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R-1057 STATE OF HAWAII
BUREAU OF CONVEYANCES
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AUG 18, 2003 01:00 PM
Doc No(s) 2003-171988



/s/ CARL T. WATANABE
REGISTRAR OF CONVEYANCES

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Return by Mail () Pickup () to:

Steven S.C. Lim, Esq.
Carlsmith Ball LLP
121 Waianuenu Avenue
Hilo, HI 96720

TITLE OF DOCUMENT:

DECLARATION OF CONDITIONS APPLICABLE TO
AN AMENDMENT OF DISTRICT BOUNDARY FROM AGRICULTURAL TO URBAN

No. of Pages: 16

PARTIES TO DOCUMENT:

DECLARANT: U of N Bencorp, a Hawaii non-profit corporation, whose mailing address is 75-165 Hualalai Road, Second Floor, Kailua-Kona, HI 96740-1742

PROPERTY: The subject land is situate at Waiaha 1st, Kailua-Kona, District of North Kona, County and State of Hawaii, Tax Map Key Nos. (3) 7-5-10:85 and 7-5-17:06

DECLARATION OF CONDITIONS APPLICABLE TO
AN AMENDMENT OF DISTRICT BOUNDARY FROM AGRICULTURAL TO URBAN

THIS DECLARATION OF CONDITIONS is made this 14th day of August, 2003, by U of N Bencorp, a Hawaii non-profit corporation, whose mailing address is 75-165 Hualalai Road, Second Floor, Kailua-Kona, HI 96740-1742, as Petitioner in State of Hawaii Land Use Commission Docket No. A02-737 (hereinafter called the "Declarant" or "Petitioner");

W I T N E S S E T H :

WHEREAS, Declarant is the owner of certain real property situate at Waiaha 1st, Kailua-Kona, District of North Kona, County and State of Hawaii, specifically identified as Tax Map Key Nos. (3) 7-5-10:85 and 7-5-17:06, and more particularly described in Exhibit "A" attached hereto and incorporated herein by reference (hereinafter called the "Property" or "Reclassified Area"); and

WHEREAS, said State of Hawaii Land Use Commission (hereinafter called the "Commission"), by Findings of Fact, Conclusions of Law, and Decision and Order filed August 8, 2003, in the aforementioned Docket No. A02-737 (hereinafter called the "Decision and Order"), amended the State Land Use district boundaries and reclassified the Property from the Agricultural District to the Urban District, subject to certain conditions enumerated therein; and

WHEREAS, pursuant to Section 15-15-92 of the Commission's Rules, the conditions imposed by the Commission in said Docket No. A02-737 are to run with the land and require Declarant to record said conditions at the Bureau of Conveyances of the State of Hawaii;

NOW, THEREFORE, Declarant hereby declares that the Property described in Exhibit “A” attached hereto and described above shall be reclassified from the State Land Use Agricultural District to the State Land Use Urban District, subject to the following conditions imposed by the Commission in Docket No. A02-737:

1. Affordable Housing. Petitioner shall provide affordable housing opportunities for residents of the State of Hawaii in accordance with applicable housing requirements for the Project of the County of Hawaii. The location and distribution of the affordable housing or other provisions for affordable housing shall be under such terms as may be mutually agreeable between the Petitioner and the County of Hawaii.

2. Drainage Improvements. Petitioner shall design and construct on-site and regional drainage improvements required as a result of the development of the Reclassified Area to the satisfaction of the State Department of Health, the Commission on Water Resource Management of the State Department of Land and Natural Resources, and the County of Hawaii. The Petitioner shall prepare a Drainage Study meeting with the approval of the County of Hawaii Department of Public Works. The Drainage Study shall consider regional drainage issues.

3. Public School Facilities. Petitioner shall contribute to the development, funding, and/or construction of school facilities for the Project, on a fair-share basis, as determined by and to the satisfaction of the Department of Education. Terms of the contribution shall be agreed upon in writing by the Petitioner and the Department of Education prior to seeking building permits for any portion of the Reclassified Area.

4. Water Resources. Petitioner shall provide adequate water supply facilities and improvements or equivalent funding to accommodate the Project. The water supply facilities,

improvements and/or equivalent funding shall be coordinated and approved by the Commission on Water Resource Management of the State Department of Land and Natural Resources, and the County of Hawaii Department of Water Supply.

5. Wastewater Facilities. Petitioner shall provide adequate wastewater treatment, transmission, and disposal facilities for the Project as determined by the State Department of Health and the County of Hawaii Department of Environmental Management.

