptions

HHFDC shall be responsible for certifying claims for general excise taxation exemption submitted by Developer on behalf of its contractors, consultants or assigns for all work qualified for exemption, as permitted by law.

Pursuant to Section 15-306-2, HAR, non-residential uses shall be limited to incidental or de minimis uses that are intended to directly benefit the residents of the Project to be eligible for exemptions from general excise taxes.

22. Assumption of Risk and Liability

 Developer shall assume sole and complete risk and liability for the development of the Project. Developer shall indemnify, defend, and hold harmless HHFDC, the State of Hawaii, and their officers, employees, directors, agents, representatives, officials, successors or assigns from and against any and all liability, loss, damage (including foreseeable or unforeseeable consequential damages), cost, and expense, including attorneys’ fees, and all claims, suits, and demands therefore, relating to, arising out of, or resulting from directly or indirectly: (a) the acts or omissions of the Developer or its employees, officers, agents, or subcontractors; (b) the design, construction, repair, renovation, or defects of the Project or Property and/or lease, use, occupation, or operation and management of the Project or Property; and/or (c) the enforcement of this Agreement (whether or not suit is brought therefore). This provision shall survive the expiration or earlier termination of this Agreement, notwithstanding any other provision to the contrary.

23. Insurance

 Developer shall maintain insurance acceptable to HHFDC in full force and effect throughout the term of this Agreement. The policy or policies of insurance maintained by the Developer shall be issued by insurance company(s) authorized to do business in the State of Hawaii with a minimum financial strength rating of A- VII from A.M. Best or as otherwise acceptable to HHFDC, and provide the following minimum policy limits and coverage:

|  |  |
| --- | --- |
| Coverage | Minimum Policy Limits |
| Commercial GeneralLiability Insurance | Developer's commercial general liability, including products and completed operations coverage, shall be written on occurrence form with limits of not less than $3,000,000 per occurrence and $5,000,000 in the aggregate arising out of or in connection with operations, servicing, and maintenance performed under this Agreement. |
| Automobile Insurance | Automobile insurance, as required by Hawaii laws, shall be no less than $1,000,000 per accident. If the Developer does not own automobiles, it shall maintain Hired and Non-owned Automobile Liability coverage of no less than $1,000,000 per accident. |
| Pollution Liability | Intentionally Omitted. |
| Builder’s Risk for Property During Construction | All risk policy written on a replacement cost basis in an amount not less than 100% of the replacement cost of the buildings and contents, including betterments and improvements, made by Developer, located on the Property. Developer shall be responsible for any deductible or self-insurance retention, and to provide these coverages on a primary basis. The State of Hawaii and HHFDC shall be loss payees under the Property Insurance. Coverage shall be evidenced on form Acord 27 – Evidence of Property Insurance. |
| Workers' Compensation | As required by Hawaii laws. |
| Contractor’s Pollution Liability Insurance | As described below. |
| Property Insurance | As described below.  |

 The Commercial General Liability Insurance and the Automobile Insurance shall contain the following five provisions:

 a. It is agreed that any insurance maintained by the State of Hawaii shall apply in excess of and not contribute with insurance provided by this policy.

 b. The State of Hawaii and HHFDC are added as additional insured parties with respect to operations performed on the Property under this Agreement.

 c. If a general aggregate limit is used, the general aggregate limit shall apply separately to this Agreement.

 d. Insurance shall include a cross liability or severability of interest clause.

 e. The Developer will immediately provide written notice to HHFDC should any of the insurance policies evidenced on its Certificate of Insurance form be cancelled, limited in scope, or not renewed upon expiration.

 The above required insurance shall be primary and shall cover the insured for all operations to be performed under this Agreement and on the Property, all operations performed incidentally, directly, or indirectly connected with the operations to be performed under this Agreement and on the Property, including operations performed outside the work area and all change order work.

Developer agrees to a Waiver of Subrogation for each required policy described herein. When required by the insurer, or should a policy condition not permit the Developer to enter into a pre-loss agreement to waive subrogation without an endorsement, Developer shall notify the insurer and request that the policy be endorsed with a Waiver of Transfer of Rights of Recovery Against Others, or its equivalent. This Waiver of Subrogation requirement shall not apply to any policy, which includes a condition specifically prohibiting such an endorsement, or voids coverage should the Developer enter into such an agreement on a pre-loss basis.

All rights or claims of subrogation against the State of Hawaii and HHFDC, their officers, employees, and agents by the Developer are waived.

 On or before the effective date of this Agreement, Developer agrees to deposit with HHFDC certificates of insurance necessary to satisfy HHFDC that the insurance provisions of this Agreement have been complied with. Developer further agrees to keep such insurance in effect and certificates of insurance on deposit with HHFDC during the entire term of this Agreement. Certificates of insurance shall refer to this Agreement.

 HHFDC shall retain the right at any time to review and approve coverage, form, and amount of the insurance required by this Agreement. If, in the opinion of HHFDC, the insurance provisions in this Agreement do not provide adequate protection for HHFDC, HHFDC may require the Developer to obtain insurance sufficient in coverage, form, and amount to provide adequate protection. HHFDC's requirements shall be designed to assure protection from and against the kind of and the extent of risks which exist at the time a change in insurance is required.

 HHFDC shall notify the Developer in writing of any changes in the insurance requirements desired by HHFDC. If the Developer does not deposit copies of insurance policies with HHFDC incorporating such changes requested by HHFDC within thirty (30) days of receipt of such notice, this Agreement shall be in default without further notice to the Developer and HHFDC shall be entitled to all legal remedies, including termination of this Agreement, and the Developer shall be liable for all damages, costs, and fees.

 The procuring of the required policy or policies of insurance shall not be construed to limit the Developer's liability under this Agreement or to fulfill the indemnification provisions and requirements of this Agreement. Notwithstanding the policy or policies of insurance, the Developer shall be obligated for the total amount of any damage, injury, or loss incurred under or related to this Agreement.

The Developer shall procure from each of the insurers under all policies of insurance obtained pursuant to the provisions of this Agreement, including but not limited to public liability and fire insurance, a waiver of all rights of subrogation which said insurer might otherwise have, as against the other party hereto, said waiver to be in writing and for the express benefit of the other.

23.a. Contractor’s Pollution Liability Insurance.

Any general contractor contracted to build a building on the Property shall be required to obtain and maintain Pollution Liability Insurance covering its liability for bodily injury, property damage and environmental damage resulting from sudden accidental and gradual pollution and related cleanup costs arising out of or caused by the operations and construction activities of said general contractor. Combined single limit per occurrence shall not be less than $3,000,000 and aggregate limit of not less than $5,000,000. The policy shall have tail coverage extending 5 years beyond the completion of the work contemplated by the applicable construction contract. The policy shall name the State of Hawaii and HHFDC as additional insured parties.

23.b. Property Insurance.

 The Developer, at its cost and expense, shall procure and maintain at all times during the term of this Agreement fire and extended coverage insurance with an insurance company(s) authorized to do business in the State of Hawaii, insuring all buildings and improvements erected on the Property in the joint names of HHFDC and Developer, with the standard mortgage clause for mortgagee, if any, as their interest may appear, in an amount equal to the replacement cost of the facilities and shall pay the premiums at the time and place required under the policy.

Subject to the prior written approval of any prior mortgagee, in the event of total or partial loss, any proceeds derived from the policy(s) shall be used by the Developer for rebuilding, repairing, or otherwise reinstating the same buildings in a good and substantial manner according to plans and specifications approved in writing by HHFDC.

The Developer shall furnish HHFDC on or before the date of this Agreement, a certificate showing the policy(s) to be in full force and effect and shall furnish a like certificate upon each renewal of the policy(s).

24. Observance of Laws, Ordinances, and Regulations

 Developer, at its sole cost, shall ensure that the planning, design, construction, and operation of the Project complies with the rules, regulations, ordinances, codes, and standards of the County, and any Federal and State requirements. If there is a conflict between requirements, the more restrictive requirement shall control. Without limiting the generality of the foregoing:

 a. The Developer shall be responsible for complying with the requirements of the State Historic Preservation Division of the State of Hawaii Department of Land and Natural Resources (“**SHPD**”), including but not limited to Sections 6E-8, 6E-42 and 6E-43, HRS. Requirements may include consultation with SHPD, archaeological inventory survey, data recovery, excavations and/or archaeological monitoring of construction work at the Property. In addition, if human burials are found during the survey and determined to be Native Hawaiian in ethnicity, their treatment and disposition will need to be decided in consultation with the Oahu Island Burial Council. Treatment and disposition of burials can include preservation in place.

 During construction, Developer shall monitor all excavations in accordance with an archaeological monitoring plan approved by SHPD. If any archaeological resources are uncovered during the course of site construction, Developer shall immediately stop work and contact the SHPD in Honolulu, Hawaii at (808) 692-8015 and abide by instructions or procedures to deal with such archaeological resources. Whether or not findings are uncovered, Developer shall prepare and submit an archaeological monitoring report to SHPD. HHFDC shall not be responsible for any delays caused by archaeological resources uncovered at the Property.

 b. As required by County rules, the Developer shall be responsible for a drainage report and any mitigation measures to return the Property to pre-development runoff conditions when the grading/construction plans are submitted to the County for approval.

 c. As may be required by applicable County rules, roof drains and surface runoff from paved surfaces shall be routed through vegetated filters or storm water quality inlets prior to discharging into the municipal or HHFDC drainage system to the extent required by the County or HHFDC, respectively.

d. As may be required by applicable County rules, a dust control management plan shall be developed which identifies and addresses activities that have significant potential for fugitive dust to be generated. Implementation of adequate dust control measures during all phases of the Project is necessary. Construction activities must comply with provisions of HAR, Chapter 11-60.1, “Air Pollution Control,” and Section 11-60.133 on Fugitive Dust. Developer’s contractor should provide adequate means to control dust from road areas and during the various phases of construction activities. These measures include, but are not limited to:

 (1) Planning for the different phases of construction, focusing on minimizing the amount of dust-generating materials and activities, centralizing material transfer points and on-site vehicular traffic routes, and locating potential dust equipment in areas of the lease impact;

 (2) Providing an adequate water source at the site prior to start-up of construction activities;

 (3) Landscaping and rapid covering of bare areas, including slopes, starting from the initial grading phase;

 (4) Controlling of dust from shoulders, project entrances, and access roads; and

 (5) Providing adequate dust control measures during weekends, after hours, and prior to daily start-up of construction activities.

25. Safe, Sanitary and Orderly Condition

 During the Development Period, Developer, its officers, agents, assigns, employees, consultants and/or contractors, or persons acting for or on its behalf, shall keep the premises and improvements, if any, in a safe, clean, sanitary and orderly condition and shall not make, permit, or suffer any waste, strip, spoil, nuisance, or unlawful, improper, or offensive use of the Property.

26. Information to be Provided by Developer

 a. Developer shall submit bi-weekly status reports on the progress of development of the Project.

 b. Upon HHFDC request, Developer shall promptly furnish current data and information, financial or otherwise, concerning Developer and the Project, including the following:

1. Project budget showing Developer’s estimated costs for developing and constructing the Project, including Developer’s estimates of costs incurred to date and to be incurred over the remainder term of development; and
2. Project schedule showing Developer’s progress to date and estimated time for completing the Project. Each significant design phase for preparing the Project plans shall be indicated.
3. Developer shall give HHFDC notice when served of any litigation or claims of any kind which might subject Developer to any liability in an amount in excess of $50,000.00 whether or not covered by insurance, within thirty (30) calendar days of Developer's receipt of such litigation or claim.

27. Taxes and Assessments

 Developer shall be responsible for all taxes and assessments applicable to the Project. Developer will pay or cause to pay all taxes, assessments, or other governmental charges levied upon any of Developer's properties or Developer's income before the same become delinquent.

28. HHFDC Review and Approval

 All Project plans shall be subject to HHFDC’s review and approval prior to submittal to the County for processing, including all of the following:

 a. All requests for changes in land use designations, including land use classifications, zoning, or zoning exemptions or waivers for the Project.

 b. All plans, specifications, and drawings for all on-site and off-site improvements.

 c. All development budgets, construction schedules, and amendments including

 Composite plans.

 HHFDC will complete its review within twenty (20) working days of receipt of all such material from Developer, or in such additional time as reasonably necessary for HHFDC to complete its review.

29. Land Use Restrictions

HHFDC shall execute and record land use restrictions restricting the use of the applicable portion of the Property conveyed to the Developer in fee simple, with the requirements of this Agreement and affordability requirements described in this Agreement in a form and content acceptable to HHFDC (“Declaration”). The Declaration shall encumber the fee simple title to the Property. The Declaration shall be executed and recorded at 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 applicable, prior to conveyance of fee simple title to the Developer, to ensure compliance with this Agreement and that the applicable units in the Project shall remain affordable for the required affordability period, unless otherwise extended at the sole discretion of HHFDC. After recordation, the party recording the Declaration shall immediately transmit a recorded copy of the Declaration to other party.

Should the Declaration be prematurely terminated for any reason prior to the end of the required affordability period, if HHFDC approved any exemptions from general excise taxes for development of the Project pursuant to Section 201H-36, HRS, HHFDC reserves the right to recapture from the Developer and/or the Project a prorated portion of any exemptions from general excise taxes approved by HHFDC for development of the Project.