6. Archaeology.

a. Petitioner shall submit a complete inventory survey report of the Reclassified Area for the review and approval of the State Historic Preservation Division of the Department of Land and Natural Resources (“DLNR-SHPD”). Petitioner shall prepare and implement a data recovery plan, a preservation plan, a burial treatment plan, and a monitoring plan to be reviewed and approved by the DLNR-SHPD. The submittal of these plans shall be accompanied by the design plans for the Project to facilitate the development of appropriate mitigation measures.

b. Should any previously unidentified human burials, archaeological or historic sites such as artifacts, marine shell concentrations, charcoal deposits, stone platforms, pavings or walls be found, Petitioner shall stop work in the immediate vicinity and the DLNR-SHPD shall be notified immediately. The significance of these finds shall then be determined and approved by the DLNR-SHPD. Subsequent work shall proceed upon an archaeological clearance from the DLNR-SHPD when it finds that mitigative measures have been implemented to its satisfaction. Petitioner shall also comply with all applicable statutory provisions and

administrative rules regarding inadvertent burial finds within the Reclassified Area. Any mitigation and preservation shall be monitored by the KWC as described below.

c. The proposed mitigation commitments for all identified sites with burials shall be submitted to the DLNR-SHPD for review and comment. A burial treatment plan for those sites, to include without limitation Sites 23683, 23684 and 23685, shall then be approved by DLNR-SHPD, and a certified copy of said plan shall be filed with the Commission prior to any land alteration in the vicinity of these sites. Mitigation commitments shall be monitored by the Kahu Wai'aha Committee ("KWC").

d. For all sites approved by the DLNR-SHPD to undergo archaeological data recovery, an archaeological data recovery plan (scope of work) shall be prepared by Petitioner. This plan shall be approved by the DLNR-SHPD and a certified copy of said plan shall be filed with the Commission prior to any land alteration in the vicinity of these sites. The approved plan shall be monitored by the KWC.

e. For all sites approved for preservation by the DLNR-SHPD, to include without limitation the Great Wall of Kuakini (Site 6302), the papam« or rough square game board (Site 23682), the agricultural heiau (Site 23681), and after completion of the finished grade for the area, at least one of the alignments for the ancient trails (Site 23679 or Site 23680), a preservation plan shall be prepared by Petitioner. (Burial sites are covered under the burial treatment plan.) This plan shall include buffer zones/interim protection measures during construction, and long-range preservation (including public access and interpretation, where appropriate). The plan shall include input from the KWC and relevant Hawaiian groups. The plan shall be approved by the DLNR-SHPD and a certified copy of said plan shall be filed with

the Commission prior to any land alteration in the vicinity of these sites. The approved preservation plan shall be monitored by the KWC.

f. Petitioner shall preserve the approximate alignment of at least one of the mauka-makai trail segments. Due to the difficulty of development on this site, the site grading would occur first, then the Petitioner shall reestablish a minimum of one of the two trail segments, Site 23679 (20 meter segment) or Site 23680 (ten meter segment), at a mutually agreeable site, giving allowances for building footprints, on finished grade, in consultation with the Office of Hawaiian Affairs.

7. Cultural, Historical, Customary and Traditional Rights and Resources.

a. Petitioner shall initially establish and annually provide reasonable operating and capital expenditure costs or facilities through revenues from the Project, the KWC composed of: (1) a person of Native Hawaiian ancestry who is a lineal descendent and knowledgeable regarding the type of cultural resources and practices within the Reclassified Area, as selected by the Executive Officer of the Commission from a list of three names based on a review of their resumes, and (2) a management member knowledgeable regarding the type of cultural resources and practices within the Reclassified Area, as selected by the Petitioner. The individuals making up the KWC shall operate on an equal vote basis.

b. The KWC shall be established by Petitioner no later than six months from the issuance of this Decision and Order. Upon establishment of the KWC, Petitioner shall provide a written report to the Commission, the Office of Planning, and the County of Hawaii with details as to its composition, structure, operating costs and compensation for members and staff, procedures, and plan of action.

c. The KWC shall jointly decide, on an equal vote basis, monitoring and dispute resolution decisions related to the protection of native Hawaiian practitioners' exercise of customary and traditional practices and rights within the Reclassified Area; the availability of natural and cultural resources for present and future generations; and appropriate access within the Reclassified Area to the extent that these rights are protected by PASH vs. Hawaii County Planning Commission, 79 Haw. 425 (1995), in perpetuity. In the event that the two person KWC cannot agree on a specific decision, they shall jointly select a third person to break the tie. A certified description of any action requiring selection of a third member of the KWC shall be filed with the Commission.