30. Conditions Prior to Commencement of Construction

 Developer shall not commence with any part of construction of the Project until a Notice to Proceed has been issued by HHFDC. The Notice to Proceed shall not be issued prior to the fulfillment to HHFDC's satisfaction of all of the following conditions precedent, subject to applicable subordination to Developer’s interim lender as required by such lender:

 a. Developer shall have performed and complied with all agreements and conditions required to be performed and complied with by Developer pursuant to this Agreement prior to or at commencement of construction.

 b Developer shall furnish to HHFDC an electronic file in “pdf” format of the set of plans and (upon request of HHFDC) specifications for the applicable phase or project approved by HHFDC, the Disability and Communication Access Board, and the County.

 c. Developer shall furnish to HHFDC evidence satisfactory to HHFDC that the Project is in compliance with the requirements of Section 103-50, HRS, and the Disability and Communication Access Board, or that Section 103-50, HRS is not applicable to this Project.

 d. Developer shall furnish to HHFDC evidence satisfactory to HHFDC that the Developer has obtained a foundation or building permit for the construction proposed.

 e. Developer shall furnish to HHFDC evidence of Notice of General Permit Coverage approved by the Department of Health for the type of discharge(s) from the project authorized by an NPDES General Permit.

 f. Developer shall furnish to HHFDC a copy of the construction contract(s) for the proposed work to be commenced (“Construction Contract”).

 g. Developer shall furnish to HHFDC a copy of a performance and payment bond equal to 100% of the Construction Contract project for the work to be commenced. The contractor shall be the principal, and the surety shall be a corporate surety satisfactory to HHFDC. The bond shall be conditioned upon the full and proper performance of the work in accordance with the plans and specifications approved by HHFDC and upon the payment of all materials and labor in connection with the development and construction of the Project. The State of Hawaii and the HHFDC shall be additional co-obligees on the bonds.

 h. Developer shall furnish to HHFDC a construction schedule for the Project.

 i. Developer shall furnish to HHFDC a breakdown of the total development cost of the Project, including estimated contingencies.

 j. Developer shall provide evidence satisfactory to HHFDC that Developer has sufficient funds secured and available to pay for the proposed construction.

 k. The Property has been conveyed to the Developer, or for work off the Property, Developer shall furnish to HHFDC evidence that Developer has obtained a right-of-entry from the respective landowner.

 l. The representations and warranties of Developer contained in this Agreement and otherwise made by or on behalf of Developer in writing, in connection with the Project shall be true and correct.

31. Publicity and Project Signage

Developer shall have sole responsibility for funding the advertising and promotional program for the Project. The advertising and promotional program shall disclose the fact that the Project is being developed by Developer with assistance from HHFDC. Developer shall include the HHFDC logo in all its advertisements relating to the Project. All of Developer’s advertising and promotional program shall be subject to the review and prior approval of HHFDC. HHFDC shall be given ten (10) working days to provide comments to the Developer.

If Developer erects a construction or Project sign, such sign shall acknowledge the State of Hawaii and HHFDC’s participation and assistance in the Project.

32. HHFDC Inspection

 Upon 24 hours prior written notice to Developer, HHFDC and its agents shall have the right of entry upon the Property. HHFDC and its agents shall have the right to inspect all work done, labor performed, and materials furnished in and about the construction site and to inspect all books, contracts, records, and papers of Developer relating to the development, financing and construction of the Project under this Agreement. HHFDC and its agents shall not interfere with the work in progress. At least two (2) weeks prior to start of construction, Developer shall furnish HHFDC a current construction schedule, and updated schedules as they may be revised. HHFDC shall be invited to Developer's pre-construction meeting with its general contractor and to Developer's regularly scheduled owner-architect-contractor meetings for the Project.

33. Coordination of Construction with Ongoing Activities

 Developer shall make reasonable efforts to coordinate its construction on the Property and shall also cooperate with other activities taking place in the vicinity. Developer shall be responsible for repairing or paying for the costs of repairing any damage that its activities may cause to any improvements.

34. Submittals to HHFDC upon completion of construction

 Upon the earlier of completion of the Project, or as soon as each item is obtained, the Developer shall submit the following to HHFDC:

1. A certification by an architect or engineer duly licensed under the laws of the State of Hawaii that the improvements have been substantially completed in accordance with the Project plans and specifications, with a summary description of the Project, as-built, to include the following information:
2. Area of Project Site;
3. Gross building area of Project (excluding parking);
4. Gross building area of any non-residential uses;
5. Total number of residential units and number of each residential unit type and average size of each unit type;
6. Number of buildings, stories, and elevators in each building;
7. Number of parking stalls, as allocated between residential and non-residential uses;
8. Number of handicapped parking stalls, as allocated between residential and non-residential uses; and
9. Number of loading stalls;

b. An electronic file in “pdf” format of "as-built" drawings reflecting all construction changes, alterations or deletions and bearing the stamp or seal and the signature of the registered professional engineer or architect, after each increment of construction work has been completed;

1. All copies of applicable Certificates of Occupancy issued by the County; and
2. Copy of the Affidavit of Publication filed at the applicable Circuit Court of the State of Hawaii indicating that notice of completion of the applicable increment of construction work has been published.

35. Warranty

All construction shall be performed in a good, workmanlike manner contemporary with industry standards using new or reconditioned materials in normal working order.

36. Termination for Illegal Purposes.

Notwithstanding any provision to the contrary, at any time during the term of this Agreement, HHFDC shall have the right to terminate this Agreement if the Property or any part of the Property, appurtenances, or improvements are used or intended to be used, in any manner or in part, to commit or to facilitate the commission of a crime.

37. Nondiscrimination

[HHFDC acknowledges that, except for the resident manager, the Project is an affordable senior rental housing project for tenants 55 years old and older. Except for this requirement,][[2]](#footnote-3) the development, sale or use of the Property shall not be in support of any policy which discriminates against anyone based upon race, sex, including gender identity or expression, sexual orientation, color, national origin, religion, marital status, familial status, ancestry, disability, age, or human immunodeficiency virus infection.

The Project shall not have a requirement or preference for any religious faith or culture.

38. Hazardous Materials

a. Developer shall complete a Phase I Environmental Site Assessment Report and any follow-up reports recommended by a qualified environmental consultant acceptable to the State of Hawaii Department of Health and shall be responsible for any environmental cleanup of the Property of hazardous materials required by the State of Hawaii Department of Health prior to commencement of construction of any new units or substantial rehabilitation of the Project.

b. Developer shall not cause or permit the escape, disposal, or release of any hazardous materials. Developer shall not allow the storage or use of such materials in any manner not allowed by law or by the highest standards prevailing in the industry for the storage and use of such materials. Developer shall not allow any such materials on the Property, except to use in the ordinary course of Developer’s business, and then only after written notice is given to HHFDC of the identity of such materials and upon HHFDC’s consent. HHFDC may withhold consent at its sole and absolute discretion. If any lender or governmental agency shall ever require testing to ascertain whether or not there has been any release of hazardous materials by Developer, then the Developer shall be responsible for all costs. In addition, Developer shall execute affidavits, representations, and the like from time to time at HHFDC’s request, concerning Developer’s best knowledge and belief regarding the presence of hazardous materials on the Property.

Developer shall indemnify, defend, and hold harmless HHFDC, the State of Hawaii, and their respective officers, employees, directors, agents, representatives, officials, successors, or assigns (“Indemnitees”) from and against any and all liability, loss, damage (including foreseeable or unforeseeable consequential damages), cost, and expense, including attorneys’ fees, and all claims, suits, and demands therefore, relating to, arising out of, or resulting from directly or indirectly to: (a) the Developer’s breach of any warrants or obligations under this Agreement; (b) the use, generation, manufacture, treatment, handling, refining, production, processing, storage, release, discharge, disposal or presence of any hazardous material on, within, under or about the Property with the exception of those products customarily produced or distributed and readily available for sale to a consumer for use in or around a residence or for the personal use or consumption of a consumer in or around a residence; (c) the Indemnitees’ investigation and handling (including the defense) of any Hazardous Materials Claims, whether or not any lawsuit or other formal legal proceeding shall have been commenced in respect thereof; and/or (d) the Indemnitees’ enforcement of this Agreement, whether or not suit is brought therefore. This covenant shall survive the expiration or earlier termination of this Agreement, notwithstanding any other provision to the contrary.