d. The KWC shall monitor the quality of the Petitioner's actions to provide access to and/or preserve and maintain traditional and customary native Hawaiian practices and cultural resources. The KWC shall provide recommendations consistent with this Decision and Order to the Commission with respect to maintenance and/or preservation of those traditional and customary native Hawaiian practices and cultural resources.

e. The KWC shall provide reports to the Commission on an annual basis describing items and issues covered in their deliberations and any other findings and recommendations.

f. Petitioner shall preserve and protect rights to gathering for cultural purposes, including religious practice, by providing appropriate access to burial sites and other archaeological sites within the Reclassified Area consistent with this Decision and Order. Petitioner shall adhere to prevailing and/or published protocols of the DLNR-SHPD where these sites are found to exist, as monitored by the KWC.

8. Soil Erosion and Dust Control. Petitioner shall implement efficient soil erosion and dust control measures during and after the development process to the satisfaction of the State Department of Health.

9. Transportation. Petitioner shall participate in the pro-rata funding and construction of local and regional transportation improvements and programs necessitated by the proposed development in designs and schedules accepted and determined by the State Department of Transportation (DOT) and County of Hawaii Department of Public Works (DPW). Agreement between the Petitioner and the DOT and DPW as to the level of funding and participation shall be obtained prior to the Petitioner obtaining County zoning, or prior to the Petitioner securing County building permits if County zoning is not required.

10. Traffic. Petitioner shall, prior to the Petitioner obtaining County zoning, submit a revised Traffic Impact Analysis Report for the review and approval of the DOT and DPW, which shall include an analysis of the entire development of the existing/proposed University of the Nations-Kona, Hualalai Village project, and the Cultural Center, as well as existing and potential future developments in the immediate area as required by the DOT and DPW.

11. Cultural Center. The Petitioner shall develop the Cultural Center with sensitivity to the host native Hawaiian culture, and provide for outreach and educational opportunities for the children of Hawaii. The Petitioner shall consult with the KWC and the Ka Haka 'Ula O Ke'elikolani, College of Hawaiian Language at University of Hawaii-Hilo to promote cultural sensitivity in the development of programs for the Cultural Center. Petitioner shall, prior to commencement of operations for the Cultural Center, submit a status report to the Commission for its approval on the Petitioner's traffic mitigation efforts for development of the Reclassified

Area. If, for any reason, the Cultural Center does not commence operations by January 1, 2008, the Petitioner shall return to the Commission for a hearing to review compliance with the requirements of this Condition.

12. Ka Haka 'Ula 0 Ke'elikelani, College of Hawaiian Language at University of Hawaii-Hilo. Petitioner shall cooperate with the College of Hawaiian Language at University of Hawaii-Hilo in promoting the perpetuation of the Hawaiian language by providing distance learning opportunities for teaching the native Hawaiian language, as well as cooperating in activities that promote Hawaiian cultural authenticity.

13. Civil Defense. Petitioner shall fund and construct adequate civil defense measures serving the Reclassified Area as determined by the State of Hawaii Department of Defense-Office of Civil Defense, and the County of Hawaii Civil Defense Agency.

14. Solid Waste. Petitioner shall develop a Solid Waste Management Plan in conformance with the Integrated Solid Waste Management Act, Chapter 342G, Hawaii Revised Statutes. Petitioner's Solid Waste Management Plan shall be approved by the County of Hawaii Department of Environmental Management, Solid Waste Division. The Plan shall address and encourage an awareness of the need to divert the maximum amount of waste material caused by developments away from the County's landfills.

15. Compliance with Representations to the Commission. Petitioner shall develop the Reclassified Area in substantial compliance with the representations made by the Petitioner to the Commission in this Docket, as proposed in its Petition and in documentary evidence and testimony before the Commission. Failure to do so for any reason including economic feasibility, may result in the imposition of fines as provided by law, removal of improvements by

Petitioner at Petitioner's own expense, reversion of the Reclassified Area to its former classification, a change to a more appropriate classification, or any other legal remedies.

16. Notice of Change to Ownership Interests. Petitioner shall give notice to the Commission of any intent to sell, lease, assign, place in trust, or otherwise voluntarily alter the ownership interests in the Property, prior to development of the Property.