For the purpose of this Agreement, “hazardous materials” shall mean any pollutant, toxic substance, hazardous waste, hazardous material, hazardous substance, or oil as defined in or pursuant to the Resource Conservation and Recovery Act, as amended, the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, the Federal Clean Water Act, or any other federal, state, or local environmental law, regulation, ordinance, or rule, whether existing or subsequently enacted (“Hazardous Materials Laws”).

As used in this Agreement, the term “Hazardous Materials Claims” means and includes (i) any and all enforcement, clean-up, removal, mitigation or other governmental or regulatory actions instituted, or to the best of the Developer’s knowledge contemplated or threatened, in respect of the Property pursuant to any Hazardous Materials Laws, and (ii) any and all claims made or to the best of Developer’s knowledge contemplated or threatened, by any third party against the Developer seeking damages, contribution, cost recovery, compensation, injunctive relief, or similar relief resulting from any Hazardous Discharge or from the existence of any hazardous material on, within or under the Property.

As used in this Agreement, the term “Hazardous Discharge” means any event involving the use, deposit, disposal, spill, release, or discharge of any hazardous material on, within or under the Property.

39. Conveyance of Property to Developer

Conveyance of the applicable portion of the Property to Developer for residential rental, commercial, and mixed-use projects without a residential for-sale component, shall be by ground lease (“Ground Lease”). The Ground Lease term shall be up to 75 years at a lease rent as proposed in Developer’s Proposal and accepted by HHFDC, substantially in a form acceptable to HHFDC. Conveyance of the applicable portion of the Property for residential for-sale and mixed-use projects with a residential for-sale component shall be in fee simple. Conveyance of the Property shall be subject to the following:

a. As applicable, the Developer shall obtain final subdivision approval from the County, or create a condominium property regime (“CPR”) of the Property, as approved by HHFDC;

b. HHFDC reserves the right to require additional subdivision(s) and/or CPR units of the Property and to convey title to Developer in phases;

c. HHFDC reserves the right to withhold conveyance of title until after the completion of the process for an Environmental Assessment or Environmental Impact Statement as required pursuant to Chapter 343, HRS;

d. HHFDC reserves the right to withhold conveyance of title until after the approval of the last discretionary approval necessary for construction of the applicable phase of the Project;

e. HHFDC reserves the right to withhold conveyance of title until after all the offsite improvements necessary for the development of the phase for which title is requested have been completed or bonded in accordance with the County’s subdivision regulations;

f. HHFDC reserves the right to withhold conveyance of fee simple title until after the Declaration for such portion of the Property has been recorded;

g. HHFDC reserves the right to withhold conveyance of title until the closing of all the interim financing required for development of the Project for the phase for which title is requested;

h. HHFDC reserves the right to withhold conveyance of title until HHFDC has received the lease premium, lease rent (if applicable), or purchase price of the applicable portion of the Property;

i. Developer shall be responsible for preparation of the legal descriptions of the parcel(s) to be conveyed to Developer, as well as the remaining portions of the Property created by Developer’s subdivision and/or CPR but not conveyed to Developer;

j. Developer shall be responsible for all closing costs, fees, expenses and taxes, including those that are reasonably and necessarily incurred by HHFDC;

k. Developer shall accept the Property in “AS IS, WHERE IS” condition without any express or implied warranties or representations. HHFDC shall incur no expenditures and liability in connection with this Agreement and the Property’s development and operation;

 Developer acknowledges that a Phase I Environmental Site Assessment (“ESA”) has not been completed for the Property. Developer shall be responsible for completing a Phase I ESA, any follow-up Phase II ESA, and any environmental mitigation for the Property, as necessary.

l. The parties acknowledge that the lease rent under the Ground Lease may be substantially less than the fair market rent for the demised premises and, if so, is in furtherance of the public purpose of providing affordable housing opportunities to tenants or homeowners of the Project;

m. For affordable leasehold projects, the applicable project shall remain affordable for the term of the Ground Lease;

n. The Ground Lease shall be subject to the terms and conditions of this Agreement and a default under this Agreement shall constitute a default under the Ground Lease;

o. The Project shall commence construction by the Construction Commencement Deadline; and

p. The Project shall be completed by the Completion Date.

40. Right of Entry to Developer

HHFDC grants the Developer a right-of-entry for itself, its volunteer workers, agents, employees, consultants, contractors, and anyone else who works on the Project on behalf of the Developer to enter the Property for the purposes of conducting engineering studies and maintenance of the Property under this Agreement. Developer shall not permit any other person to occupy or use the Property or any portion of the Property, nor shall Developer occupy the Property for any other purpose, without HHFDC’s prior approval. Developer shall not undertake any construction on the Property without HHFDC’s written approval or HHFDC’s issuance of a Notice to Proceed with Construction pursuant to Paragraph \_**30**\_ of this Agreement. Developer agrees to defend, indemnify, and hold harmless the State of Hawaii and HHHFDC as set forth in Paragraphs \_**22**\_ and **\_\_38\_\_** of this Agreement.

 41. Default

 Developer shall be in default if:

 a. Developer shall fail to complete the Project by the Completion Date, or timely pay, perform and/or complete Developer’s other obligations under this Agreement;

 b. Developer shall become insolvent, or shall voluntarily or involuntarily be dissolved or shall make any assignment for the benefit of creditors or shall generally fail to pay Developer’s debts as they become due;

 c. Developer shall become the subject of an order for relief in an involuntary case under the bankruptcy laws as now or hereafter constituted and such order shall remain in effect and unstayed for a period of sixty (60) consecutive days;

 d. Developer shall commence a voluntary case under the bankruptcy laws as now or hereafter constituted, or shall file any petition or answer seeking for itself any arrangement, composition, adjustment, liquidation, dissolution or similar relief to which it may be entitled under any present or future statute, law, or regulation;

 e. Developer shall file any answer admitting the material allegations of any petition filed against Developer in any such proceedings;

 f. Developer shall seek or consent to or acquiesce in the appointment of or taking possession by, any custodian, trustee, receiver or liquidator of Developer or of all or a substantial part of Developer’s properties or assets;

 g. Developer shall file any proceeding requesting Developer’s dissolution or liquidation; or within sixty (60) days after commencement of any proceedings against Developer seeking any arrangement, composition, adjustment, liquidation, dissolution or similar relief to which Developer may be entitled under any present or future statute, law or regulation and such proceedings shall not have been dismissed;

 h. Within sixty (60) days after the appointment of, or taking possession by, any custodian, trustee, receiver or liquidator of any or of all or a substantial part of the properties or assets of Developer, without HHFDC’s consent or acquiescence, any such appointment or possession shall not have been vacated or terminated;

 i. There shall be any attachment, execution or other judicial seizure of, or otherwise materially affecting all or any part of this Agreement, the Property or any improvements thereon unless such attachment, execution or seizure is set aside, dissolved, bonded off or otherwise eliminated within thirty (30) days of its occurrence;

 j. Any third person shall obtain an order or decree in any court of competent jurisdiction enjoining or prohibiting Developer from performing this Agreement as a result of the negligent or willful acts or omissions of Developer, and (1) such proceedings shall not be discontinued and such order or decree shall not be vacated within thirty (30) days after the granting thereof and (2) Developer shall fail to provide reasonable assurances to HHFDC of its ability to complete the Project;

 k. There shall be a sale, transfer, hypothecation, assignment or conveyance of all or any part of this Agreement, the Project, including the housing units and other improvements comprising the Project, or the Property by Developer without the prior written consent of HHFDC, except as expressly allowed and contemplated by this Agreement;

 l. Any representation or warranty made by or on behalf of Developer, in any other writings in connection with the Project shall prove to have been false or incorrect in any material respect on the date as of which such representation or warranty was made;

 m. A final judgment is entered which alone or with other outstanding final judgments against Developer or any of its partners would have a material adverse effect on their financial ability to perform their obligations in connection with this Agreement and (1) such judgment shall not be discharged, or (2) within thirty (30) days after entry of such judgment the execution thereof shall not be stayed pending appeal, or (3) such judgment shall not be discharged within thirty (30) days after the expiration of any such stay;

 n. Any of the above events b. through m., inclusive, occur as to any of the members or managers or partners of the Developer, and additional security is not provided as provided in Paragraph \_**43.f**\_ of this Agreement;

 o. Abandonment or suspension of development or construction of improvements required by this Agreement for a period of four (4) consecutive calendar months;

 p. An event of default under any loans and loan agreements issued by HHFDC to the Developer, or HHFDC programs approved by HHFDC to the Developer for the Project;

 q. If all or a portion of the Ground Lease has been issued to the Developer, an event of default under the Ground Lease, or any phase of the Ground Lease; or

 r. An event of default under the Declaration.

42. Cure Period

Developer shall immediately proceed with taking all action necessary to cure all defaults.

Developer shall have 30 calendar days to cure a default which can be remedied and cured by the payment of money.

If a default cannot be remedied by the payment of money (“non-monetary default”), Developer shall have thirty (30) calendar days in which to cure such non-monetary default, or if such default cannot be reasonably cured in thirty (30) calendar days, Developer shall commence to cure the default within thirty (30) calendar days and thereafter shall continue to diligently cure such default subject to approval by HHFDC.

During such period of any monetary or non-monetary default, Developer shall protect the Project from loss, damage, vandalism, waste, or other destruction and shall maintain the Project schedule to the extent that it is practicable to do so.

43. HHFDC Remedies

After Developer has been declared to be in default and Developer fails to cure such default within the time period prescribed in Paragraph \_**42**\_ above, Developer agrees that HHFDC shall have all legal and equitable rights to which HHFDC may be entitled under the laws of the State of Hawaii, including without limitation the rights and remedies set forth below. HHFDC may:

1. Terminate all of Developer’s right, title, and interest under this Agreement to develop the Project and the Property and take over the completion of the Project. Notwithstanding such termination, Developer shall not be released from the obligation to pay and perform all outstanding obligations under this Agreement, including the payment of any unpaid balance of Developer’s equity, which Developer is obligated to pay and invest and damages arising out of delays and cost overruns incurred to complete the Project lien-free;
2. To retain all fees, deposits, funds, or security that have been paid or delivered to HHFDC or escrow;
3. To keep and use all plans, drawings, specifications, and work product whether prepared by Developer or Developer’s consultants and, in HHFDC’s sole discretion, to negotiate with Developer’s consultants and contractors to complete the Project;
4. To enter into negotiations with other developers and enter into a development agreement with another developer to complete the development of the Project pursuant to development rights afforded to such person under a development agreement;
5. To complete the development of the Project and use any of Developer’s equity and any other funds or security which Developer has paid or deposited with HHFDC to complete the Project lien-free;
6. To require Developer to put up additional security in an amount necessary to pay for the completion of the Project lien-free and Developer’s other obligations under this Agreement. HHFDC may require such additional security to be in the form of cash or an irrevocable letter of credit (or equivalent) or bond;
7. To sue for damages, including but not limited to architectural and engineering fees and costs and attorney fees and costs;
8. To seek specific performance;
9. To cancel, terminate, and seek such cancellation and termination from the County Council of any zoning exemptions approved by HHFDC for the Project pursuant to HRS Section 201H-38;
10. To terminate any loans and loan agreements issued by HHFDC to the Developer for the Project and seek repayments of such loan in accordance with such loan agreements;
11. To terminate any HHFDC programs approved by HHFDC for the Project and seek to recapture any benefits received by Developer for the Project; or
12. If all or a portion of the Ground Leases have been issued to the Developer, to cancel and terminate any Ground Lease.

All rights, powers, and remedies herein given to HHFDC are cumulative and not alternative, are in addition to all rights, powers, and remedies afforded by statutes or rules of law and may be exercised concurrently, independently, or successively in any order whatsoever.

44. Termination for Convenience

 a. HHFDC may, when the interests of the State of Hawaii so require, terminate this Agreement in whole or in part, for the convenience of HHFDC. HHFDC shall give written notice of the termination to Developer specifying the part of the Agreement terminated and when termination becomes effective.

 b. Developer shall incur no further obligations in connection with the terminated performance and on the date(s) set in the notice of termination Developer will stop performance to the extent specified. Developer shall also terminate outstanding orders and subcontracts as they relate to the terminated performance. Developer shall settle the liabilities and claims arising out of the termination of subcontracts and orders connected with the terminated performance subject to HHFDC’s approval. HHFDC may direct Developer to assign Developer’s right, title, and interest under terminated orders or subcontracts to HHFDC. Developer must still complete the performance not terminated by the notice of termination and may incur obligations as necessary to do so.

 c. HHFDC may require Developer to transfer title and deliver to HHFDC in the manner and to the extent directed by HHFDC:

 (1) Any completed goods or work product; and

 (2) The partially completed goods and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (hereinafter called “**manufacturing material**”) as Developer has specifically produced or specially acquired for the performance of the terminated part of this Agreement.

Developer shall, upon direction of HHFDC, protect and preserve property in the possession of Developer in which HHFDC has an interest. If HHFDC does not exercise this right, Developer shall use best efforts to sell such tools and manufacturing materials. Use of this paragraph in no way implies that HHFDC has breached this Agreement by exercise of this termination for convenience provision.

 d. Compensation to Developer shall be paid as follows:

 (1) Termination of this Agreement in whole:

 (a) Developer shall be reimbursed for third-party Project costs incurred up to the date of HHFDC’s notice of termination as evidenced by invoices, as approved by HHFDC;

 (b) Proceeds of sales of supplies and manufacturing materials under **Section 44.c.(2)** shall be offset or credited against any amounts due Developer.

 (c) Developer shall be paid an overhead and project management fee of up to five percent (5%) of the total Project budget (excluding Developer’s profit and overhead and project management fees), allocated monthly evenly over the term of this Agreement up to the date of HHFDC’s notice of termination; and

 (d) Developer shall be paid no anticipatory profit or consequential damages.