17. Annual Reports. Petitioner shall timely provide without prior notice, annual reports to the Commission, the Office of Planning, and the County of Hawaii Planning Department in connection with the status of the development proposed for the Reclassified Area, and Petitioner's progress in complying with the conditions imposed. The annual report shall be submitted in a form prescribed by the Executive Officer of the Commission. The annual report shall be due prior to or on the anniversary date of the Commission's approval of the Petition.

18. Release of Conditions Imposed by the Commission. Petitioner may seek from the Commission full or partial release of the conditions provided herein as to all or any portion of the Reclassified Area upon evidence acceptable to the Commission of satisfaction of these conditions.

19. Recording of Conditions. Within seven (7) days of the issuance of the Commission's Decision and Order for the subject reclassification, Petitioner shall (a) record with Bureau of Conveyances and/or the Assistant Registrar of the Land Court of State of Hawaii, as applicable, a statement that the Reclassified Area is subject to conditions imposed by the Commission in the reclassification of the Reclassified Area, and (b) file a copy of such recorded statement with the Commission. Petitioner shall record the conditions imposed herein by the

Commission with the Bureau of Conveyances and/or Assistant Registrar of the Land Court of the State of Hawaii, as applicable, pursuant to Section 15-15-92, Hawaii Administrative Rules.

The above-stated conditions contained in this Declaration, set forth in Paragraphs enumerated 1 through 19, shall operate as covenants running with the land and shall be binding upon Declarant and each and every subsequent owner, lessee, sublessee, transferee, grantee or assignee.

The limitations, restrictions, covenants and conditions of this Declaration shall continue and remain in full force and effect at all times with respect to the Property included in this Declaration until such time that the Commission removes or releases the conditions relating to the subject Property established through its Decision and Order filed August 8, 2003 in Docket No. A02-737.

The term "Petitioner", as and when used herein, shall mean and include the Declarant herein and the terms "Declarant" and "Petitioner", as and when used herein, or any pronouns used in place thereof, shall mean and include the masculine, feminine or neuter, the singular or plural number, individuals, partnerships, trustees or corporations and their and each of their respective successors, heirs, personal representatives, successors in trust and assigns, according to the context hereof.

[NO FURTHER TEXT ON THIS PAGE]

IN WITNESS WHEREOF, Declarant has caused this instrument to be executed on the date first written above.

U OF N BENCORP,
a Hawaii non-profit corporation

By: Mark R. Spengler
Mark R. Spengler
Its President and CEO

“Declarant”

STATE OF HAWAII)
) SS
COUNTY OF HAWAII)

On this 14th day of August, 2003, before me personally appeared MARK R. SPENGLER, to me personally known to be the person described in and who executed the foregoing instrument, and acknowledged to me that he executed same as his free act and deed and, if applicable, in the capacity shown, having been duly authorized to execute such instrument in said capacity.

Willetha T. Archer
Name: Willetha T. Archer
Notary Public, State of Hawaii
My commission expires: 5-19-07

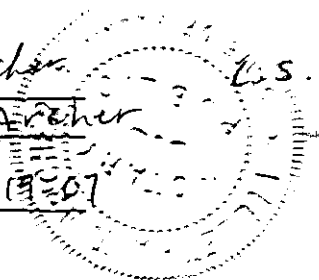


EXHIBIT "A"

All of that certain parcel of land situated on the easterly side of Kuakini Highway, Project FAP No. SS-229(1) and on the westerly side of Lot B and Hualalai Road (Kailua-Keauhou Middle Road), at Waiaha 1st and 2nd, North Kona, Hawaii, Hawaii, being a portion of Lot B, a portion of Royal Patent 1930 to Asa Thurston on a portion of Land Commission Award 387, Part 4, Section 2, No. 3 to American Board of Commissioners for Foreign Missions and a portion of Grant 5327 to Samuel Liftee, and more particularly described as follows:

Beginning at the northerly corner of this parcel of land at the Great Wall of Kuakini, being the southeast corner of Land Court Application 1659, Map 4, Lot 7, (TMK: 7-5-18:28), the coordinates of said point of beginning referred to Government Survey Triangulation Station "KAILUA" (North Meridian) being 4,301.12 feet south and 3,245.12 feet east and running by azimuths measured clockwise from true South:

Thence, along Lot A, along Lot 1 of Land Court Application 1666-Map 1 for the following six (6) courses:

1. 258° 38' 49" 419.30 feet to a point;
2. 265° 41' 49" 603.40 feet to a point;
3. 269° 49' 49" 229.50 feet to a point;
4. 261° 25' 49" 329.20 feet to a point;
5. 258° 35' 49" 269.50 feet to a point;
6. 265° 37' 49" 77.10 feet to a point;

Thence, along Lot B, along a curve to the left having a radius of 500.00 feet, the chord azimuth and distance being:

7. 325° 39' 31" 184.00 feet to a point;
8. 315° 03' 20" 145.67 feet along Lot B to a point;

Thence, along Lot B, along a curve to the right having a radius of 900.00 feet, the chord azimuth and distance being:

9. 322° 59' 20" 248.44 feet to a point;

- 10. 240° 55' 18" 92.44 feet along Lot B to a point;
- 11. 179° 04' 30" 10.85 feet along Lot B to a point;
- 12. 269° 04' 30" 20.28 feet along Lot B to a point;
- 13. 240° 55' 18" 144.12 feet along Lot B to a point;

Thence, along Lot B, along a curve to the left having a radius of 160.00 feet, the chord azimuth and distance being:

- 14. 217° 00' 44" 129.69 feet to a point;
- 15. 193° 06' 10" 33.04 feet to a point;

Thence, along Lot B, along a curve to the right having a radius of 100.00 feet, the chord azimuth and distance being:

- 16. 215° 47' 40" 77.15 feet to a point;

Thence, along Lot B, along a curve to the right having a radius of 50.00 feet, the chord azimuth and distance being:

- 17. 271° 35' 47" 54.62 feet to a point;

Thence, along the westerly side of Hualalai Road (Queen Kaahumanu Highway Extension) Hawaii Belt Road for the following five (5) courses;

- 18. 304° 42' 24" 138.61 feet to a point;
- 19. 302° 00' 00" 134.71 feet to a point;
- 20. 311° 15' 00" 21.71 feet to a point;
- 21. 334° 11' 04" 337.35 feet to a point;
- 22. 71° 47' 48" 37.57 feet to a point;

Thence, along the northerly side of Hillcrest Subdivision for the following eight (8) courses:

- | | | | | | |
|-----|-----|-----|-----|-------------|---|
| 23. | 76° | 50' | 39" | 150.56 feet | along Lots 29 and 26 of Kona Hillcrest
Subdivision to a point; |
| 24. | 75° | 03' | 00" | 404.68 feet | along Lots 26, 24, 23, 22, 21 & 20 to a point; |
| 25. | 71° | 43' | 30" | 124.57 feet | along Lots 20 & 19 to a point; |
| 26. | 71° | 05' | 30" | 389.65 feet | along Lots 18 through 14 to a point; |
| 27. | 74° | 18' | 00" | 108.90 feet | along Lots 14 & 13 to a point; |
| 28. | 73° | 28' | 00" | 81.34 feet | along Lots 13, 12, & 9 to a point; |
| 29. | 74° | 29' | 00" | 176.29 feet | along Lots 9 & 8 to a point; |
| 30. | 75° | 12' | 00" | 174.88 feet | along Lots 7, 6 & 5 to a point; |
| 31. | 74° | 32' | 00" | 285.07 feet | along Lots 5, 4, 3 & 2 to a point; |
| 32. | 70° | 05' | 00" | 39.34 feet | along County of Hawaii, Lot 1 to a point; |
| 33. | 74° | 38' | 30" | 147.50 feet | along County of Hawaii, Lot 1 to a point; |
| 34. | 76° | 51' | 00" | 65.76 feet | along County of Hawaii, Lot 1 to a point; |

Thence, along Parcel 25 (TMK: 7-5-18:25) for the following four (4) courses:

- | | | | | | |
|-----|------|-----|-------|---------------|---|
| 35. | 76° | 51' | 00" | 100.00 feet | to a point; |
| 36. | 76° | 01' | 30" | 141.17 feet | to a point; |
| 37. | 72° | 30' | 00" | 240.00 feet | to a point; |
| 38. | 71° | 31' | 00" | 131.08 feet | to a point; |
| 39. | 141° | 47' | 47.4" | 1,044.47 feet | to a point; |
| 40. | 151° | 59' | 00" | 321.64 feet | along the easterly side of Kuakini Highway to a
point; |

41. 265° 01' 00" 424.15 feet along Lot 7, Land Court Application 1659, Map 4 to the point of beginning and containing a gross area of 62.409 acres, more or less, and a net area of 61.950 acres excluding the two (2) Water Tank Sites (TMK: 7-5-17:13 and 15), as per survey of Donald C. McIntosh, L.P.L.S. #4968, dated November 18, 2002.

END OF EXHIBIT "A"