 (2) Termination of this Agreement in part:

 (a) Developer shall be reimbursed for third-party Project costs incurred for the portion of this Agreement that is terminated up to the date of HHFDC’s notice of termination as evidenced by invoices, as approved by HHFDC;

 (b) Proceeds of sales of supplies and manufacturing materials under Section 44.c.(2) shall be offset or credited against any amounts due Developer;

 (c) Developerʻs overhead and project management fee for the remaining term of this Agreement (if any) shall be reduced by five percent (5%) of the portion of the total Project budget that is being terminated;

 (d) Developer shall be paid no anticipatory profit or consequential damages for the portion of this Agreement that is terminated. Developerʻs profit for the Project for the remaining term of this Agreement shall be reduced by the percentage of the portion of the total Project budget that is terminated over the remaining term of this Agreement, as though the portion of the total Project budget that is terminated is evenly allocated over the term of this Agreement, over the total Project budget (excluding Developer’s profit and overhead and project management fees); and

 (e) Developer shall have the option of terminating this Agreement in whole, in which case, Developer shall be compensated pursuant to **Section 44.d.(1)** above.

45. Cooperation and Continuing Obligations of Parties. In the event of any termination of this Agreement, HHFDC and Developer hereby agree to cooperate with the orderly transition of control over the Property, Project, entitlements and related agreements from Developer to HHFDC or an approved assignee. Further, the Parties hereby acknowledge that there is a possibility that matters and/or issues related to the transition of control over the Property, Project, entitlements and related agreements from Developer to HHFDC may be inadvertently overlooked and discovered after termination of this Agreement. As such, notwithstanding the termination of this Agreement, Developer and HHFDC hereby agree to use commercially reasonable efforts in effectuating the transfer of said Property, Project, entitlements and related agreements. This provision shall survive any expiration, termination of, or release from this Agreement.

**GENERAL PROVISIONS**

46. Assignments

Without the prior written approval of HHFDC, Developer shall not transfer or assign this Agreement or any interest in this Agreement, either voluntarily or by operation of law. Any such transfer or assignment shall be null and void.

47. Force Majeure

 If any party is prevented from performing its obligations stated in this instrument by any cause not within the reasonable control of that party, including but not limited to fire, an act of God, public enemy, terrorism or war, an act or failure to act of a government entity (except on the part of HHFDC), unavailability of materials, or actions by or against labor unions, it shall not be in default of its obligations stated in this Agreement. Any party delayed by such an event shall notify the party to which it is obligated within ten (10) days following the event. If the notified party agrees that the event was the cause of the delay, the time to perform the obligations stated in this Agreement shall be extended by the number of days of delay caused by the event. If no notice is given by the delayed party, no time extension shall be granted.

48. Amendments, Waiver

 This Agreement can only be changed by an instrument in writing signed by HHFDC and Developer. The terms of this Agreement may not be waived, modified, or in any way changed by implication, through conduct, correspondence, or otherwise, unless such waiver, modification, or change shall be specifically agreed to in writing by HHFDC and Developer. Any waiver in whole or in part to any of the terms and conditions of this Agreement shall be specific and not general. Each waiver shall only apply to the specific conditions and circumstances surrounding it.

49. Binding Effect of Agreement

 This Agreement shall be binding upon and inure to the benefit of HHFDC and Developer, their respective successors and assigns.

50. Gender Number

 The use of any pronoun in reference to HHFDC or Developer shall be construed to mean the singular or plural, the masculine, feminine, or neuter, as the instrument and context may require.

51. No Party Deemed Drafter

 The parties agree that neither HHFDC nor Developer shall be deemed to be the drafter of this Agreement. In the event this Agreement is ever construed by a court of law, such court shall not construe this Agreement or any provision against any party as the drafter of this Agreement.

52. Counterparts

 This Agreement may be executed in any number of counterparts. Each such counterpart hereof shall be deemed to be an original instrument but all such counterparts together shall constitute but one Agreement.

53. Invalidity of Provision

 If any provision of this Agreement as applied to any party or to any circumstances shall be adjudged by a court of competent jurisdiction to be void or unenforceable for any reason, the same shall in no way effect any other provision under circumstances different from those adjudicated by the court, or the validity or enforceability of this Agreement as a whole. If any provision of this Agreement is inconsistent with any provision of any other document (excluding any loan documents) relating to the Project, the provisions of this Agreement shall control.

54. No Third-Party Beneficiaries

No third-party beneficiaries are intended by this Agreement, and the terms and provisions of this Agreement shall not give rise to any right in third parties to enforce the provisions of this Agreement.

55. Campaign Contributions by State and County Contractors

The Developer acknowledges that Section 11-355, HRS, prohibits campaign contributions from specified State or County government contractors during the term of the contract if the contractors are paid with funds appropriated by a legislative body.

56. Governing Law

The laws of the State of Hawaii shall govern the validity, construction, and effect of this Agreement.

57. Accessibility Features

The Developer shall consider incorporation of the following accessibility-related features recommended by the University of Hawaii Center on Disability Studies into the Project to ease everyday access for anyone with mobility challenges:

 a. One no-step entrance;

 b. Interior doorways at least 32 inches wide;

 c. Adequate space to use a wheelchair in food preparation areas;

 d. Bathroom walls that can support grab bars;

 e. Half bath or preferably full bath on the main floor; and

 f. Light switches and electrical outlets within comfortable reach.

58. Construction by Hawaii Workforce

Developer, its contractors and subcontractors shall comply with HRS Chapter 103B (Act 68 SLH 2010), as amended by Act 192 SLH 2011 and implemented by State of Hawaii Comptroller’s Memorandum No. 2011-18 dated July 25, 2011 to ensure that Hawaii residents compose not less than eighty per cent of the workforce employed to perform the contract for the construction of this Project. Every contractor shall comply with this requirement for the entire duration of its contract on the Project. Certifications of Compliance For Employment of State Residents shall be made under oath by an officer of the general contractor and subcontractor whose subcontract is $50,000 or more and submitted to HHFDC. Shortage trades, as determined by the State of Hawaii Department of Labor and Industrial Relations, shall not be included in the calculation. All improvements under this Agreement shall be a public building for purposes of this requirement.

59. Notices

Any notice to the parties provided for or permitted by this Agreement may be given sufficiently for all purposes in writing and (a) mailed as registered or certified U.S. mail, return receipt requested, postage prepaid, addressed to such party at its post office address below or the last such address designated by such party in writing to the other; or (b) delivered personally; or (c) sent by email (so long as receipt of the email is confirmed and a copy of such email notice is provided immediately thereafter in accordance with the requirements of this paragraph by hand delivery or regular mail). Any such written notice shall be deemed conclusively to have been received at the time of such personal delivery, upon email delivery, or at 5:00 pm on the third business day after being deposited with the United States mail as aforesaid.

 If to HHFDC: Hawaii Housing Finance and Development Corporation

 677 Queen Street, Suite 300

 Honolulu, Hawaii 96813

 Attn: Executive Director

 Email: denise.iseri-matsubara@hawaii.gov

 If to Developer: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

60. Attorneys’ Fees and Costs

Should any litigation be commenced between the parties hereto concerning this Agreement, the subject matter of this transaction, or the rights and duties of either in relation thereto, each party shall pay their own attorneys’ fees and costs of litigation.

**PROJECT SPECIFIC REQUIREMENTS**

61. Land Use Commission Declaration of Conditions

 The Developer shall be responsible for complying with the Declaration of Conditions Imposed by the Land Use Commission dated June 6, 1990 and Findings of Fact, Conclusions of Law, and Decision and Order for Docket No. A88-622 recorded at the Office of the Assistant Registrar as Document No. 1736622, and Amendment to Declaration of Conditions Imposed by the Land Use Commission dated February 6, 1992 and recorded at the Office of the Assistant Registrar as Document No. 1888121.

62. Ordinance 01-07

The Developer shall be responsible for complying with the Unilateral Agreement and Declaration of Conditional Zoning for Ordinance 01-07 dated March 6, 2001 and recorded at the Office of the Assistant Registrar as Document No. 2689090 (“**Ordinance 01-07**”), including but not limited to the preparation and submittal to the County of the following:

 a. A Master Site Development Plan for the NW Corner, including the HSVH project area, prior to the submittal of an application for any subdivision approval, grading permits, or building permits, whichever comes first.

b. A traffic impact assessment report of the NW Corner, including the HSVH project area. HHFDC procured the traffic engineer Wilson Okamoto Corporation to complete a traffic assessment of the NW Corner, assuming a hypothetical master plan and project for the NW Corner for information purposes. This study is not intended to satisfy the requirements of Ordinance 01-07. If competed, a copy will be provided to the Developer for information. HHFDC does not warrant that this work will be completed or will satisfy the requirements of the Developer.

c. As described in the RFP, the HSVH project submitted a Master Site Development Plan (July 26, 2019) to the County Department of Planning and Permitting (“**DPP**”) for the HSVH project, however, DPP did not approve the HSVH master plan. In addition, while the HSVH master plan shows an access from the NW Corner to Fort Barrette Road, the Developer acknowledges that Fort Barrette Road is subject to access restrictions at the NW Corner, and in the past, HHFDC has been unsuccessful in obtaining State of Hawaii Department of Transportation approval of an access to Fort Barrette Road for the NW Corner, including alternatives for left turns and right turns (in and out only), for ingress and egress. In addition, while also shown on the HSVH master plan, Developer acknowledges that HHFDC has received no indication that accesses to the NW Corner at Farrington Highway or at Kealanani Avenue are assured.

Driveway connections of the Project with the adjacent public roadways shall comply with the connection requirements of such adjacent public roadway.

63. Sewer Connection

On March 10, 2022, the County approved HHFDC’s Sewer Connection Application or 1,000 multi-family dwelling units and 150,000 square feet of shopping center use at the Property. The sewer connection approval is valid for two years from approval. The Developer shall be responsible to obtain any extensions to the approved Sewer Connection Application or variations to the approved uses for the Project. In addition, the Developer shall be responsible for any wastewater system facility charge assessed for the Project by the County.

64. Maintenance

 Except for the Entry Feature Lot (defined in Paragraph  **69** below), commencing six (6) calendar months from the HHFDC Board Approval, Developer shall be responsible for the irrigation and maintenance of the Property, including the area from the Property boundary to the adjacent street curb and gutter.

 Except for the Entry Feature Lot (defined in Paragraph  **69**  below), the Developer shall be responsible for the maintenance of the landscape lot, Lot 5353, from the property boundary to the street curb and gutter, the full length of the Property along Farrington Highway and Kealanani Avenue.

65. Development, Ownership and Operation of Common Areas

 The Developer shall be responsible for the development, ownership, operation, maintenance and replacement of any roads, streets, parks, open space, and other common areas of the Project not dedicated to the County or the Villages of Kapolei Association.

66. Housing Finance and Development Corporation – Campbell Estate, Kapolei Village Condemnation Agreement

 The Developer shall comply with the Housing Finance and Development Corporation – Campbell Estate, Kapolei Village Condemnation Agreement, dated April 11, 1989, recorded at the Office of the Assistant Registrar, Land Court, as Document No. 1650349 and at the State of Hawaii Bureau of Conveyances as Document No. 89-104102 (“**Condemnation Agreement**”), and shall consider the letter from James Campbell Company LLC to HHFDC dated October 23, 2007, as it relates to the Condemnation Agreement and the Property.

67. Declaration of Covenants, Conditions and Restriction of Villages of Kapolei

 The Property is located within the Villages of Kapolei, and therefore, subject to the Amended and Fourth Restated Declaration of Covenants, Conditions and Restrictions of Villages of Kapolei, dated March 16, 2016, recorded at the Office of Assistant Registrar, Land Court, as Document No. T-9703149, as amended (“**Kapolei DCC&R**”). The Developer shall be responsible for negotiating with the Villages of Kapolei Association and, with the approval of the annexation document by HHFDC, annexing the Property to the Community Area of the Kapolei DCC&R. The Developer acknowledges that all residential units, including units in residential rental projects, are subject to a maintenance assessment to the Villages of Kapolei Association, which is $42/unit/month as of July 2021. Maintenance assessments for commercial projects are subject to negotiation with the Villages of Kapolei Association. HHFDC reserves the right to annex the Property to the Community Area of the Kapolei DCC&R at its discretion, without the consent of the Developer.

68. Non-Potable Water for Irrigation

The Developer shall consider connecting the irrigation system for common areas at the Project to the HHFDC non-potable transmission line in Kealanani Avenue for irrigation purposes at the Property and shall install a meter outside the roadway right-of-way for measuring the quantity of water used. The meter shall be installed near the property line to enable meter reading from Kealanani Avenue. The onsite irrigation system connecting to the HHFDC non-potable transmission line shall be designed for irrigation (“R-1”) use in the event that the HHFDC non-potable transmission line is connected to the R-1 water system from the Honouliuli Wastewater Treatment Plant in the future. Non-potable water for irrigation shall be subject to an assessment from HHFDC. The parties acknowledge that, as of April 2022, HHFDC’s fee for non-potable water for irrigation is $2.00/1,000 gallons/month.

69. Subdivision and Maintenance Requirements

 a. The Developer shall be responsible to subdivide the HSVH project site from the Property as approved by HHFDC, and the cancellation of the HSVH CPR from the Property. HHFDC shall work with the Developer and the State of Hawaii Department of Defense to effectuate this objective. The Developer shall provide HHFDC with the metes and bounds description and survey map of the finally approved subdivision of the HSVH site and the remainder of the Property.

 b. The Developer shall be responsible to subdivide the portion of the landscape lot, Lot 5353, Map 505 Land Court Application 1069, at the corner of Farrington Highway and Kealanani Avenue where the entry feature for the Villages of Kapolei is located (“**Entry**  **Feature Lot**”), from the balance of the Lot 5353, as approved by HHFDC. HHFDC plans to dedicate the Entry Feature Lot to the Villages of Kapolei Association for maintenance. HHFDC will maintain the Entry Feature Lot prior to conveyance to the Villages of Kapolei Association. Except for the Entry Feature Lot, the Developer shall be responsible for the maintenance of Lot 5353, from the Property boundary to the street curb and gutter, the full length of the Property along Farrington Highway and Kealanani Avenue.

c. As described in the RFP, the Developer acknowledges that on May 9, 2003, HHFDC received subdivision approval of a roadway widening parcel along Farrington Highway, including frontage along NW Corner. Lots 2-A and 2-B of Map 13 of Land Court Application 1828 is the Land Court registration of a portion of this subdivision approval, as to what was previously Lot 2 on Map 1 Land Court Application 1828. The Land Court Registration for the balance of this subdivision approval is pending. HHFDC is unable to provide an estimate of the completion date of this registration.

d. As described in the RFP, HHFDC has procured ControlPoint Surveying, Inc. (“**ControlPoint**”) to de-register NW Corner from Land Court. On July 7, 2022, HHFDC filed a Petition with Land Court to withdraw NW Corner from Certificate of Title No. 341,501 and to issue a new Certificate of Title for the de-registered NW Corner. If successful, HHFDC plans to have ControlPoint prepare a follow-up map of the Subdivision of Farrington Highway Road Widening subdivision approval at NW Corner indicating the Land Court and de-registered parcels and the resultant revised property description of NW Corner. There is no assurance that HHFDC and ControlPoint will be successful in de-registering NW Corner from Land Court. If unsuccessful, NW Corner will continue to be Land Court and the Subdivision of Farrington Highway Road Widening will need to be registered with Land Court, before the resultant property description for the NW Corner can be identified.

70. Wall Along Southern (Kumu Iki) Boundary of the NW Corner

 The existing wall along the southern (Kumu Iki) boundary of the NW Corner is entirely on the NW Corner parcel and within 2’ of the boundary of the NW Corner parcel (“**Wall With Kumu Iki**”). The Developer accepts the wall in its “AS IS, WHERE IS,” condition and shall be responsible for the ownership, repair, maintenance, replacement and/or modification of the wall along the Property, from Ft. Barrette Road up to the HSVH project site.

 The Developer shall comply with the Kapolei DCC&R as it relates to the Wall With Kumu Iki. The Developer acknowledges that Section 5.01(e) of the Kapolei DCC&R provides:

 “Each Owner of a Lot will maintain or cause his Sub-Association, if applicable with respect to areas to be maintained by such Sub-Association, to maintain in good repair any fence or wall along any street boundary of His Lot or within the Cotenancy Area, respectively, which had been erected by Declarant or Developer, and will also maintain any fence or wall erected by Declarant or Developer on his Lot or within two feet of any common boundary between his Lot and his neighbor’s Lot. Each Owner with a fence or wall along such a common boundary shall be liable to the Owner of the adjoining Lot for half the cost of maintenance or repair of such fence or wall incurred by such Owner of the adjoining Lot, unless such fence or wall is maintained by a Sub-Association.

 No Owner shall replace any fence or wall without the approval of the Design Review Committee. Existing fences and walls may be replaced with fences and walls of the same or like material or such other materials approved by the Design Review Committee from time to time. The Design Review Committee shall be authorized, but not required, to permit an Owner to replace an existing fence or wall located along a common boundary with a neighboring Lot with a hollow tile fence or wall over objection of the neighboring Lot Owner if the Owner wishing to install the hollow tile fence or wall bears the entire cost of purchasing and installing the hollow tile fence or wall. Once installed, unless otherwise provided herein, the cost of repair and maintenance of the common hollow tile fence or wall shall be borne by the Owners of both Lots as provided in the immediately preceding paragraph, or by a Sub-Association, if applicable.”

As described in the RFP, HHFDC has procured a structural engineer, KSF, Inc., to complete an assessment of the condition of the Wall With Kumu Iki and provide the assessment to the Developer for information as such assessment is completed. HHFDC does not warrant that this work will be completed, or will satisfy the requirements of the Developer.

71. Signage

 The signage and entry feature for the Villages of Kapolei is located at the Entry Feature Lot at the corner of Farrington Highway and Kealanani Avenue. Project signage at the Property visible from Fort Barrette Road and Farrington Highway shall not overpower the style and character of the entry feature for the Villages of Kapolei at the Entry Feature Lot, and shall be subject to HHFDC’s prior written approval.

(The remainder of this page is intentionally left blank; the signature page follows.)

 IN WITNESS THEREOF, the undersigned have executed these presents as of the day and year first written above.

 HAWAII HOUSING FINANCE AND

Approved as to Form: DEVELOPMENT CORPORATION

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ By \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Deputy Attorney General Delmond J.H. Won

 Executive Assistant

 “HHFDC”

 A Hawaii limited liability company

 By \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 Name:

 Title:

 Developer”

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STATE OF HAWAII )

 ) SS

CITY AND COUNTY OF HONOLULU )

 On this day of , 20 , before me appeared

DELMOND J.H. WON, personally known to me, who, being by me duly sworn, did say that he is the EXECUTIVE ASSISTANT of the HAWAII HOUSING FINANCE AND DEVELOPMENT CORPORATION, a public body and a body corporate and politic of the State of Hawaii, that the seal affixed to the foregoing instrument is the corporate seal of the corporation, and that this \_\_\_\_ -page DEVELOPMENT AGREEMENT, NORTHWEST CORNER, VILLAGES OF KAPOLEI,

dated , was signed and sealed on behalf of the corporation by authority of its Board of Directors, and the said officer acknowledged the instrument to be the free act and deed of the corporation.

Name:

Notary Public, State of Hawaii

 Judicial Circuit

My commission expires: \_

STATE OF HAWAII )

 ) SS.

CITY AND COUNTY OF HONOLULU )

 On \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, before me personally appeared \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ and \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, to me personally known, who, being by me duly sworn or affirmed, did say that such person(s) executed the foregoing instrument as the free act and deed of such person(s), and if applicable, in the capacities shown, having been duly authorized to execute such instrument in such capacities.

 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 Notary Public, State of Hawaii

 My commission expires: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Document Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Number of Pages: \_\_\_\_

Notary Name: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ First Judicial Circuit

Document Description: Development Agreement,

Northwest Corner, Villages of Kapolei

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Notary Signature Date

NOTARY CERTIFICATION

STATE OF HAWAII )

 ) SS.

CITY AND COUNTY OF HONOLULU )

 On \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, before me personally appeared \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ and \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, to me personally known, who, being by me duly sworn or affirmed, did say that such person(s) executed the foregoing instrument as the free act and deed of such person(s), and if applicable, in the capacities shown, having been duly authorized to execute such instrument in such capacities.

 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

 Notary Public, State of Hawaii

 My commission expires: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Document Date: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Number of Pages: \_\_\_\_

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Northwest Corner, Villages of Kapolei

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Notary Signature Date

NOTARY CERTIFICATION

EXHIBIT A

Property Location Map or

Property description

EXHIBIT B

HHFDC Sales Requirements

EXHIBIT C

SAE Program

1. This Section shall be subject to the revised HHFDC rules, HAR Sec. 15-307-1, et seq, and Sec. 15-308-1, et seq, effective 1/15/22, as amended. [↑](#footnote-ref-2)
2. If applicable. [↑](#footnote-ref-3)